

## Bricker & Eckler LLP

100 South Third Street  
Columbus, Ohio 43215-4291

Phone 614 . 227 . 2300  
Fax 614 . 227 . 2390  
info@bricker.com  
www.bricker.com

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## We Kick Off 2004 with a Look At Concealed Weapons, Collaborative Financing

*This issue begins our fifth year of ohioconstructionlaw.com, and as usual we have a lot to say about what is going on in the construction industry in Ohio today. A new law takes effect this spring that, while it has nothing directly to say about construction, may have an impact on safety concerns at construction sites. The “concealed carry” law took ten years to get through the General Assembly, and when it takes effect in April, there may be a lot of Ohioans out there with permits that let them carry guns hidden on their persons. Will this law make a difference on the construction site, and can an owner or contractor prohibit guns—even authorized guns—from being brought to a site? Read “‘Concealed Carry’: What Does It Mean for Construction Sites?” and find out.*

**T**his month we have a second article that should be of interest to anyone pondering how to finance the construction of a recreational facility. If you haven’t yet considered collaborative financing—or even if you have—you should read “Collaborations: Stretching the Recreational Dollar in Tight Times.” Guest author Becky Princehorn, from Bricker & Eckler’s Bond Department, discusses this innovative way to finance your project and provides a checklist of items you need to cover in the planning stages.

“What the Legislators Are Considering” contains the usual summaries of pending legislation, including a recently introduced bill on continuing education for design professionals, House Bill 322. Once again we cover three cases of interest in “What the Courts Are Saying,” starting with a decision from the Ohio Supreme Court on January 21<sup>st</sup> interpreting the safety requirements for scaffolds and explaining which ones apply in an action charging an employer with a Violation of a Specific Safety Requirement (a “VSSR”). Next, we summarize a case that goes back to basics on contract law—specifically, the meaning of a “cost plus” contract and the enforcement of a requirement that change orders be in writing. That one came down recently

from the Court of Appeals for Fayette County. Our last opinion, from the Franklin County Court of Appeals, is a complicated case on insurance coverage for faulty workmanship by a subcontractor. If you need information on any of these topics, you know where to find it—in our monthly column of recent case summaries.

Our other regular columns offer a variety of topics this month. First, “Holman, Gillis and Shevelov on Construction Documents” focuses on emergency situations and what standard contracts say about them. “Hindsight About Unforeseen Site Conditions” (which now alternates with “OSHA Corner”) discusses the Doctrine of Superior Knowledge, and Sam Wampler’s “ADR Corner” looks at **themes**. No, not the kind you had to write in tenth grade; the kind you will want to develop as you prepare to mediate a construction dispute. If you look closely, you will find our Upcoming Seminars listed somewhere in this issue, too. If your New Year’s resolution was to learn something new every day, we hope you’ll find plenty of material in our January issue to assist you with this goal.

# “Concealed Carry”: What Does It Mean for Construction Sites?



**Maureen P. Taylor**  
Senior Attorney  
BRICKER CONSTRUCTION

**Highlights:** In a little more than two months, a new statute goes into effect that will enable most Ohio residents to carry concealed handguns throughout the state, except for designated locations. Should a construction site be designated as “off limits,” and what must an owner or contractor do to accomplish this designation? This article looks at the sections of the law of most interest to the construction industry: the permitting process, the locations that are off limits by statute, how to prohibit guns on private property, and statutory immunity for employers. It concludes with brief recommendations, based on steps local contractors are already taking.

**A**fter April 8, 2004, there may be a lot more guns out there.

April 8 is the day the new “concealed carry” law, Amended Substitute House Bill 12, takes effect. The new law permits Ohioans to apply to a county sheriff for a permit to carry a concealed handgun. The sheriff must issue the permit as long as the applicant pays a fee, is at least 21 years old, has had the equivalent of a 12-hour course in handling firearms, and does not fall into any prohibited category (including fugitives from justice, felons or those indicted for or charged with a felony or certain other crimes, those guilty of violent misdemeanors in the past three years, those subject to protection orders, and those determined by a court to be mentally incompetent).

That means most Ohio residents could qualify to carry concealed firearms. But how many will want to? The Legislative Service Commission has told sheriffs’ offices to expect roughly 71,000 applicants per year, with perhaps a rush in the first year. Eventually, the Commission expects approximately 3% of Ohio’s population age 21 and over will be licensed to carry a concealed handgun. These figures are based on the experience of other states that have had similar laws on the books for a few years.

So what does this new law mean to the construction industry? Will laborers pack pistols in their lunchboxes, right next to the bologna sandwiches? Must employers post “No Guns Allowed” signs at every entrance to a construction site? If an employee gets shot on a job, will the employer be liable for failing to provide a safe worksite?

As with any new law, there are more questions than answers at first, until the law has been tested in the courts. But a reading of the statute itself, coupled with a review of what has happened in other states, provides some initial guidance for the construction industry.

## What the New Statute Says

What does the law change in the existing gun laws? A great deal.

In addition to making it easier to obtain a permit to carry a concealed handgun, the law impacts gun dealers, boaters (because there are rules about carrying handguns on vessels), and the media (who can now obtain lists of permit holders in each county, a compromise necessary to obtain Governor Taft’s signature). But of most interest to the construction industry will be the permitting process, the premises where concealed handguns can—and cannot—be carried, and the provisions for immunity for employers.

**The Permit Process.** The law in existence right now, and for the past 145 years, prohibits the carrying of handguns in public unless they are out in the open where they can be seen. The new law will change this for anyone with a permit, and the sheriff’s office **must** issue a permit within 45 days of the application to all applicants who pay the fee (\$45 or less), meet the qualifications, and have nothing in their past to disqualify them.

In addition to the fee, applicants must submit a recent color photo of themselves; a set of their fingerprints; a signed statement that they have read a brochure on firearms, dispute resolution, and the use of deadly force; and a “competency certification.” This last certifies not mental competence but competence with a firearm. Several different certificates will be acceptable, but all should equate to the satisfactory completion of a 12-hour class in firearms safety, including two hours of practice on a shooting range.

The fingerprints will assist the sheriff’s office to check criminal records and incompetency records to see that applicants are not disqualified. Being too young (under 21) or having lived in Ohio for too short a time (less than 45 days) could disqualify an applicant. So could being a “fugitive from justice”; being indicted for or charged with a felony, a violation of the drug laws, or a violent misdemeanor; being convicted of or pleading guilty to any of these crimes; being convicted of various juvenile offenses in the

last 10 years; being committed to a mental institution or found by a court to be mentally ill; or being subject to a civil protection order or a temporary protection order.

If Michigan's experience can be a guide, just over one percent of the applications will probably be denied on one or more of these bases.

Those with concealed carry permits from other states can use them in Ohio if the states have a reciprocal agreement. Permits expire every four years and are renewable. They can be revoked for bad behavior—forging a competency certificate, or being guilty of using weapons while intoxicated, for instance.

Amendments to the bill added a second kind of permit for those in a real hurry to defend themselves. Applicants with reasonable cause to fear for their lives can get special, 90-day, temporary permits by signing an affidavit attesting to their fears and paying not more than \$30.

**Where Guns Can Be Carried.** A concealed carry license will permit its holder to carry a concealed handgun anywhere in Ohio **except** the places prohibited by statute, Ohio Revised Code 2923.126(B) & (C):

- Police stations, sheriff's offices, jails and similar law enforcement facilities;
- Airport passenger terminals and airplanes;
- School safety zones;
- Courthouses or buildings where courts are located;
- Places where liquor is being dispensed under a "D" permit, whether they are rooms or open air arenas;
- Institutions of higher education, whether public or private;
- Churches or other places of worship—unless they post a sign saying that concealed weapons are permitted;
- Day care facilities of various types;
- Buildings owned or leased by the State or by any political subdivision of the State;
- Places where handguns are prohibited by federal law; and
- Places where signs have been conspicuously posted by the "owner or person in control of private land or premises" prohibiting anyone from entering upon the premises with firearms or concealed firearms.

For most construction sites, this last restriction will be important. Many construction sites would not fall under the statutory prohibitions, and even if they did, it is not clear that a church or college facility **under construction** would automatically be off limits to

concealed handguns. So if a contractor wants a particular construction site that it controls to be gun-free, the best way to assure that will be to post signs saying that in conspicuous places—basically, anywhere someone might enter the site.

If signs are so posted, anyone who brings a handgun—concealed or otherwise—on site may be guilty of **criminal trespass**, a fourth degree misdemeanor (up to 30 days in jail).

The catch is that the person must **knowingly** violate a posted prohibition making the site off limits for guns. That is why it is important that the signs be **conspicuously** posted. Small signs or signs not placed where a person entering the site would be sure to see them will make it difficult to prove that the trespasser brought a concealed handgun on a construction site despite **knowing** that the site was a gun-free area.

