



BrickerConstructionLaw.com

*A Discussion of Current Laws, Regulations and Practices for
all participants in the Construction Industry*



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Underground Utilities Series Concludes in Sixth Annual Heavy/Highway Issue

We start our sixth annual heavy/highway issue with the fifth and final article in a series on the protection of underground utilities. Two chapters of the Ohio Revised Code control the protection of underground utilities on a construction project. They lay out the duties of the three parties involved—the project owner, the utility owner, and the contractor. To explain some of the complexities of these statutes and how they allocate responsibilities among the parties, Doug Shevelow draws upon his background as both a civil engineer and a construction attorney in this article. If you are an owner, an owner’s agent, an excavation contractor, or just someone with an interest in how construction projects work, you should find this article informative.

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In our monthly “What the Courts Are Saying” column we start with a case from the Ohio Court of Appeals for Jefferson County. The Court was asked to determine if an independent contractor who creates a hazard can rely on the open and obvious doctrine as a defense to a third-party negligence claim. The Court held that the open and obvious doctrine applies to landowners and does not apply to independent contractors. Our second case this month comes from the Bankruptcy Court for the Eastern District of Michigan, Southern Division. A contractor filed for bankruptcy and sought to have a \$77,000 debt to a material supplier completely discharged through the bankruptcy. The key point was whether or not the material supplier could prove it supplied materials to specific projects on which the contractor worked.

Rental property owners, construction firms, and contractors will need to pay heed to the U.S. Environmental Protection Agency’s new Renovation, Repair, and Painting Rule. Matt Warnock provides a regulatory update on the new rule which requires that all persons performing certain renovation work be certi-

fied or receive on-the-job training from (and perform work under) the direction of a certified renovator.

Over the last couple of years there have been several cases involving a wide variety of issues related to prevailing wage. Andrew Balcar focuses on two recent cases where contractors received substantial penalties as a result of their subcontractors’ failure to pay prevailing wages.

In “Hindsight About Unforeseen Site Conditions” Doug Shevelow looks at a situation where a design/builder sued a medical practice for cost overruns attributed to making a medical office building project conform to local codes for stormwater management. Were the building zone requirements a “hidden condition?”

In the ADR Corner, Construction Fellow Desmond Cullimore, P.E., covers a case where a contractor failed to participate in the selection of an arbitrator. The contractor later sought to have the court remove the selected arbitrator.

Also, in this issue you will find an announcement regarding our listing of upcoming seminars.

Utility Protection: Potential Contractor and Third Party Liabilities



Doug Shevelow, P.E.
Associate
BRICKER CONSTRUCTION

Highlights: Sixth and final in a series. Two chapters of the Ohio Revised Code control the protection of underground utilities on a construction project. They lay out the duties of the three parties involved—the project owner, the utility owner, and the contractor. To explain some of the complexities of these statutes and how they allocate responsibilities among the parties, Doug Shevelow draws upon his background as both a civil engineer and a construction attorney in this article. If you are an owner, an owner’s agent, an excavation contractor, or just someone with an interest in how construction projects work, you should find this article informative.

Introduction

In my first three articles on this topic, I covered the duties of a project owner, utility owner, and contractor under Ohio’s statutes and case law covering underground utility protection on construction projects. In articles four and five, I discussed the liabilities that may befall a project owner and utility owner, including some recent case law developments that may have opened the door for making utility owners liable for a contractor’s economic losses. In this final article, I shall focus on the liability of the contractor and the agents of the project owner.

But first, it may be helpful to repeat some key points regarding utility protection in general.

The Statutory Scheme

Ohio Revised Code § 153.64 governs the protection of underground utilities on publicly-funded construction projects. It was passed by the General Assembly in 1982. Ohio Revised Code §§ 3781.25 through 3781.32, specifically governing the protection of underground utilities on private projects, were passed by the General Assembly in 1989. The public works and private works statutes are mostly complementary, but the private works statutes are generally more detailed and comprehensive.

The “2-3-2 Rule”

One helpful way to keep things straight is something I refer to as the “2-3-2 Rule.” There are two main statutes regarding utility protection: public and private.

There are three main parties to a construction project: the project owner, the utility owner, and the contractor. And there are two phases to a construction project: design and actual construction. The statutes assign particular duties and liabilities depending on what party is involved with which phase of the project.

When considering a question of what duty someone owes under the law regarding utility protection on a construction project, it is helpful to answer a question on each of these factors:

- First ask, “Do the public or private project statutes apply?”
- Followed by “Who am I—the project owner (or owner’s design professional), utility owner, or contractor?”
- Followed by “What stage of the project are we dealing with—design or construction?”

When must you follow the statutes?

The most fundamental question is when do the utility protection statutes apply? R.C. § 153.64(A) includes a very broad definition of “public improvement,” and requires that its utility protection provisions be followed during the construction of any public improvement “which may involve underground facilities.”

Another section of the Ohio Revised Code, R.C. § 3785.25(H), includes a very broad definition for “excavation,” including “the use of tools, powered equipment, or explosives to move earth, rock, or other materials in order to penetrate or bore or drill into the earth, or to demolish any structure whether or not it is intended that the demolition will disturb the earth.” So, odds are that if you think a construction-related activity may be considered an excavation by the statutes, triggering particular duties on your part, then that is probably so—everything from driving survey lath to excavating with a massive hydraulic excavator triggers certain legal duties.

Who is OUPS?