What should the signs say? Well, the law actually requires the posting of signs in most—but not all—of the places where guns are statutorily prohibited, and here it dictates wording in substantially this form:

Unless otherwise authorized by law, pursuant to the Ohio Revised Code, no person shall knowingly possess, have under the person's control, convey, or attempt to convey a deadly weapon or dangerous ordnance onto these premises.

There is no requirement to post a sign in a bar with a D liquor permit, in a college, or in a church. The proposed wording is slightly different for school safety zones, as it mentions Ohio Revised Code • 2923.122 and specifically mentions a school safety zone, rather than the less definite "these premises."

There is no requirement to follow this wording, however, when posting private premises made weapon-free by the choice of the owner, contractor, or construction manager. The sign can be more direct:

**NO GUNS!**

**THIS IS A CONSTRUCTION SITE  
CONTROLLED BY XYZ CONSTRUCTION.  
IT IS ILLEGAL TO BRING A HANDGUN  
ON THIS SITE.**

**VIOLATORS WILL GO TO JAIL!**

**Employer Immunity.** Suppose the employer posts no signs, some of the employees or subcontractors obtain concealed carry permits and bring their guns to work, and someone gets shot on the construction site. Can the employer be held liable for the injury?

Public employers have governmental immunity to protect them in such cases, and the new law provides a form of immunity for private employers, too. Section 2923.126(C)(2)(a) says this:

A private employer shall be immune from liability **in a civil action** for any injury, death, or loss to person or property that allegedly was caused by or related to a licensee bringing a handgun onto the premises or property of the private employer, including motor vehicles owned by the private employer, **unless the private employer acted with malicious purpose.** A private employer is immune from liability **in a civil action** for any injury, death, or loss to person or property that allegedly was caused by or related to the private employer's decision to permit a licensee to bring, or prohibit a licensee from bringing, a handgun onto the premises or property of the private employer. As used in this division, "private employer" includes a private college, university, or other institution of higher education.

This provision appears to protect an employer regardless of the decision it makes. Allowing guns can't make the employer liable, and prohibiting guns can't make the employer liable. So an employee who is badly beaten in a fight, for instance, should not get very far by arguing, "If my employer had only allowed me to bring my concealed weapon to work, that big bully would never have dared to attack me! It's all my employer's fault!"

But look again. The immunity provision has two important limitations: (1) it applies only in civil actions, such as an intentional tort suit against an employer; and (2) even in a civil action, if a plaintiff can show a malicious purpose on the part of the employer, the immunity disappears. Ohio courts have defined malice to include a "conscious disregard for the rights and safety of other persons that has a great probability of causing

substantial harm." *Preston v. Murty* (1987), 32 Ohio St. 3d 334. So the immunity is far from ironclad.

Would the immunity apply to prevent an employer from being cited by OSHA, following a shooting on

the jobsite? No, an OSHA citation is not a "civil action." While there is no OSHA regulation directly related to guns brought to work, Section 5(a)(1) of the Occupational Safety and Health Act requires that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Any OSHA inspection following a jobsite shooting would likely focus on this "general duty" clause.

OSHA's "policy regarding violent employee behavior" should apply to any use of weapons on a construction site by a worker. After quoting the general duty clause, that interpretation says this:

In a workplace where the risk of violence and serious personal injury are significant enough to be "recognized hazards," the general duty clause would require the employer to take feasible steps to minimize those risks. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation.

On the other hand, the occurrence of acts of violence which are not "recognized" as characteristic of employment and represent random antisocial acts which may occur anywhere would not subject the employer to a citation for a violation of the OSH Act.

So, as in so many areas of the law, it all depends on the specific facts. If an employer has sufficient warning that workers may bring guns to the construction site, then a possible shooting may be a "recognized hazard" that the employer should act to abate. Posting of the warning signs just discussed and enforcement of such warnings would most likely be seen as a feasible means of abatement.

## What Employers Can Do

A quick check with some local contractors showed that many already have a ban on weapons as part of their safety policies. According to Mark Potnick, Director of Safety Affairs and Labor Relations for the Ohio Contractors Association, the law won't affect these policies. The fact that an employee may have a permit to carry a concealed handgun will not override the employer's policy. If guns were prohibited on a construction site before April 8, they will be prohibited after it, too.

Potnick did say that it is always a good idea to remind employees of this prohibition, especially if more people are getting and carrying guns. He expects the

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Ohio Contractors Association to include a module in some of their safety training programs on the topic of weapons on the worksite.

Echoing that sentiment, Rick Lombardi, Vice President and General Manager of Turner Construction Company, stressed that the company's standard safety program has always included a prohibition against any firearms on its jobsites. "The fact that it is now legal to carry concealed weapons does not change our position in Ohio or elsewhere," Lombardi said. "Anyone carrying a firearm will be prohibited from entering the site, whether or not they are entitled by law to carry it as a concealed weapon."

Often, in addition to a prohibition on weapons in the company safety manual, a ban will also be included in the actual contract for the specific project, or in the subcontracts.

Another place the prohibition can be found—although you might not think to look for it there—is in a company's substance abuse policy. This is so because such policies often list items that are prohibited on the jobsite. In addition to illegal drugs, drug paraphernalia, and alcoholic beverages, firearms and explosive materials may be listed. These are all prohibited items at any jobsite for Complete General Construction Company, according to Al Tambini, its Safety Director. The company defines "company premises/jobsites" to include all construction sites as well as company vehicles and properties belonging to customer-clients. So firearms are prohibited wherever Complete General is working.

One possible advantage to including the ban on weapons in the substance abuse policy may be that policy's more stringent penalties. Complete General's policy,

for instance, makes an employee "subject to discharge" for a first offense of using or possessing any prohibited item. Discharge is not automatic, however, as alternative discipline—written reprimand, suspension, and discharge—can be meted out. The circumstances and the seriousness of the offense determine which route is taken.

Wherever the ban on handguns and other dangerous weapons appears, a contractor should have such a ban and should publicize it well. If the ban is part of a substance abuse policy, it would be wise for the company to cross-reference it in the safety manual. Tool Box Talks and other safety training sessions should emphasize the dangers of workplace violence, focusing specifically on handguns and explaining that regardless of the law, the company policy forbids bringing them to work.

If a company still does not have a policy on weapons, now would be a good time to add one. Looking for guidance? For members of the Society for Human Resource Management, that organization has a good discussion of weapons policies, including a sample policy, on its website: [http://www.shrm.org/hrresources/lrpt\\_published/CMS\\_000962.asp](http://www.shrm.org/hrresources/lrpt_published/CMS_000962.asp).

It's easy to take the attitude that "it can't happen here" or "not on my jobsite." But don't fool yourself. According to the U.S. Department of Labor, **homicide** was the third-leading cause of fatal occupational injury in the United States in 2001. There were 639 workplace homicides, and 26 of them happened on construction sites. Take steps now to keep your worksite from becoming a statistic.

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## Collaborations:

# Stretching the Recreational Dollar in Tight Times

**Highlights:** Ohio Revised Code § 755.16 establishes a creative way to build and operate recreational facilities: by collaborative efforts involving school districts, townships, counties, or other political subdivisions. Becky Princehorn first explains the statutory requirements for such a collaboration and then sets out a checklist of concerns any entities should address before embarking on such an effort.

Playgrounds, swimming pools, community recreation centers—just when they are needed the most, finding the money to build them may be the most difficult. Recreational facilities and programs enhance the educational experience and improve the quality of life in a community. Nevertheless, in tight times, these amenities are often left on the "cutting room floor" as nice to have, but not essential to the educational mission. But it does not have to be that way.

The issues are the same in townships, municipalities, and school districts. All chief financial officers



**Rebecca C. Princehorn**  
Partner  
BRICKER & ECKLER LLP

are struggling these days. Perhaps it is time for local government and school districts both to recognize that they share the same taxpayers, and working together makes economic as well as political sense.

How can more than one governmental entity work together to build a recreation center or a swimming pool? The General Assembly authorized just such collaborative efforts in Ohio Revised Code § 755.16, which permits the joint acquisition and maintenance of parks, recreational facilities and community centers.

While it is possible to form a joint recreation district, operated by a joint recreation board, it is not necessary to create such a new political subdivision. A simple agreement between the political subdivisions can get the collaborative efforts started and satisfy the statutory requirements. Of course, the parties entering into this type of relationship should have a basic understanding of the governing laws and be aware of common concerns that can arise.

### Legal Framework

School districts and local governments are permitted to collaborate under Ohio law by simple agreement. Ohio Revised Code § 755.16 allows the cooperative funding of facilities and recreational programs, as long as the parties to the collaboration agreement are political subdivisions.

For this purpose, what is a political subdivision? The statute defines political subdivisions as “any municipal corporation, township, township park district, county, or school district . . . and a joint recreation district.” The political subdivision may join forces with any one or more of the same in any combination. So two school districts could work together, or a school district could work with a county, township, or municipality.

In particular, the statute states that the parties may jointly acquire, equip, operate and maintain parks, recreational facilities and community centers. It defines “community centers” as facilities that (1) are acquired, constructed, operated, or maintained by political subdivisions, school districts, or a joint recreation district; (2) may be used for governmental, civic, or educational operations or recreational activities; and (3) may be used only by the entities that acquire, construct, operate, or maintain them or by

any other person upon terms and conditions determined by those entities.

The statute permits the parties to appropriate money for these amenities and to contribute lands, money, personal property or services to the collaboration.

### Collaboration Concerns

Although a collaboration can be a simple agreement, those setting it up need to review a checklist of concerns to ensure the collaboration meets all parties’ needs:

- **Contributions.** Define the scope of the collaboration, including the contributions to be made by the respective parties. Decide who will provide funds, property and/or services. Make sure to include any conditions relating to these contributions, e.g., annual appropriation, after-acquired property, etc.
- **Term.** Define the term of the collaboration and determine whether extensions will be permitted.
- **Employees.** Decide whether the parties’ employees will remain with their respective party or become employees of the collaboration. Consider how the collaboration will affect them for purposes of sovereign immunity. Note that recent changes in Ohio law include as a governmental function for purposes of sovereign immunity the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, auditorium or gym.
- **Contracts with third parties.** Determine if the parties will be contracting with any third parties, such as booster organizations or youth athletic leagues, to provide regular or periodic services.
- **Insurance.** Consider whether endorsements are needed for existing casualty and liability policies, or if additional insurance would be better.
- **Daily operation and scheduling of the collaboration.** Decide how the parties will handle daily operations—will this be done directly or delegated to staff, e.g., the school district’s athletic director or activities director, or the municipality’s parks and recreation director?
- **Evaluation.** Consider when the parties will want to evaluate the collaboration.
- **Termination.** Determine whether the parties can withdraw from the collaboration at will or only under certain conditions, such as following a specified notice period.

Any collaboration agreement should touch on this checklist of concerns and should be revisited to ensure the needs of the parties continue to be met. These relationships evolve over time, and the parties should prepare for such changes.

*Becky Princehorn is a Chair of the Political Subdivisions & Governmental Agencies industry group. She practices public finance and public law, emphasizing school and local government law. Reach her at 614.227.2302 or [rprincehorn@bricker.com](mailto:rprincehorn@bricker.com).*

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# 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. To that end, we provide you with the opening section of each bill's Analysis compiled by the Legislative Service Commission, reprinted with permission. For the rest of the Bill Analysis, check out Bills Online, [www.legislature.state.oh.us/bills\\_online.cfm](http://www.legislature.state.oh.us/bills_online.cfm). For the text of any particular bill, go to [www.legislature.state.oh.us/search.cfm](http://www.legislature.state.oh.us/search.cfm).

Please recognize that this summary omits some bills that may be of interest to our readers. Also, due to the nature of the legislative process, the status of any bill may change on a daily basis. The very brief summaries here cannot explain all facets of any currently pending legislation. Readers with additional questions about pending or desired legislation should contact one of the attorneys in Bricker & Eckler's Government Relations Practice Group. For more information on the attorneys in this group, check out [www.bricker.com/legalservices/practice/govern](http://www.bricker.com/legalservices/practice/govern).

## Summaries of Pending Legislation

### \*\*\* HOUSE BILLS\*\*\*

#### State Contractors: Fair Employment in Northern Ireland, H.B. 15

Reps. Miller, Ujvagi, Domenick, Allen, Sferra, Skindell

##### Bill Summary:

- Requires firms that contract with the state to supply goods, render services, or construct public improvements to implement the MacBride Principles of Fair Employment with respect to their business activities in Northern Ireland.

*Assigned to the House Commerce & Labor Committee.*

#### Vehicles To Display Lights in Road Construction Zones, H.B. 18

Reps. Miller, Carano, Ujvagi, Domenick, Allen, Sferra, Skindell

##### Bill Summary:

- Permits the Director of Transportation, a board of county commissioners, or a board of township trustees to require that vehicles display lighted lights during hours of actual work within a construction zone.

- Assesses one point against an offender's driver's license for a violation of the requirement to display lighted lights, in addition to a criminal penalty.
- Provides that the requirement to display lights applies only when signs giving notice are erected in accordance with the Director's specifications and when a violation occurs during hours of actual work within the construction zone.

#### Making Unlicensed Practice of Certain Professions a Deceptive Trade Practice, Sub. H.B. 38

Reps. Willamowski, Hagan, McGregor, Seitz, Setzer, Schaffer, Buehrer

##### Bill Summary:

- Specifically prohibits any person who is not licensed to practice law in Ohio from committing any act that is prohibited by the Supreme Court as being the unauthorized practice of law and provides that only the Supreme Court may make a determination that any person has committed the unauthorized practice of law in violation of that prohibition.

- If necessary to serve the public interest and consistent with the rules of the Supreme Court, authorizes any person who is authorized to bring a claim before the Supreme Court that alleges the unauthorized practice of law in violation of the prohibition described in the preceding dot point to make a motion to the Supreme Court to seek interim relief prior to the final resolution of the person's claim.
- Permits any person who is damaged by another person who commits a violation of that prohibition to commence a civil action to recover actual damages from the person who commits the violation, upon a finding by the Supreme Court that the other person has committed an act that is prohibited by the Supreme Court as being the unauthorized practice of law, and provides that the court is bound by the determination of the Supreme Court regarding the unauthorized practice of law.
- Requires a court in which the action for damages is brought to consider specified factors in awarding damages.

*Substitute Bill passed the House on 1/20/04; introduced in the Senate 1/22/04.*

*NOTE: Substitute Bill pertains only to the unauthorized practice of law, omitting professions related to construction, so HB 38 will no longer appear in this column.*

### **Prevailing Wage on School Construction + Ohio Contractors on Public Improvements, H.B. 45**

Reps. Bocchieri, Ujvagi, Brown, Beatty, Harwood, Koziura, Otterman, Allen, Strahorn, Miller

#### **Bill Summary:**

- Subjects school facilities construction to the Prevailing Wage Law.
- Prohibits schools from awarding a contract for a public improvement supported in whole or in part by the state to a contractor who does not have a principal place of business in Ohio.

*Assigned to the House Commerce & Labor Committee.*

### **Drug-Free Public Works Projects, HB. 136**

Rep. G. Smith

#### **Bill Summary:**

- Requires public improvement contractors to have written safety programs that include drug and alcohol testing.
- Requires public works contractors for projects financed with money appropriated by the General Assembly to establish drug-free workplace programs.
- Requires the Department of Administrative Services to adopt, by rule, specified standards and requirements for drug-free workplace programs.

*Assigned to the House State Government Committee.*

### **Establishing Statewide Uniform Residential Building Code, H.B. 175**

Reps. Buehrer, Widener, Olman, D. Evans

#### **Bill Summary:**

- Requires the Board of Building Standards to adopt a statewide uniform residential building code, separate from the nonresidential building code, for one-, two-, and three-family dwelling houses and accessory structures incidental to those dwelling houses.
- Requires the Residential Construction Advisory Committee to recommend a residential building code to the Board of Building Standards.

- Permits a certified building department established by a county, township, or municipal corporation to administer and enforce the residential building code, the nonresidential building code, or both.

- Specifies that an owner of a residential building in an area without a local building department certified to enforce the residential building code is not required to receive approval of the plans and specifications for the residential building.

- Permits specified local governments to adopt additional regulations governing residential buildings and property maintenance regulations if the regulations are not in conflict with the statewide residential building code and address subject matter that is not addressed in that code.

- Provides procedures for the Board of Building Standards to determine whether a conflict exists with a local regulation, and requires the incorporation of a local regulation into the statewide residential building code if the regulation conflicts with that code but is necessary for health, safety, or welfare.

- Requires a political subdivision with a certified building department to collect, on behalf of the Board of Building Standards, a fee of 1% of any local fees collected in connection with residential buildings.

- Removes detailed requirements that the Board of Building Standards adopt energy conservation and thermal efficiency standards for residential structures while retaining this requirement in a general manner.

- Adds penalty provisions for violations of the Building Standards Law.

- Removes the authority of a county or municipal corporation to require licensing of residential contractors.

- Requires residential contractors to be licensed statewide by the Ohio Construction Industry Examining Board.

- Increases the Ohio Construction Industry Examining Board from 17 to 22 members by adding a five-member residential construction section to the Board.

- Modifies the composition of the Residential Construction Advisory Committee.