The Ohio Utility Protection Service (OUPS) is not a utility marking service; but it is many other things. OUPS is a clearinghouse of information, a consortium of utility owners organized under R.C. § 153.64(A) (4) as an “underground utility protection service” and registered with the Secretary of State and Public Utilities Commission.

OUPS takes requests from contractors and project owners for utility locations and relays those requests to the actual utility owner. It is the utility owner who has the legal duty to provide project owners with utility locations for planning purposes and to mark utility locations on the ground during construction. OUPS also preserves the record of these requests. OUPS is also very active in educating the public and construction industry about underground utility safety.

Contractor's Liabilities

If a contractor has fully complied with the OUPS statutes by calling before it digs, treading carefully in the tolerance zone (i.e. within 18-inches on either side of the utility), stopping and calling 911 when any damage occurs regardless of where the marks are, and preserving and protecting the marks, it should not be liable for damages, whether they be damages incurred by the utility owner or damages incurred by third parties.

But still, even when there are no utilities marked in a given area, an excavator is not allowed to ignore the obvious. An excavator will be presumed to be on notice of underground utilities, even if nothing is marked, when there are other indications of the presence of utilities. See *East Ohio Gas Co. v. Kenmore Construction Co., Inc.* (2001), Ohio App. LEXIS 1444 at 30. These indicators can include, among other things, valves, pedestals, hydrants, and utility poles with lines extending underground.

Once a utility owner establishes that a contractor breached its statutory or common law duties, and that the breach has caused the utility owner to incur damages, there are varying ways to calculate those damages. Generally, the correct measure of damages is the cost of reestablishing service, (i.e. the cost of making the utility whole) which may include a utility's indirect costs. *Cinn. Bell v. Cooper* (Hamilton Muni. Ct. 1985), 23 Ohio Misc. 2nd 9.

Indirect costs can add significantly to a damage award. Several Ohio cases have held that in addition to the actual cost of repair, a utility can allocate a fraction of its overhead towards repair costs, too. See, e.g. *Columbus & Southern Elec. Co. v. J.P. Sand & Gravel* (1985), 22 Ohio App.3d 98. In that case, a gravel pit operator undermined an electric transmission tower, causing it to collapse. The utility used its own forces to re-erect the tower and was able to collect the actual cost of repair, plus indirect fixed overhead on the employees and equipment used to make the repair, such as warehousing, engineering, supervision, and administrative costs. These indirect costs added nearly 60% to the overall damage tally.

On the other side of the coin, one court has held that, when a utility claims that its measure of damages is the book value of the damaged facility, the contractor can rebut the evidence of book value with evidence of an appropriate depreciation factor. See *Ohio Edison Co. v. Ford* (1993), Ohio App. LEXIS 2645.

Third Party Liability—Utility Locator and Owner's Engineer

One court has held that a third party locating service hired by a utility may have liability towards a contractor when the locator's failure to accurately mark utility locations damages the contractor. The court held that the contractor could be construed as a third party beneficiary to the contract between the locator and the utility. See *East Ohio Gas Co.*, cited previously.

When an engineer hired to show utility locations on the construction plans makes mistakes and the contractor ends up suing the owner as a result, the engineer may be liable to the owner to the extent the owner is liable to the contractor. See *United Telephone v. Williams Excavating* (1997), 125 Ohio App.3d 135.

In *Williams Excavating*, the owner's engineer failed to clearly request that a phone company identify its underground lines. As a result, the engineer designed a sanitary sewer along the same alignment as the phone company's underground lines, which led to many different claims from many different parties, including the contractor, the utility owner, and the project owner. It is always good advice for an engineer designing projects along the public right of way to make sure its design fee includes the costs of getting the needed information from all affected utilities.

Conclusion

The rules governing the protection of underground utilities in Ohio are a combination of different statutes and case law. Duties and liabilities of the various parties involved in design and construction projects are not always clear. The purpose of this series of articles is to help explain the law by looking at the statutes and more important cases in greater detail. The two most important things to take away from these articles are 1) always call OUPS before you dig; and 2) if you are ever accused of running afoul of utility protection law, or believe that somebody has done so, call an attorney experienced in this narrow area of the law.

An excavator will be presumed to be on notice of underground utilities, even if nothing is marked, when there are other indications of the presence of utilities.

BRICKER & ECKLER'S 20 RULES FOR PUBLIC OWNERS' CONTRACTING SUCCESS

These Rules represent our collective wisdom, over 100 years of construction law experience and over 100 years of construction experience. While no one can guarantee success, we believe that if an Owner understands and follows these Rules, the Owner will have a successful project. We emphasize the need for deep understanding of the Rules. To help you, we shall include articles in Brickerconstructionlaw.com explaining them. If you need further assistance, please contact us.

- 1 Analyze and understand the risks and requirements of each of your projects**, and how your team will eliminate or minimize those risks and meet those requirements.
- 2 Beginning with the hiring process, communicate your expectations to your team and follow through** to see that each team member meets those expectations.
- 3 Conduct a thorough evaluation of your design professional and, if applicable, construction manager candidates** so you hire a team of competent, cooperative, and responsive professionals for each of your projects.
- 4 Require that your drawings be well coordinated** using a competent third person to review them for conflicts. Discuss coordination with your design professional candidates, understand the process, and see that the process becomes part of the owner – design professional agreement.
- 5 Understand and address any green building issues (LEED, etc.)**. Begin early during the hiring process by discussing any green building issues with your design professional and, if applicable, construction manager candidates. Incorporate each team member's responsibilities for any green building issues into its contract.
- 6 Provide sufficient time** so that your design professional can complete the design process, including the coordination of the plans and specifications, and, if applicable, there is time for a constructability review by your construction manager.
- 7 Hire competent project administration, including observations and inspections**, so that through your design professional and/or construction manager you have knowledgeable eyes inspecting the Work each day to guard you against defective and non-conforming Work.
- 8 Make sure that your representatives, design professional, and/or construction manager, are knowledgeable about the roofing and through wall flashing Work** and that your representatives carefully review the plans, specifications and shop drawings and then inspect the Work as it is being installed.
- 9 Provide for the commissioning** of new HVAC systems or major modifications to existing systems.
- 10 Carefully think through how the risks for unforeseen site conditions** will be evaluated and allocated.
- 11 Include contractor hiring criteria** in your bidding documents that will permit you to evaluate and hire qualified contractors.
- 12 Exercise your discretion** and hire qualified contractors that can be expected to work as part of a cooperative team to complete your Project on time, on budget, and free from defects.
- 13 Use contracts that protect your interests and that are consistent with your expectations**. Have your contracts, including owner-architect agreement, owner-construction manager agreement, and owner-contractor agreement, drafted to protect you.
- 14 Train your Team in how to use your Contract Documents**. Do not stop simply with good Contract Documents that will protect your interests. Your Team needs to know how to use them. Take the additional step and provide this training.
- 15 Include indemnification provisions** in your contracts with your contractors, design professional, and, if applicable, construction manager, that will protect you from claims caused by other persons.
- 16 Be decisive and responsive - understand what you are required to do** and do it in a timely and competent manner.
- 17 Ensure that your Contract Documents** require a clear and detailed notice of any problem that would affect your budget, completion date, or the quality of the Work.
- 18 Deal with all problems on your projects immediately, including contemporaneous documentation**; do not let small problems grow into major disputes. If you sense you have a significant problem, contact your legal counsel immediately.
- 19 Keep your contractors' sureties informed about any significant problems**. If you have a significant problem with a contractor on your project, you want the contractor's surety informed and involved as early as possible.
- 20 Have the insurance provisions in your Contract Documents** reviewed by your insurance professional, follow his or her recommendations for modifying those provisions and have your insurance professional verify that you have the required coverage.

"By failing to prepare, you are preparing to fail." – Ben Franklin

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All too often a Public Owner will contract with someone who does not do what the person promises to do. These Rules are intended to help protect Public Owners from those broken promises; they are not intended to state the Owner's obligations under its Agreements.

What the Courts Are Saying...



Each month, Brickerconstructionlaw.com summarizes recent decisions of state and federal courts that may affect construction projects and those involved with them in Ohio, Indiana, Kentucky and Michigan. From time to time, we may even include cases from other states if they seem 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!



Andrew Balcar
Department Attorney
BRICKER CONSTRUCTION

This month we start with a case from the Ohio Court of Appeals for Jefferson County. The Court was asked to determine if an independent contractor who creates a hazard can rely on the open and obvious doctrine as a defense to a third-party negligence claim. The Court held that the open and obvious doctrine applies to landowners and does not apply to independent contractors. Our second case this month comes from the Bankruptcy Court for the Eastern District of Michigan, Southern Division. A contractor filed for bankruptcy and sought to have a \$77,000 debt to a material supplier completely discharged through the bankruptcy. The key point was whether or not the material supplier could prove it supplied materials to specific projects on which the contractor worked.

The Open and Obvious Doctrine Does Not Protect Independent Contractors From Liability

When a contractor excavates during a project, there is always the chance that the public may be exposed to danger—especially where the contractor takes inadequate measures to protect the public from a dangerous situation. When construction results in a potentially dangerous situation that is open and obvious, the owner of the property is not always held liable for injuries resulting from that danger.

In *Wakefield v. John Russell Construction Co.*, 2010 Ohio App. LEXIS 1072, the Court of Appeals of Ohio, Seventh Appellate District, reviewed an injury case where a contractor claimed that the danger was open and obvious and, therefore, it should not be held liable for a pedestrian's assumption of risk. At issue, was whether an independent contractor may use the open-and-obvious doctrine to avoid liability for injuries to a pedestrian.

In *Wakefield*, a pedestrian crossed through a construction area to enter a building. A contractor had previously excavated a trench around the building. The trench was 12 inches wide and 16 to 18 inches deep. When the pedestrian tried to step over the trench, she lost her balance, fell, and was injured. As a result of her fall, a cast was placed on her left arm and she faced two surgeries and physical therapy.

The pedestrian claimed the contractor was negligent per se for failing to follow a City ordinance to protect the trench. A city statute required all openings and obstructions to be "carefully guarded, protected or barricaded at all times." The statute also required excavations to be protected by means of backfill, steel plates, or through a method acceptable to the City Engineer. In addition, she claimed the edge of the trench that gave way when she stepped on it was a dangerous condition and was not open and obvious.

The contractor claimed the "open-and-obvious" doctrine as a defense. The open-and-obvious doctrine provides that property owners "owe no duty to people who enter their premises where there is an open and obvious danger." The basis of the doctrine is that the open and obvious nature of the danger presents a warning to persons entering the premises. The property owner should reasonably expect that a person entering the premises will discover the danger and take measures to protect themselves.