- Provides procedures for a homeowner and residential contractor to follow prior

to a homeowner filing a claim against the contractor or seeking arbitration.

*Assigned to the House Homeland Security, Engineering & Architectural Design Committee.*

### **Prohibiting Pay Retainage, Sub. H.B. 208**

Reps. Young, Brinkman, Buehrer, McGregor, Flowers, Aslanides, Peterson, D. Evans, Gibbs, Reidelbach, Callender

#### **Bill Summary:**

- Decreases the percentage of retainage that may be withheld for specified public improvement projects from 8% to a maximum of 2%.

- Limits the use of holding a retainage to a percentage-based system in the private sector.

- Prohibits a contractor, subcontractor, and material supplier from withholding retainage at a higher rate than the amount being withheld from that contractor, subcontractor, and material supplier.

- Requires that interest be paid on retainage withheld.

- Modifies conditions for the release of retainage withheld for specified public improvement projects and establishes similar conditions for the release of retainage withheld for private sector construction projects, including a "line item release" by trade.

- Modifies penalties for the delayed release or unauthorized withholding of retainage for public improvement projects and establishes similar penalties relative to private sector construction projects.

- Shortens by ten days statutorily specified payment deadlines and adds new criteria to establish the deadline.

- Except for contracts for residential construction, establishes criteria regarding the unauthorized withholding of funds that render a construction contract void and unenforceable as against public policy.

- Abolishes retainage provisions applicable to contracts for specified street improvements authorized by county commissioners.

- Requires public and private owners to state in their construction contracts the percentage amount of retainage to be withheld for the project.

- Allows contractors to use insurance for replacing delivered materials that are stolen, destroyed, or damaged by casualty.
- Defines “retainage” and “schedule of values” as those terms apply to specified provisions governing public and private sector construction projects.

*Assigned to the House Commerce & Labor Committee, which reported out a substitute bill on 12/10/03.*

### **School Facilities—Renovate Rather Than New, H.B. 217**

Reps. Williams, Hagan, McGregor, Miller, Widowfield, Aslanides, Martin, Allen, Brinkman

#### **Bill Summary:**

- Prohibits the Ohio School Facilities Commission from prohibiting a school district undertaking a state-assisted classroom facilities project from renovating an existing facility rather than acquiring a comparable facility by new construction as long as certain conditions are satisfied.

*Assigned to the House Education Committee.*

### **Construction & Demolition Debris Fees, H.B. 259**

Reps. Harwood, Kearns, Seitz, Oelslager, Carano, Cirelli, Strahorn

#### **Bill Summary:**

- Eliminates the current annual license fee for construction and demolition debris facilities, and instead establishes a 22¢ per cubic yard or 66¢ per ton fee on the disposal of construction and demolition debris.
- Requires monthly remittance of disposal fees from owners or operators of construction and demolition debris facilities to local boards of health or the Director of Environmental Protection, and allows quarterly remittance of the fees.
- Authorizes municipal corporations and townships to appropriate a portion of the disposal fees for specified purposes.

*Assigned to the House Energy & Environment Committee.*

### **Revising Building and Fire Codes, H.B. 266**

Reps. Flowers, Widener

#### **Bill Summary:**

- Renames the Board of Building Standards as the Board of Building and Fire Stan-

dards and adds five members to the re-named Board.

- Transfers authority to adopt the State Fire Code from the State Fire Marshal to the Board of Building and Fire Standards.
- Creates a five-member Ohio Building Code Advisory Committee and a five-member Ohio Fire Code Advisory Committee to assist the Board of Building and Fire Standards in Ohio Building Code and State Fire Code development.
- Transfers the State Fire Marshal’s office from the Department of Commerce to the Department of Public Safety, where it will become the Division of the State Fire Marshal.
- Adds two members to the State Board of Building Appeals.
- Transfers the regulation of underground storage tanks from the State Fire Marshal to the Superintendent of Industrial Compliance.
- Requires the Superintendent of Industrial Compliance to propose rules to the Board of Building and Fire Standards for the adoption of an Aboveground Petroleum Storage Tank Program and gives the Superintendent primary responsibility, with specified exceptions, for administering that program.
- Creates a 16-member Aboveground Petroleum Storage Tank Study Committee for the purpose of submitting a recommendation whether unregulated aboveground petroleum storage tanks should be registered or otherwise regulated.
- Makes appropriations.

*Assigned to the House State Government Committee.*

### **Adopting Uniform Mediation Act, H.B. 303**

Rep. Oelslager

#### **Bill Summary:**

- Creates the Uniform Mediation Act.
- Specifies when the Uniform Mediation Act applies to a mediation proceeding.
- Sets forth specific exclusions from the Uniform Mediation Act and provides parties with an opportunity to opt out from the coverage of the Act.
- Provides that mediation communications are privileged and are not subject to discovery or admissible in evidence except when the privilege is waived by all parties or in specified exceptions.

- Prohibits communications by a mediator in specified circumstances.
- Requires mediators to make a reasonable inquiry before accepting a mediation to determine whether any conflict of interest arises and to disclose any conflicts to the mediation parties as soon as is practicable.
- Provides that mediation communications are confidential to the extent agreed by the parties.
- Provides that an attorney or other individual designated by a party may accompany the party to and participate in a mediation.

*Assigned to the House Judiciary Committee.*

### **Requiring Continuing Education for Architects, Engineers & Surveyors, H.B. 322**

Rep. Widener

#### **Bill Summary:**

- Grants explicit authority to the State Board of Examiners of Architects to adopt rules pertaining to continuing education requirements for architects.
- Requires that to renew a certificate of qualification, an architect meet any continuing education requirements the State Board establishes.
- Requires professional engineers and surveyors to complete the continuing professional development requirements the bill establishes in order to renew a certificate of qualification.
- Allows the State Board of Registration for Professional Engineers and Surveyors to waive continuing professional development requirements for registrants serving in the active military.
- Sets forth ways in which engineers and surveyors may satisfy continuing professional development requirements and establishes the amount of credit that may be earned for different activities.
- Requires that engineers and surveyors maintain a log of continuing professional development activities and permits the State Board to audit a person’s log at any time and establishes sanctions for a person who is discovered to have not completed requirements.

*The House Homeland Security, Engineering & Architectural Design Committee reported out a Substitute Bill on 1/21/04.*

\*\*\* SENATE BILLS\*\*\*

**Compensatory Time in Lieu of Overtime, S.B. 26**

Sens. Coughlin, Spada, Stivers, Schuler

**Bill Summary:**

- Permits private employers to award compensatory time off in lieu of monetary overtime compensation to their employees, subject to the consent of the employee and other specified conditions.
- Permits public and private employers to establish biweekly work schedule programs to allow their employees to work 80 hours in any two consecutive work weeks.
- Prohibits private employers from requiring their employees to accept compensatory time off in lieu of monetary payment for overtime and prohibits public and private employers from requiring their employees to work a biweekly work schedule program.
- Establishes civil and criminal penalties for violations of the bill's provisions.

*Assigned to the Senate Insurance, Commerce & Labor Committee.*

**Rural Accelerated School Building Assistance Program, S.B. 54**

Sens. Carey, Mumper

**Bill Summary:**

- Creates the Rural Accelerated School Building Assistance Program to provide early state assistance for classroom facilities acquisition for school districts with territories greater than 350 square miles.

*Assigned to the Senate Finance & Financial Institutions Committee.*

**Tort Reform, Sub. S.B. 80**

Sens. Stivers, Hottinger, Goodman, Wachtmann, Amstutz, Randy Gardner, Austria, Nein, Schuring, Armbruster, Coughlin, Carey, Harris, Mumper, Schuler

**Bill Summary: Statutes of repose**

\* \* \*

- Provides that the ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or

supplier of a product if the product involved is asbestos, that the cause of action based on asbestos that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to asbestos, whichever date occurs first, and that the civil action for wrongful death must be commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues.

- Provides that the ten-year statute of repose does not bar an action based on a product liability claim against a manufacturer or supplier of a product for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.
- Prohibits a cause of action to recover damages for injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction.
- Allows a cause of action to recover damages for injury or wrongful death to be brought within two years from the date of discovery of a defective and unsafe condition of an improvement to real property if that discovery is made during the ten-year statute of repose

but less than two years prior to the expiration of that period.

- Specifies that the ten-year statute of repose described in the prior two dot points does not apply to a civil action for injury or wrongful death against the owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement at the time the defective and unsafe condition of the improvement constitutes proximate cause of the injury or wrongful death.
- Prohibits the above-described ten-year statute of repose from being asserted as an affirmative defense by any defendant who engages in fraud with regards to an improvement to real property.