The Court reviewed a Supreme Court case where a contractor created a hole in a bridge and a pedestrian was injured when he fell through the hole. The Supreme Court held that "[a]n independent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which

The open-and-obvious doctrine provides that property owners "owe no duty to people who enter their premises where there is an open and obvious danger."

exonerates an owner or occupier on land from the duty to warn those entering the property concerning open and obvious dangers on the property.”

When an independent contractor is involved, the issue of whether the danger is open and obvious is an issue that may be considered in the comparative negligence analysis to determine the degree of liability for each party involved in the matter, but not in determining whether the contractor was negligent for a failure to warn.

An owner, or a person with interest in the property, may avail themselves of the open-and-obvious doctrine; however, a person with no property interest who conducts activities on the property with the owner’s consent (such as an independent contractor) may not use the open-and-obvious doctrine to avoid liability.

A Failure to Adequately Connect Materials to Specific Projects May Result in a Dischargeable Bankruptcy Debt Under the Michigan Builders Trust Fund Act

The Michigan Builders Trust Fund Act provides a mechanism to protect laborers, subcontractors, and materialmen from a contractor’s failure to pay. When a contractor finds it difficult to stay afloat and files bankruptcy, material suppliers may have a hard way to go when collecting unpaid balances if they do not maintain business practices in line with the Act.

In *Astro Building Supplies, Inc. v. F & C Construction*, 2010 Bankr. LEXIS 833, the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, determined whether a debt owed to a material supplier is non-dischargeable in bankruptcy where the material supplier failed to adequately document its dealings with the contractor.

In *Astro*, a building supply company supplied materials to a contractor in the business of repairing and replacing residential roofs. The relationship existed for more than four years. The contractor went out of business in 2007 and subsequently filed for bankruptcy. The contractor owed the material supplier approximately \$77,774.31.

The material supplier argued that the contractor’s outstanding balance should not be discharged in bankruptcy and the supplier should be paid the full balance. In making its argument, the material supplier referred to the Michigan Builders Trust Fund

Act. The material supplier claimed that the Act imposed a fiduciary duty on the contractor to not retain or use construction payments from a particular project until it paid all laborers, subcontractors, and materialmen.

The Act imposed a trust upon the construction payments and the contractor, as trustee, would violate its fiduciary duty as trustee if it were to retain or use construction payments from a particular project before it paid all laborers, subcontractors, and materialmen. Under the Act, such a violation amounts to embezzlement.

The prima facie elements of a claim under the Act are “(1) a defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for labor or materials provided on a construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project.”

These elements require the material supplier to show that the contractor used the supplies in specific construction projects, that the customers for these specific projects paid the contractor, and that the contractor failed to pass those payments on to the material supplier.

During the four-year relationship, the material supplier sold \$1,111,207.99 of materials to the contractor for work on various projects. The material supplier provided the contractor with many invoices during the business relationship, and the contractor made many payments. The contractor’s payments neither identified specific invoices, nor identified specific projects for which the materials were incorporated. In fact, the material supplier maintained a “running balance” of the contractor’s outstanding balance.

The material supplier’s practice of maintaining a “running balance” amounted to an open account, a line of credit, or some other credit arrangement. The Court determined that such an arrangement does not create a fiduciary duty between the supplier and the contractor under the Act. Because the material supplier used such a practice when invoicing the contractor and accepting payments, the material supplier could not prove that its materials were incorporated into specific projects. The Court determined that a failure to make the connection between materials and projects is a failure to establish the existence of a trust under the Act and, therefore, there could be no violation of the Act.

Because the material supplier used such a practice when invoicing the contractor and accepting payments, the material supplier could not prove that its materials were incorporated into specific projects.



Dispute Resolution Services



Samuel Wampler, Mediator
Partner, Bricker & Eckler LLP

Reputation

Experience

Knowledge

Training

Cost effectiveness

Convenience

For further information or to schedule a mediation with Sam, please call Kathy Parker at 614-227-4956 or e-mail at kparker@bricker.com.

Construction disputes are often complex and expensive, and a great majority are ripe for resolution through mediation, because it offers parties the opportunity to resolve their disputes more cost-effectively than a trial in court or arbitration. The opportunity for success in mediation starts with selection of a skilled and experienced mediator who understands the dispute resolution process and has training and experience to guide the parties to their best opportunity for a win-win result.

Sam Wampler has 30+ years of experience as a trial attorney, mediator, arbitrator, civil settlement officer, and referee. He has litigated and settled hundreds of matters on behalf of contractors, owners, and design professionals over the years.

- **Reputation** – Sam has been recognized by Chambers USA as a leading attorney in Ohio construction law and is described as “a clever and hard-working lawyer” who is “easy to get along with.” He is a member of the Million Dollar Advocates Forum and has been recognized in California for his work in the Civil Law Settlement program and for distinguished service as Judge Pro Tem of the Superior and Municipal Courts in San Diego County.
- **Experience** – Sam served two years as chair of the Columbus Bar Association’s ADR Committee and has served as both a private mediator and mediator for various Ohio courts since 1998. Sam has conducted bench trials, arbitrations and jury trials in a variety of civil claims involving construction, engineering, fraud and real estate. He also serves by appointment as an arbitrator in construction disputes for the American Arbitration Association.
- **Knowledge** - Sam has written extensively on the topic of mediation and alternative dispute resolution techniques. His articles are available at www.BrickerConstructionLaw.com.
- **Training** – Sam has completed intensive studies in negotiation, advanced negotiation and mediation at Harvard Law School, and studied Advanced Mediation Techniques for Multi-Party and Complex Disputes at the Center for Dispute Settlement. He also participated as a select member in the Advanced Commercial Mediation Institute.
- **Cost-effective** – Mediation can be a very cost-effective method of resolving a complex construction dispute. There are always at least two or more parties involved. Sam can quote a daily rate that, when divided, usually represents a very small expense in comparison to other resolution options.
- **Teamwork** – Sam offers co-mediation, an effective service for disputes that involve highly technical issues. Partnering with a Bricker & Eckler Construction Department member who is a professional engineer or licensed architect, Sam manages the dispute resolution process while establishing a strong line of communication on the technical issues between the parties, providing the best opportunity for resolution.
- **Convenient** – The Bricker & Eckler LLP offices in Columbus, Cincinnati/Dayton or Cleveland will accommodate most mediations with no additional facility charges.

Lead-Based Paint Regulatory Update: The E.P.A.'s Renovation, Repair, and Painting (RPR) Rule



Matt Warnock
Associate
BRICKER CONSTRUCTION

As of April 22, 2010, rental property owners, construction firms, and contractors will need to pay heed to the U.S. Environmental Protection Agency's new Renovation, Repair, and Painting Rule, 40 CFR 745.80 through 40 CFR 745.92. (For more information see <http://www.epa.gov/lead/pubs/renovation.htm>.) This rule requires all renovations or dust sampling activities at single family homes, multi-family housing, and child-occupied facilities (e.g., day-care centers, pre-schools, and kindergarten classrooms) built before 1978 to be performed by a certified firm (broadly defined to include a company, partnership, corporation, sole proprietorship, or individual).

In addition, the rule requires that all persons actually performing the renovation work be certified or receive on-the-job training from (and perform work under) the direction of a certified renovator. It is anticipated that hundreds of thousands of individuals and businesses will need to be certified as a result of the rule.

What types of facilities will be subject to the rule?

The rule defines child-occupied facilities as residential, public, or commercial buildings where children under age 6 are present on a regular basis and that were built prior to 1978, including, but not limited to: 1) homes; 2) apartment complexes; 3) schools; and 4) day-care facilities. Housing constructed after 1978, zero bedroom units (e.g., studio apartments or dormitories), and facilities deemed lead-free by a certified inspector are not subject to the rule.

Who will the rule apply to?

The rule applies to anyone *who receives compensation* for renovation work, which generally includes activities modifying an existing structure and resulting in the disturbance of painted surfaces (e.g., surface preparation activity, HVAC duct work, weatherization activities, removal of building components). Compensation is broadly defined to include: 1) payment to specialty contractors (e.g., painters, plumbers, electricians) for work completed; 2) payment of wages to employees performing the work, even wages paid to a government or non-profit's employees; and 3) rental payments to property owners/landlords. As a result,

general contractors, specialty contractors, employees, and owners of rental properties all could fall within the scope of this rule.

NOTE: Minor or de minimis repair and maintenance activities disturbing six square feet or less of paint in an interior room, or 20 square feet or less outside, are not subject to this rule. Window replacement, however, is not considered a minor maintenance or repair.

How does a person completing renovation work comply with the rule?

Compliance with the rule starts with proper training and certification. All firms engaging in renovation work must apply to U.S. EPA for certification in order to perform renovations and/or dust sampling. Certification requires completion of an application and the payment of a fee.

For an individual, certification involves successful completion of an eight-hour training course from an accredited training provider. For individuals already accredited as a lead abatement worker or supervisor through U.S. EPA or HUD, only a four-hour refresher course is required. Certification must be renewed every five years.

NOTE: In Ohio, certification flows through the Ohio Department of Health. To ensure there are enough certified persons in Ohio prior to April 22, 2010, the Ohio Department of Health offered the training course for between \$10 and \$100. The training courses will be held in various locations in the State throughout 2010. Specific information about training courses can be found at <http://www.development.ohio.gov/cdd/ohcp/WhatsNew.htm> (click on "2010 Lead Abatement Training Program"). And, additional information about the new rule is available from the Ohio Department of Health's Lead Poisoning Prevention Program at (877) NOT-LEAD or LEAD@odh.ohio.gov.

The certified renovator must abide by certain lead work practice standards (e.g., work area containment, dust minimization, and thorough clean up). For renovation work at single family and multi-family residences, the individual renovator (or firm) must distribute pamphlets available from U.S. EPA to the

owner and occupant of the building. Informational signs also must be conspicuously posted regarding the work.

For renovation work at child-occupied facilities, pamphlets must be distributed to the property owner as well as an adult representative of the business if the building owner and business owner are different. The renovator (or firm) must then receive written confirmation that the pamphlet was mailed or received. Additionally, parents or guardians of the children at those facilities must be notified through distribution of the pamphlets or the posting of informational signs in areas where parents and guardians are likely to see them.

Perhaps most onerous are the recordkeeping requirements, which require firms to keep a number of records relating to training, certification, and completed work for three years.

What happens if a firm does not comply with the rule?

Because U.S. EPA implemented the rule under the Toxic Substances Control Act, it retains the authority to inspect work sites, review records and reports, and respond to citizen tips and complaints. A violation of the rule can result in suspension or revocation of a renovator's certification. And, an enforcement action could be undertaken by U.S. EPA (or a state if the program's undertaking has been delegated) against the firm completing the renovation work with possible penalties of up to \$32,500 per day.