*Passed the Senate on 6/11/03; assigned to the House Judiciary Committee.*

**Deadline for Providing Copies of Public Records, SB. 87**

Sens. Dann, Miller, Coughlin, Brady

**Bill Summary:**

- Requires a public office or person responsible for public records to provide copies of public records within ten days or, if requested to be provided by United States mail, within 15 days after receipt of the request.

*Assigned to the Senate State & Local Government & Veterans' Affairs Committee.*

**Modifying Qualifications of County Engineers, S.B. 90**

Sen. Schuring

**Bill Summary:**

- Eliminates the requirement for a county engineer to be a registered surveyor.
- Requires the office of the county engineer to have a registered surveyor on its staff if the county engineer is not a registered surveyor.
- Requires a county engineer to have an engineering degree with a major area of study in civil engineering.

*Assigned to the Senate State & Local Government & Veterans' Affairs Committee.*

### Requiring an Indoor Air Quality (Mold) Program for School Buildings, S.B. 121

Sen. Dann

#### Bill Summary:

- Amends several statutes for the purpose of adopting new section numbers and enacting sections to establish sanitation requirements and standards for indoor air pollutants for schools and to require boards of health or a board's designated representative to conduct inspections of schools and school buildings.

*Assigned to the Senate Health, Human Services & Aging Committee.*

### Modifying Requirements for Registration of Professional Engineers & Surveyors, S.B. 150

Sen. Coughlin

#### Bill Summary:

- Increases from \$16 to \$20 the annual renewal of registration fee for professional engineers and professional surveyors.

- For registration renewals of professional engineers and professional surveyors beginning with calendar year 2008, implements continuing professional development requirements.
- Authorizes the State Board of Examiners of Architects to adopt rules pertaining to continuing education requirements for architects who hold a certificate of qualification under state law.

*Assigned to the Senate Insurance, Commerce & Labor Committee.*

## 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. We highlight what the courts have said in these cases to keep you informed about decisions that may affect your business and your interests, but the summaries themselves are neither legal advice nor legal opinion. 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!

Our first case for January is a very recent decision of the Ohio Supreme Court on a topic we covered just last September: violations of specific safety requirements (VSSRs). The case arose from a serious accident to a roofer, and the dispute focused on which regulations apply to work done from scaffolds. Then we turn to the Ohio Courts of Appeals, beginning with a case from Fayette County that explains the "cost" in "cost plus" contracts and cautions that contract provisions requiring written change orders mean what they say. Our final summary focuses on a complex insurance coverage dispute arising in Franklin County and providing some surprising interpretations of standard policy exclusions.

### Safety Rule for Cranes & Derricks Applies To Scaffolds, State Supreme Court Says

Does a state regulation about working with "cranes, hoists and derricks" within ten feet of electrical power lines also apply to working on a scaffold erected near such lines? That question faced the Ohio Supreme Court earlier this month in *State ex rel. Devore Roofing & Painting v. Industrial Commission* (Jan. 21, 2004), 101 Ohio St.3d 66, 2004-Ohio-23.

The Court had to rule on the application of an injured roofer for an award in addition to workers' compensation benefits based on the employer's violation

of a specific safety requirement (usually called a "VSSR"). The Industrial Commission had granted an award equal to 40% of the maximum weekly workers' compensation rate to a roofer who fell 25 feet off a scaffold when the aluminum downspout he was moving contacted an electrical wire, sending current through his body. According to the Court, he received "a multitude of massive injuries."

But eligibility for a VSSR requires the injured employee to demonstrate that injuries were **caused** by the employer's violation of a specific safety requirement. What requirement had the employer violated? The Ohio Administrative Code contains specific safety requirements for construction, including mandates for working within ten feet of overhead electrical wires, but these are in a section entitled "Cranes, hoists and derricks." No crane, hoist or derrick was involved in this accident.

The Court of Appeals for Franklin County thought there was nothing in the standard that would clearly tell an employer it applied to working from a scaffold. Following what it thought were the dictates of the Ohio Supreme Court from earlier decisions, the appellate court told the Commission to vacate the award.

Looking at the same regulation, Ohio Administrative Code 4121:1-3-07(E), the Supreme Court disagreed. The plain language of the regulation said it

applied “when it is necessary to move or operate cranes, derricks, or any other type of hoisting apparatus **or construction equipment** within ten feet of an electrical conductor carrying one hundred ten volts or more.” The Court pointed out that, by definition in an earlier section of the regulation, “construction equipment” included scaffolds.

But was the injured employee “operating” the scaffold? The hearing officer had found that he was, as he “was using it to perform the construction activity he was required to do,” and the Supreme Court agreed, finding “nothing unreasonable or illogical in this result.” When equipment is being used to perform the work for which it was designed, it is being “operated,” according to the Court.

The employer’s next argument focused on the title of the regulation, which failed to give an employer notice that it would need to follow this regulation when “operating” a scaffold. After looking at several cases, the Supreme Court said this:

These cases do not hold . . . that the text of a safety rule may never exceed the scope of its title, nor do they require that safety rules must have all-encompassing titles.

Here, the regulation’s drafters had made it clear that they intended an application broader than cranes, hoists and derricks when they included “construction equipment” (defined to cover scaffolds) in the regulation itself.

The Court pointed out that safety requirements for different industries are in different chapters of the Ohio Administrative Code. Still, some requirements state expressly that they also apply to other industries. “It stands to reason,” the Court said, “that if the drafters of a safety requirement located in a chapter devoted to a particular industry can expressly extend it to another industry, a requirement that is located in a rule devoted to certain equipment can expressly be extended to other equipment.”

All seven Justices agreed to reinstate the additional compensation ordered by the Industrial Commission.

What lesson should an employer take from this unanimous decision of the Ohio Supreme Court? It pays to be very familiar with all the safety requirements in the construction industry (and perhaps in some other industries, too). An employer cannot assume that because it has complied with the obvious requirements—those whose titles specifically mention the kinds of work

and equipment involved at a specific construction site—it will be able to avoid paying hefty compensation to an injured employee who brings a VSSR claim.

## Fayette County Case Underscores Two Principles of Contract Law

Some principles of contract law are pretty basic, but we still need to be reminded of them from time to time. A decision of the Court of Appeals for Fayette County (the Twelfth District) on the last day of 2003 provides a valuable reminder on two issues: oral change orders and the meaning of a “cost plus” contract.

In *Burns v. Zuck-Spriggs* (Dec. 31, 2003), 2003-Ohio-7215, the parties had signed a written contract to build a house, and they had reached an oral agreement on a “cost plus” contract to build a horse barn. But they apparently ignored one provision in the written contract, which stated that “to be effective any changes or modifications to the Plans must be by written Change Order signed by both parties.”

That was their first mistake. Their second was in thinking they agreed on what a “cost plus” contract meant.

When the work was done, both sides had complaints: The contractor wanted to be paid almost \$10,000 more for extra work on the house, plus \$44,442.47 more for the barn. The homeowners complained of work performed in an unworkmanlike manner that required costly repairs and took 400 hours of their own time.

So they went to court, where each side got a small award. The net effect was that the contractor got \$8,870. Not happy with that, he appealed the decision.

The Court of Appeals began its discussion with the clause in the written contract calling for all changes or modifications to be in writing and signed by both parties. How could the contractor get around that? He claimed that the homeowners’ requests for changes—a longer driveway and black bathroom fixtures, for instance—had waived that provision by oral modification.

The court disagreed, pointing to a 1997 decision of the Ohio Supreme Court that found such clauses “valid and binding.” Waiver was possible, but unless it was a written waiver, it required “such clear and convincing evidence as to leave no reasonable doubt.” Here, there was a dispute over whether the “extras” were part of the original contract, so evidence was not clear and convincing. Trial judges hear the witnesses and are in a better position to evaluate conflicting testimony than are appellate courts, so the Court of Appeals found no reason to reverse the trial court’s decision on oral change orders.

But it did reverse the trial court on the next issue: the meaning of a “cost plus” contract. Both sides agreed that the oral contract for the barn was “cost plus ten percent.” But what did that mean? To the

“It stands to reason,” the Court said, “that if the drafters of a safety requirement located in a chapter devoted to a particular industry can expressly extend it to another industry, a requirement that is located in a rule devoted to certain equipment can expressly be extended to other equipment.”

homeowners, it meant the cost of materials, plus ten percent. To the contractor, it meant the cost of **materials and labor**, plus ten percent.

The court resolved this issue very easily by turning to an impeccable source: Black's Law Dictionary. There it found this definition of a "cost plus" contract: "One which fixes the amount to be paid the contractor on a basis, generally, of the cost of the material and labor, plus an agreed percentage thereof as profits."

Since labor should have been included in the cost plus contract for the horse barn, the Court of Appeals returned the case to the trial court to determine the cost of the contractor's labor.