The U.S. EPA, however, encourages persons to voluntarily disclose and correct violations prior to discovery by U.S. EPA. Certain compliance incentives also are available to small businesses (fewer than 100 employees).

ADR Corner

Challenging the Selection of an Arbitrator

A contract with pre-dispute arbitration provisions provides the parties with a process to resolve their disputes before disputes arise. Such pre-dispute arbitration provisions exist in the standard American Institute of Architect's A201 General Conditions of the Contract for Construction. If your contract contains such provisions, when a dispute arises you are bound to follow the process outlined in your contract. Such provisions were the subject of conflict recently in *Summit Construction Company v. American Arbitration Association*, 2010-Ohio-874.

In *Summit*, an owner and a contractor entered into a contract to construct a hotel. The contract contained the standard AIA A201 General Conditions (1997 version). The following A201 pre-dispute arbitration provisions were at issue in *Summit*.

"Claims [...], shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and the Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect." §4.4.1.

Any Claim "shall, after initial decision by the Architect or 30 days after submission of the

Claim to the Architect, be subject to mediation as a condition precedent to arbitration [...]" § 4.5.1.

"Prior to arbitration, the parties shall endeavor to resolve disputes by mediation [...]" §4.6.1.

The contractor completed the project and the owner made final payment. All appeared well until the owner noticed defects in the hotel. Blaming the contractor for the defects, the owner contacted the American Arbitration Association (AAA) and filed a demand for arbitration with mediation as a precursor.

The standard A201 general conditions required the parties to use the AAA Construction Industry Arbitration Rules when resolving disputes. Rule 4 of the AAA Construction Industry Arbitration Rules provides the process for initiating arbitration when the parties have provided for arbitration in their contract, as the parties did in this contract.

Rule 4 - The Parties Shall Endeavor to Resolve Disputes by Mediation

The contract provided that, "the parties shall endeavor to resolve the dispute by mediation." The AAA contacted the owner and contractor to coordinate the mediation. The contractor objected to the use of



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Construction Fellow
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mediation and arbitration. The contractor claimed that the contract required the owner to submit the claim to the architect for an initial decision. The owner, however, insisted that involvement of the architect applied only to claims occurring prior to final payment—the contract did not require a decision by the architect where a claim arose after final payment.

The AAA case manager reviewed the parties' positions and concluded that the owner met the filing requirements for arbitration, and since the parties did not agree on mediation, the parties would proceed directly to arbitration.

Selection of the Arbitrator

Rule 14 of the AAA Construction Industry Arbitration Rules provides the process for selection of an arbitrator where the

parties have not appointed an arbitrator. The AAA provides a list of arbitrators and the parties are encouraged to agree on an arbitrator. Where the parties do not agree on an arbitrator, each party must submit the list to the AAA and number the arbitrators in order of preference and indicate which arbitrators the party objects to using. The AAA will use the information from each party's list and appoint an arbitrator. The AAA considers a party's failure to provide a response with their preferences to be the party's consent to use any of the arbitrators on the list.

In *Summit*, the AAA case manager provided a list of possible arbitrators to both the owner and the contractor. The owner participated in the selection process; however, the contractor refused to participate. The AAA selected an arbitrator based on the owner's preferences and considered the contractor's failure to provide its preferences as consent to any arbitrator on the list.

The AAA scheduled a preliminary hearing conference call. The arbitrator, case manager, and owner all participated in the conference call. The contractor did not participate. The case manager attempted to follow up with the contractor. In response, the contractor told the case manager that if the "harassing calls" continued, the contractor would contact the authorities.

The AAA scheduled a second preliminary hearing. Again, the contractor did not participate. The contractor continued to take the position that the claim must be submitted to the architect for an initial determination. The owner contacted the architect and obtained a written statement from the architect that it would not render a determination because the claim arose after the contract ended.

Eventually, the contractor agreed to mediation. The AAA postponed the arbitration to allow the parties

time to mediate. Meanwhile, the contractor objected to the selected arbitrator. The AAA reviewed each party's position and determined that the arbitrator was acceptable. The parties did not resolve the dispute in the mediation, and the contractor continued to object to the selected arbitrator.

The contractor attempted to use judicial means to remove the selected arbitrator. The contractor requested the court to remove the selected arbitrator and to appoint a new arbitrator because the owner should have submitted the claim to the architect for a decision prior to initiating arbitration. The trial court conducted a hearing and held that the issue of whether the owner was required to submit the claim to the architect prior to initiating the arbitration process was an issue for the arbitrator to decide.

The Jurisdiction of the Court to Hear Issues Involving the Selection of the Arbitrator

The contractor appealed the trial court's decision. In its appeal, the contractor argued that submission of the claim to the architect was a condition precedent to arbitration. However, before addressing the contractor's argument, the court first analyzed whether it had jurisdiction to hear the matter.

The Ohio Constitution limits the jurisdiction of the court of appeals to judgments or final orders of lower courts. R.C. § 2505.02 defines a final appealable order as an order "that affects a substantial right in an action that in effect determines the action and prevents a judgment [...]." The court of appeals determined that the trial court's denial of the contractor's request was not a final appealable order because it did not prevent a judgment; to the contrary, the trial court's denial of the contractor's request allowed the matter to proceed to a judgment.

The appropriate time to object to the appointment of an arbitrator would be after the arbitrator makes its award. Under R.C. § 2711.13, "[a]fter an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award..." The contractor, therefore, could then challenge the appointment of the arbitrator in the common pleas court.

The common pleas court can, pursuant to R.C. § 2711.10, vacate a judgment based on impropriety on the part of the arbitrator. R.C. § 2711.10 provides four instances where the common pleas court must vacate the award of an arbitrator:

- (1) The award was procured by corruption, fraud, or undue means.
- (2) Evident partiality or corruption on the part of the arbitrators, or any of them.

The common pleas court can, pursuant to R.C. § 2711.10, vacate a judgment based on impropriety on the part of the arbitrator.

- (3) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Furthermore, R.C. § 2711.15 allows the contractor to appeal a decision of the common pleas court not to vacate an arbitration award. R.C. § 2711.15 states that “[a]n appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award.”

The Court of Appeals in *Summit* outlined the procedure a disappointed contractor must follow to object

to the selection of an arbitrator—and that process, in the eyes of the court, required the contractor to complete the arbitration first and then challenge the award on statutory grounds. In that way it could then proceed with an appeal, as the trial court’s decision would be a final appealable order.

Taking the time to understand the AAA’s rules and your rights is essential to crafting contract language that provides you with the dispute resolution process you desire. Moreover, understanding the rules and statutes that apply to arbitration proceedings and enforcement of awards will save the parties considerable time and expense when they dispute the process or the outcome.

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Hindsight About

Unforeseen Site Conditions

Unanticipated Code Requirements Are Not a Differing Site Condition on Design/Build Project

From an owner’s perspective, one of the greatest advantages of a design/build contract is that there is a single point of responsibility for both designing and constructing the project—the design/builder. The owner need not worry about being stuck in the middle of a dispute between its general contractor and design professional about whether the source of a problem is design or construction related, as in a typical design/bid/build project.

But like a design/bid/build contract, a design/build contract can easily include a differing site conditions clause to protect the design/builder from the cost of genuinely unanticipated work items. But what may be unanticipated on a design/bid/build project may be something that a design/builder should have known about. A recent case out of the First Circuit Court of Appeals for Louisiana illustrates the point.

In *Bonvillain Builders LLC v. Gentile*, 2009 La. App. LEXIS 1855, a general contractor acting as a design/builder sued a medical practice for cost overruns attributed to making a medical office building

project conform to local codes for stormwater management. The trial court found for the contractor by determining that the design/build contract’s “Hidden Conditions” provision applied to a local building code provision requiring stormwater retention for commercial buildings over a certain size. The provision read as follows:

Should conditions arise after construction begins that have been hidden from view and hampers or prevents the intent of this project, such as buried concrete, pipes, cables, or any type item, the contractor shall notify the owner for a decision as to the disposition of such item(s). The intent of this paragraph is not to place undue expenses or delays upon the contractor because of unforeseen conditions.

The Court of Appeals reversed the trial court’s ruling for the contractor, which should come as no surprise after reading another part of the contract that made the contractor responsible for completion of the work “according to prevailing construction codes” and



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that “any material and/or labor not mentioned” in the contract was included if “required to complete the contract in a manner to meet prevailing codes.” Such responsibilities are typical for a design/build. If the contractor did not anticipate these issues, he certainly should have.

It also did not help the contractor’s case that the invoice for the extra site work made necessary by the unanticipated code requirements was not presented to the owner until the project was nearly complete, and the

fact that the contract was drafted by the contractor.

Had the case not included a design/build contract, whether or not the building zone requirements were a “hidden condition” may have been a close call in light of the contract’s “or any type item” reference. In that situation, the better argument for a design/bid/build contractor may have been that the plans were defective. In other words, the owner had breached its implied warranty that its plans were buildable, what we know as the Spearin doctrine.

Contractors Pay High Penalties for Prevailing Wage Violations



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Highlights: Prevailing wage is required on most Federal and Ohio construction projects. Failure to pay the prevailing wage can result in severe penalties to the unwary contractor. In this article, Andrew Balcar looks at two recent cases where contractors were held liable for their subcontractors’ failure to pay prevailing wage.

Contractors working on federal and state projects in Ohio must, in most cases, pay prevailing wage.¹ The Davis-Bacon Act requires the payment of prevailing wage on federal projects. Whereas Ohio Revised Code Chapter 4115 requires the payment of prevailing wage on public improvement projects in Ohio.²

What are the penalties for failing to pay prevailing wage? Examples of how the penalties are calculated and applied can be found in a pair of recent decisions from the United States District Court for the Middle District of Tennessee and the Supreme Court of Ohio.

Federal False Claims Act – Penalties

In *Circle Construction*, the federal government entered into an agreement with Circle C Construction, LLC for the construction of buildings at the Fort Campbell military base.³ Circle C allegedly had a long history of working on government contracts. In addition, Circle C’s representatives attended training classes on the various prevailing wage requirements for federal government projects. Circle C also acknowledged that it was familiar with prevailing wage requirements and had knowledge of the Bacon-Davis Act requirements.

Circle C’s contract with the government required Circle C to pay prevailing wage to the electricians

working on the project and to submit payroll certifications to the government as a prerequisite for payment. Circle C was also required to include similar language in its subcontracts. Subcontractors, as a result, were to pay prevailing wage. Prior to submitting a request for payment, Circle C was required to certify that subcontractors complied with the Davis-Bacon Act and that the payroll certification was complete and accurate.