The parties here could have saved themselves a great deal of time and trouble by clarifying their intentions before entering into either contract, written or oral. A contract is supposed to be a "meeting of the minds," but here each side mistakenly thought it knew what the other was thinking. Talking out the details in the beginning, and then putting them in writing, could have saved everyone time, money and frustration.

### Claims for Subs' Faulty Workmanship Not Covered by Contractor's Insurance

Insurance coverage cases tend to be complicated, and that was certainly true of one decided last month by the Franklin County Court of Appeals. *Erie Insurance Exchange v. Colony Development Corporation* (Dec. 31, 2003), 2003-Ohio-7232, marked the fifth time the dispute had made its way to the Court of Appeals in the last four years.

After all this procedural wrangling, the court finally addressed the issues of coverage under a general contractor's comprehensive commercial general liability policy. Based on various policy exclusions, it decided there was no coverage for defects in the workmanship of subcontractors.

The underlying dispute was over problems at a condominium complex—a complication to start with, due to changing ownership. The original owner, Colony Development Corporation, was also the developer and general contractor, although it subbed out all the work. But it was Colony's insurance policy that was at issue. Would it cover claims of poor workmanship—including unstable foundation walls, settling basements, defective roof trusses, and drainage problems—brought by the condominium association against the developer?

When the condominium association filed suit, the developer turned to Erie, its insurer, and asked for a defense and indemnification; in other words, it wanted the insurer to provide a lawyer and, if it lost the suit, to pay damages (up to the amount of the policy). Erie filed its own suit, a declaratory

judgment action, asking the court to declare whether it had a duty to defend or indemnify the developer. On the first trip to the Court of Appeals, Erie was told it had to defend its insured.

While that appeal was pending, the condominium association settled with Colony, but the settlement, too, was complex. Although the total amount of the settlement was \$775,933, Colony paid only \$125,000, with the rest to come from Erie—if the court decided that Erie's policy provided coverage. The settlement became part of a consent judgment, which said nothing about the merits of the claims or whether insurance covered them.

It took three more trips to appellate courts to settle exactly what the first decision meant, but it was finally clear that Erie's duty to defend its insured was the only issue that decision had settled. The issue of a duty to indemnify—and therefore pay damages on behalf of Colony—had never been addressed, and it depended on whether the policy actually covered the claims asserted by the condominium association. That was the issue facing the Court of Appeals last month.

Insurance coverage cases generally follow a two-step process, and this case was no exception. First, the court had to decide if the claims fell generally into the category of risks the policy was designed to cover. Then, if they did, the court had to decide if any exclusion applied to remove them from coverage.

According to the coverage language in the policy, it would pay for personal injury or property damage for which the law held the insured responsible, so long as the personal injury or property damage was caused by "an occurrence which takes place in the covered territory." Had the defects in workmanship (property damage) been caused by an "occurrence"? That term was defined, too, in the policy: "an accident, including continuous or repeated exposure to the same general, harmful conditions."

While faulty workmanship might not be seen as an accident, the court looked briefly at other Ohio cases and decided that, in Ohio at least, a contractor's failure to fulfill its duty could fit the policy definition of "occurrence." So the condominium association was over the first hurdle.

But many more hurdles lay ahead in the various policy exclusions.

The first exclusion to interest the court was the "work performed" exclusion. This common exclusion says there is no coverage for "property damage to your work arising out of your work or any portion of it but only with respect to the completed operations

Insurance coverage cases generally follow a two-step process, and this case was no exception. First, the court had to decide if the claims fell generally into the category of risks the policy was designed to cover. Then, if they did, the court had to decide if any exclusion applied to remove them

hazard [for work already finished]. This exclusion **does not apply** if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”

That last sentence was significant, as here the developer had performed none of the work in question. Subcontractors had done it all, on behalf of the contractor. So the exclusion did not apply, and there still might be coverage.

Unfortunately for the condominium association, several other exclusions did apply, leading the court to conclude that there was no coverage for these claims under the comprehensive commercial general liability policy. The court addressed each exclusion at length, but we can list them briefly here:

- **The “faulty work” exclusion**—This clause limits its coverage for the insured’s faulty work to two kinds of hazard, the “products hazard” and the “completed operations hazard.” The completed operations hazard might have applied (resulting in coverage), but the property on which the faulty work occurred was actually owned by Colony—it was the condominium developer, remember—at the time of the faulty work. The completed operations hazard relates to damage that does not occur on property the insured either owns or rents, so it did not apply here. If Colony had sold the property before the faulty work was done, then there might have been coverage.
- **The exclusion for property damage to the insured’s own property**—Although this was a separate exclusion, the reasoning was the same: Colony owned the property at the time the faulty workmanship occurred, so there was no coverage.
- **The “professional services” exclusion**—This precluded coverage when damage resulted from

“any service of a professional nature, including but not limited to: 1) the preparation or approval of maps, plans, opinions, reports, surveys, designs or specifications, and 2) supervisory, inspection or engineering services.” Were construction activities “professional services”? The court noted a difference of opinion among the courts, even quoting from its **own opinion** in the very first decision related to this case: “Construction services are not professional activities.” But the court had apparently thought it over and changed its mind since that first opinion; now that statement was mere “dictum” (additional commentary not part of the holding of the case). Since Colony was a general contractor, its “coordination, supervision, inspection, and approval of subcontractors and subcontractors’ work” was a “professional service” that would not be covered by Erie’s policy.

- **The “impaired property” exclusion**—This excluded coverage for tangible property that had become less useful because of something the insured had done or because it incorporated the insured’s product or work. The court found this applied to exclude coverage for sidewalks that did not comply with the guidelines under the Americans with Disabilities Act.
- **The “operations” exclusion**—This exclusion precluded coverage for damage to real property on which the insured was performing operations, sometimes interpreted as excluding coverage for “work in progress.” The court refused to decide whether this exclusion applied or not, since application of the other exclusions made this one unnecessary.

Of most interest to general contractors is probably the court’s decision—directly contradicting what it had said earlier—that coverage for construction services would be excluded by the professional services exclusion. Unless the Ohio Supreme Court considers this provision and rules differently, this is one exclusion that general contractors will most likely want to negotiate out of their future insurance policies.

Of most interest to general contractors is probably the court’s decision—directly contradicting what it had said earlier—that coverage for construction services would be excluded by the professional services exclusion.

## Looking for an old article?

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You can also use the regular “find” feature on your computer (Control-F) to search for a particular word in the index. If that word is in the title of an article or in the parenthetical explanation of a case holding, you should be taken right to that listing, which will tell you the month and year of the article.

All back issues are available on the website, so you never need to leave [www.ohioconstructionlaw.com](http://www.ohioconstructionlaw.com).

—Maureen P. Taylor, Editor

HOLMAN, GILLIS AND SHEVELOW ON

# Construction Documents

## Emergency Situations—Act First, Think Later, and (with Luck) Get Paid

*Forty-fourth in a Series—Each issue of ohioconstructionlaw.com discusses important terms found in typical construction documents. The provision that interests Doug Shevelow, P.E., this month is the clause in the AIA Document A201, the General Conditions, that pertains to emergency situations.*

No construction project ever goes exactly as planned. Sometimes the unplanned circumstances are minor, and do not materially affect the project. Other times the changes are more substantial, resulting in significant change orders that can take weeks to develop and negotiate. At still other times, however, changes are sudden and dramatic, creating an emergency and leaving no time for protracted planning. The Owner, designer, and Contractor must react quickly to avert a significant loss.

Substantively, the contract documents are of no help—they do not account for the emergency. Procedurally, though, the AIA A201 Subparagraph 10.6.1 does offer help:

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 [Claims and Disputes] and Article 7 [Changes in the Work].

There is a similar provision in the Engineers Joint Contract Documents Committee General Conditions, EJCDC C-700, Paragraph 6.16, Emergencies:

A. In emergencies affecting the safety or protection of persons or the Work or property at the Site or adjacent thereto, Contractor is obligated to act to prevent threatened damage, injury, or loss. Contractor shall give Engineer prompt written notice if Contractor believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby or are required as a result thereof.

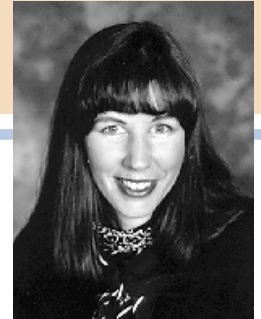
If Engineer determines that a change in the Contract Documents is required because of the action taken by Contractor in response to such an emergency, a Work Change Directive or Change Order will be issued.

So both the A201 and C-700 grant the Contractor discretion in responding to emergency situations and promise suitable compensation, with the C-700 being a bit more restrictive by requiring written notice from the Contractor. But it appears as if the written notice is required only after the Contractor takes action (“have been caused...as a result thereof”). Regardless, the counterbalance in both documents is that the Owner is allowed to second guess the Contractor's actions through the change order and dispute resolution processes.

It is easy to see how a Contractor can feel stuck in the middle. How has this tension played out in the case law?

The following cases, based on the A201, show the importance of reacting to the emergency as opposed to its aftermath, and demonstrate that contemporaneous project records can be used to prove that an emergency truly did exist.

In *F.J. Busse, Inc. v. Department of General Services* (Pa. 1979), 408 A.2d 578, the project was for the construction of a fountain where the Monongahela and Allegheny Rivers meet in Pittsburgh. The contractor incurred significant additional costs when it had to remove six to eight



**Sylvia L. Gillis**  
Partner

BRICKER CONSTRUCTION



**Michael S. Holman**  
Partner  
BRICKER CONSTRUCTION



**Doug Shevelow, P.E.**  
Construction Claims Analyst  
BRICKER CONSTRUCTION

**“In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss.”**

inches of mud left on top of the project site by flooding from Hurricane Agnes.

The Contractor argued that under the 1976 version of Subparagraph 10.6.1 (Subparagraph 10.3.1) it was due compensation because the hurricane created an emergency to which the Contractor needed to respond. The court disagreed, explaining that the contract provision was for emergency actions taken by a Contractor to *prevent* a loss, not to repair damage already done. If the Contractor had anticipated the flooding and taken measures to prevent it—such as construction of an emergency dike—reimbursement might have been justified. But cleaning up after an emergency was not covered by the clause.

The Contractor in *Pioneer Roofing Co. v. Mardian Construction Co.* (Ariz. 1986), 733 P.2d 652, made out a little better.

*Pioneer Roofing* also involved the 1976 A201. Here a roofing subcontractor was able to use project meeting minutes to show that the specified waterproofing procedure for a wooden dome atop a sports arena could not be performed in light of oncoming winter weather.

This created an emergency, as the dome’s insulation and wood would be destroyed without the necessary waterproofing. An alternate, more expensive waterproofing method appropriate for cold temperatures was used instead. The Owner refused to pay the extra costs, citing another contract provision requiring that the architect authorize all extra work in advance, which had not occurred.

After review of the project meeting minutes, where the perils of exposing the dome to winter weather were thoroughly discussed, the court agreed that this was an emergency, entitling the contractor to a change order. This is a good example of a contractor using contemporaneous project documentation to prove a claim.

So the Contractor faced with an impending emergency would do well to see what procedures the contract requires and then to act quickly to head off the emergency, if possible. But no Contractor should rely on the emergency clause as a blanket justification for more money. Even in emergencies, an Owner is likely to require thorough documentation of the action taken and the reason for it.

If the Contractor had anticipated the flooding and taken measures to prevent it—such as construction of an emergency dike—reimbursement might have been justified.

## Upcoming Seminars

Involving Bricker & Eckler LLP Construction Attorneys

For Registration Information, call Aisha Head (614) 227-8893 or (800) 844-5292

Date & Time	Seminar	Location	Attorneys	Sponsors
Jan. 29, 2004 11:30 to 1:00	15 <sup>th</sup> Annual Ohio Public Works Forecast	Holiday Inn 6001 Rockside Rd Independence, OH (Cleveland Area)	L. Liggett	Bricker & Eckler LLP
Jan. 29, 2004 1:00 to 4:00	Ohio Township Assoc. Winter Conference (Competitive Bidding)	Hyatt Regency & Convention Center Columbus, OH	G. Parks	Ohio Township Association
May 11-12, 2004 8:30 to 4:30	16 <sup>th</sup> Annual School Financing & Construction Seminar	Hilton—Easton Columbus, OH	M. Holman, M. Evans, S.L. Gillis, G. Parks, J. Rosati, M. Taylor, S. Wampler	BASA/Triad
Oct. 12-13, 2004 8:00 to 4:30	Top Gun—2 <sup>nd</sup> Annual Construction Claims Conference	TBA	M. Holman, M. Armstrong, M. Evans, G. Parks, J. Rosati, M. Taylor, S. Wampler	Bricker & Eckler LLP

## Hindsight About

# Unforeseen Site Conditions

## The Contractor's Ace in the Hole: The Doctrine of Superior Knowledge

Imagine an unforeseen site condition but the prospect of no recovery for the Contractor because of exculpatory contract language (i.e., the Owner expressly waived all warranties regarding the site information it provided) or perhaps because the Contractor failed to make a sufficiently thorough pre-bid investigation? What help can a Contractor get?

The answer could lie in the Doctrine of Superior Knowledge. The "superior knowledge" is that of the Owner; courts generally acknowledge that an Owner has a positive duty to disclose all information it knows or should know that affects the project. Through the Doctrine, an Owner can be held liable for the extra cost of unforeseen site conditions if the Owner possessed knowledge of these and did not make it available to the Contractor. Depending on the circumstances, the Doctrine may even trump the Owner's waiver of warranties regarding site conditions, or the Doctrine may excuse the Contractor's failure to conduct a thorough pre-bid investigation.

The Doctrine of Superior Knowledge requires that a Contractor making a claim prove that (1) the Owner knew (or should have known) certain information; (2) the Contractor did not; and (3) the information was material to the Contractor's planned performance. Superior Knowledge cases often deal with soil reports and subsurface conditions.

The leading Ohio case, *Romanoff Electric v. ODAS* (June 30, 1994), Franklin App. No. 92AP-1667, 1994 Ohio App. LEXIS 2835, although not involving subsurface conditions, is illustrative. In *Romanoff* an electrical Contractor for the Wexner Center for the Visual Arts at the Ohio State University suffered a loss when it was required to replace certain switchgear that was damaged by a flood. The Contractor was able to show that the Owner possessed documentation that the storm sewer for the site was inadequate. This undersizing caused the flood because the Owner had required that the under-sized sewer be the sole stormwater outlet for the site. The Owner was thus made liable for the damages.

The Contractor in *Romanoff* was fortunate in that it was able to get possession of a piece of key documentation—an Engineer's report of its evaluation of the storm sewer system. This was the smoking gun. However, not all Contractors are as fortunate. Proving that

the Owner knew something is the most difficult element of a Superior Knowledge claim. A Contractor may be taking a big risk by filing suit on just a hunch, without hard evidence of what information was available to the Owner. On the other hand, filing suit may be the only way a Contractor can get access to the Owner's files to prove its case.

If the Owner is a governmental agency or political subdivision, a Contractor can take advantage of state laws guaranteeing access to public records. In Ohio, this is the Public Records Act, found in Chapter 149 of the Revised Code. For Federal contracts, the Freedom of Information Act is applicable.

If a Contractor does file suit, then either State or Federal Rules of Civil Procedure govern the Contractor's quest for documents. A Federal case from this past summer is interesting because it points up the potential rewards and difficulties of trying to prove a Superior Knowledge claim using emails made by the Owner's personnel. In *Renda Marine v. United States* (2003), 58 Fed. Cl. 57, a marine dredging Contractor sued the Corps of Engineers, alleging differing site conditions on a contract to dredge the Houston-Galveston ship channel. The Corps failed to honor the Contractor's discovery requests for access to a key Corps employee's hard drive and email systems, claiming that it was policy for emails to be deleted after sending or responding to them.

The court held that the Corps employee's practice of deleting email was inconsistent with the Corps' legal obligation to preserve evidence. That obligation kicked in once the Corps knew the Contractor might pursue litigation. The court ordered the Corps, at its own expense, to produce backup tapes with the key employee's emails for the period after which the court deemed the Corps should have had notice about the potential litigation. The Contractor was also given access to the employee's computer hard drive.

A Contractor making a Superior Knowledge claim may have to rely upon the recollections of current or former employees of the Owner and try to impute this knowledge to the Owner. Such recollections may be especially valuable when abandoned foundations, utilities, or waste disposal areas are unexpectedly encountered on older industrial sites.



**Doug Shevelow, P.E.**  
Construction Claims Analyst  
BRICKER CONSTRUCTION

# ADR Corner

## Effective Communication— Developing Themes



**G. Samuel Wampler**  
Of Counsel  
BRICKER CONSTRUCTION

Preparing for mediation takes more than a couple of hours, and discussing how to prepare for it takes more than a couple of columns. This month we continue our consideration of that topic. Last month we looked at the importance of gathering information, including retrieving contemporaneous job records, interviewing witnesses, obtaining photographs and, if necessary, consulting with experts. Once you have gathered all of this information, how do you use it effectively?

Among the numerous reasons for obtaining this information are: 1) using it to gain a clearer understanding of the basis for your claim if you are the claimant, or to defend a claim if you are not the claimant; 2) using it to explain your position at the mediation; 3) using it to understand the other party's interests in the dispute; 4) using it to develop options for resolution; and 5) using it to rebut statements made by the other party during the mediation, if necessary. Knowledge is power, but that power is restrained unless you convey that knowledge in an effective and persuasive manner.

**Developing themes.** Construction disputes can be extraordinarily complex. As such, the ability to reduce the complexities to an understandable story requires detailed analysis of the strengths and weaknesses of the parties to the dispute, and their respective alternatives if the dispute is not resolved. Once this analysis is performed, one or more themes will emerge. Every project takes on a certain character during construction. It may be a "smooth" project, a "tough" project, or even a "disaster." Usually, if it is a disaster project, there is little disagreement on that point. There is, however, likely to be great disagreement on why it is a disaster and who is responsible for liabilities that may result.

**Payment to Contractor for unauthorized change orders.** Let's consider a dispute over payment for substantial changes to the work that were authorized by the Architect or Construction Manager, but not formally approved by the Owner. Assume that the contract requires written change orders for such work and that those change orders must be signed by the Owner. Assume further that the changes amount to

\$300,000 on a \$10,000,000 project. While the Owner may feel in a position of strength contractually, and the Contractor is at a great disadvantage, the Contractor may improve its position in a mediation with persuasive themes.

Depending on the facts, one theme might be that while the contract may require written change orders, the parties routinely proceeded without them, and the Owner always paid for changes even though they were made before a written change order was signed. The theme here is "estoppel" or "waiver" of the formal written change order requirement.

Another theme might be the Owner's "need" coupled with "value." If the facts warrant it, the Contractor may show the Owner that while the work may not have been performed pursuant to a written change order as required by the contract, the Owner nevertheless needed the work to be done (often these types of problematic changes are the result of an error or omission by the design professional), and the Contractor performed the changed work at a reasonable price, thereby delivering value to the Owner.

Another theme might be the "good faith" effort to "keep the project on schedule." Depending on the relationship of the parties and the nature of the changed work, it may well be that the Contractor acted reasonably in relying on the word of the Architect or Construction Manager when it performed the changed work without a written change order. So long as the cost of the changed work was "reasonable" and helped to keep the project from falling behind, the Contractor can demonstrate that it acted in good faith and that the Owner's complaint, if any, is with its Architect or Construction Manager who ordered the changed work without first getting the Owner's permission. While the Owner might feel left out of the loop and feel that its position is strong financially, it may now start to be persuaded to pay all or a portion of the cost of the changed work. After all, 1) it had paid without formal written change orders before; 2) it needed the work anyway, and it got the work for a fair price; and 3) the Contractor acted in good faith by helping to keep the project from falling behind schedule.

To summarize, a presentation on behalf of the Contractor at a mediation of this dispute would emphasize:

- "*Relationship of trust.*" The Owner and the Contractor had ignored the Contract before on other

Construction disputes can be extraordinarily complex. As such, the ability to reduce the complexities to an understandable story requires detailed analysis of the strengths and weaknesses of the parties to the dispute, and their respective alternatives if the dispute is not resolved.

change orders, and the Contractor trusted the Owner to honor this change.

- *“The additional work was necessary.”* The Contractor did what had to be done to satisfy the Architect or Construction Manager.
- *“The cost was reasonable.”* The Contractor submitted fair and reasonable prices for the work that would have had to be done in any event.
- *“The Project was kept on schedule.”* The Contractor was acting in the Owner’s best interest, not just trying to capitalize on an opportunity to profit from a Change Order.

Everything the Contractor or its attorney presents at the mediation should address one or more of these themes. Because the Contractor is in a weak position legally, its themes must appeal to what is fair and equitable even though perhaps not supported by law.

The themes, of course, depend on the specific facts of the case. For some sets of facts, these themes might be entirely inappropriate, and the Contractor would need to develop others. The point is, however, that now the Contractor has a justified roadmap to a fair and just resolution.

**The Owner’s themes.** The Owner is likely to approach the mediation quite differently. The Owner is going to emphasize its legal rights. For example, if there was a meeting directly between the Owner and the Contractor when the contract was signed, there may have been a discussion about the importance of the contract. If so, one theme the Owner will project at the mediation is that the parties had a contract for a reason. In the event of a disagreement, they should look to the contract to see what they promised each other. The Owner’s theme will be the importance and the sanctity of a “promise.” A promise is a promise.

Another theme of the Owner might be that it feels “defenseless.” Having been left out of the loop, the

Owner will feel somewhat defenseless against many of the equitable and fairness themes of the Contractor. However, who is the true culprit here? If the Owner was truly out of the loop and the Architect or Construction Manager who authorized the changes to the work did not have the Owner’s authority to do so, the defenseless theme may work to the Owner’s advantage in its claim against the Architect or Construction Manager. In a multi-party mediation, the “defenseless” theme can be powerful.

The Owner may also offer the “budget” theme. The budget theme goes something like this: I have a budget to manage on this project. This is why I require written change orders. How can I manage my budget if I have no say in the changes? Surely you can appreciate the position this places me in when I am asked to pay for changes I had no voice in. This takes the Owner back to its legal position, but with more rationale.

So, let’s recap the Owner’s themes:

- *“A promise is a promise.”* This is not only an appeal to what is morally right, but it is the essence of contract law—an exchange of promises. It is moral, and it is legal.
- *“I am defenseless here.”* This responds to the Contractor’s fair and equitable themes. It suggests that, like the Contractor who would be a victim if not paid by the Owner, the Owner will be a victim if it has to pay for something it didn’t request.
- And finally, the *“budget problem.”* This connects strongly with the first theme because it provides the reason for enforcing the promise.

**Communicating effectively.** Once the themes have been developed, when preparing for mediation, the party and/or its attorney should always test its

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Themes provide continuity and credibility to your presentation. They are the backbone of your position. If you begin to feel pressured during a mediation, return to your themes. Examine how the source of the pressure stacks up against your themes.

statements against the themes. It is also a good exercise to anticipate what themes the other side may present. Think hard about your investigation. If you were on the other side of the dispute, what themes would you use to substantiate your position? In this way you will be prepared to meet those themes with themes of your own.

Everything you say and every piece of evidence you may present at a mediation should address one or more of your themes. If a piece of evidence such as a daily job record, a letter, an e-mail or a photo does not address one of these themes then get rid of it. It will detract from your presentation. In your discussions with the mediator in caucus, you should continue to drive your themes home. Themes provide continuity and credibility to your presentation. They are the backbone of your position. If you begin to feel pressured during a mediation, return to your themes. Examine how the source of the pressure stacks up against your themes. If necessary, reexamine your themes and see if they still seem applicable.

If so, cling to them and be sure that you emphasize one or more of the themes during every discussion with the mediator or the other parties. When faced with legal positions, emphasize the equitable arguments, and vice versa.

**Some final thoughts.** Mediation can be stressful. Sometimes you may find yourself straying from your plan for the mediation. Long periods of waiting between caucuses can take its toll. The thirst for resolution can grow strong. Perhaps the other party has unleashed some damning evidence you were unaware of, or maybe you are hearing strong arguments against your position for the first time. Your well-developed, solid themes, supported by the facts, will stand you in good stead. This is where good preparation pays off. Stick to your themes.

This is not to say that belief in your themes should impair your willingness to compromise. After all, compromise is why you are in mediation. Measure the devastation of damning evidence and strong arguments against each of your themes and against all of your themes as a whole. Make sure your responses are consistent with and emphasize your themes in light of this evidence and regardless of these good arguments. If the themes made sense before the mediation and seemed to lend strong support to your position then, they probably still do—even in the face of devastation. This is what thorough preparation is for. Trust your preparation as you proceed toward the goal of resolution. Your outcome will be improved because you prepared well.

Next month we will look at methods of presenting your position at a mediation.

## When Experience Counts<sup>SM</sup>

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.

### Attorneys—

Michael S. Holman  
Department Chair  
614.227.2348  
mholman@bricker.com

Maria J. Armstrong  
614.227.8821  
marmstrong@bricker.com

Kimberly J. Brown  
614.227.8894  
kbrown@bricker.com

Mark Evans, P.E.  
614.227.4892  
mevans@bricker.com

Sylvia L. Gillis  
614.227.2353  
sgillis@bricker.com

Gregory T. Parks  
614.227.2386  
gparks@bricker.com

Jack Rosati, Jr.  
614.227.2321  
jrosati@bricker.com

Maureen P. Taylor  
614.227.2317  
mtaylor@bricker.com

Sam Wampler  
614.227.4889  
swampler@bricker.com

### Construction Claims Analyst—

Doug Shevelow, P.E.  
614.227.4803  
dshevelow@bricker.com

### Law Clerks—

Scott Davis  
614.227.4879  
sdavis@bricker.com

Brian Wolfe  
614.227.8846  
bwolfe@bricker.com