Phase Tech, Inc. was hired by Circle C to do the majority of the electrical work on the project. Phase Tech, however, was not immediately aware of the prevailing wage requirements for the project. There was no written agreement between Phase Tech and Circle C despite the fact that Circle C’s contractual obligations required Circle C to include specific prevailing wage requirements in all subcontracts.

Phase Tech failed to submit any payroll certification for 2004 and 2005, and Circle C initially submitted payroll certifications without listing Phase Tech’s employees. It was not until after the *Circle Construction* action was filed when Circle C asked Phase Tech to provide certifications for the years when Phase Tech’s employees were not included on the previous certified payrolls.

Phase Tech provided new payroll certifications, but Circle C allegedly never verified the new payroll certifications for accuracy. Phase Tech’s contemporaneous records were available including daily calendars with employees’ names, assigned job sites, and the times when the employees worked. Phase Tech’s pay stubs were also available, but not for the Fort Campbell project. Phase Tech’s owner testified that he told a representative of Circle C that the certifications “weren’t complete.” Despite the alleged failure to verify the new payroll certifications, Circle C apparently submitted them to the government.

After an investigation, the Department of Labor concluded that there were 62 inaccurate or false payroll certifications of which 53 were from Circle C's original payroll certifications. Apparently, "Circle C did not list Phase Tech's employees" even though contemporaneous records indicated the Phase Tech employees worked on the project. As a result, the Department of Labor found that the payroll certifications were false.

Claims against Circle C and Phase Tech were filed under the False Claims Act (31 U.S.C. § 3729(a)(1)(B)). The basis of the claims was that Circle C "knowingly submitted false payroll certifications to the Department of the Army in violation of its agreement to abide by the Davis-Bacon Act requirements in the construction of the buildings on the Fort Campbell military facility."

In its decision, the court considered the level of proof needed to prove a violation of the False Claims Act. Prior to June 7, 2008, when the Act was amended, a plaintiff needed "to show that 'the defendant intended the false record or statement be material to the Government's decision to pay or approve the false claim.'"⁴ After June 7, 2008, a defendant was liable for a violation of the False Claims Act if the defendant "knowingly makes...a false record or statement that is 'material to' a false or fraudulent claim." The court eventually determined that Circle C violated the False Claims Act under the amended and pre-amended version of the false statements provision.

The court determined that the total amount of damages was the amount "that would not have been paid if the United States had known about Circle C's false certifications." Phase Tech performed about 98% of the electrical work on the project for an amount totaling \$553,807.71. "Given the clarity of the certification and payment requirements of Circle C's contract and Circle C's history with government contracts and its wage requirements, the Court concludes that under the FCA, the United States is entitled to three times its actual damages." As such, Circle C was to pay \$1,661,423.13 in treble damages to the United States.

Ohio's Prevailing Wage Law – Penalties

Ohio's prevailing wage laws also include strong penalty provisions. According to the Ohio Supreme Court, "the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector."⁵ In *Bergman v. Monarch Construction Company*, a case we covered in the March 2010 issue of BrickerConstructionLaw.com, the Ohio Supreme Court determined whether the prevailing wage penalties in R.C. Chapter 4115 are mandatory or discretionary.⁶

The penalties for violation of Ohio's prevailing wage laws are found in R.C. § 4115.10(A). An employee is entitled to "the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five percent of that difference." The employer "also shall pay a penalty to the director of seventy-five percent of the difference between the fixed rate of wages and the amount paid to the employee."

The Supreme Court determined that the 25 percent and 75 percent penalties are mandatory. According to the Court, the statute clearly indicates that the legislative intent was for the penalties to be mandatory.

Conclusion

In each of these decisions it's clear that a general contractor allegedly failed to ensure that its subcontractor paid prevailing wage to the subcontractor's employees. Prevailing wage statutes usually require the contractor to include prevailing wage requirements in a written agreement with their subcontractor. In addition, contractors must not submit certified payroll that is inaccurate or incomplete. Where prevailing wage is required, a contractor must be careful about the subcontractor that they select, and the contractor must be sure to check time sheets, daily reports, and/or pay stubs with the certified payroll of a subcontractor to be sure the payroll is complete and accurate.

Contractors working on most state and federal construction projects must adhere to prevailing wage requirements that apply to the work. Prevailing wage may also be required where government funding, through loans, grants, or other forms of assistance, is used to pay for a portion of a public improvement.⁷ As demonstrated in the *Circle C* and *Monarch* cases, the penalties for noncompliance are severe.

Footnotes

- 1 School projects are generally exempt from prevailing wage in Ohio, but school districts can require the payment of prevailing wage if they so choose.
- 2 R.C. § 4115.032.
- 3 *United States ex rel. Wall v. Circle Construction, LLC*, No. 3:07-0091 (M.D. Tenn. filed March 15, 2010).
- 4 *Circle Construction* quoting *Allison Engine Co., Inc. v. United States ex rel Sanders*, 128 S. Ct. 2123, 2126 (2008).
- 5 *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91.
- 6 *Bergman v. Monarch Construction Company*, 2010-Ohio-622.
- 7 *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, 2009-Ohio-2957.

The court determined that the total amount of damages was the amount "that would not have been paid if the United States had known about Circle C's false certifications."

Upcoming Seminars

Involving Bricker & Eckler LLP Attorneys

For Registration Information, call or email Amy Abbey at (614) 227-4989 or aabbey@bricker.com.

Date & Time	Seminar	Location	B&E Speakers	Sponsors
05.21.10	Construction Claims	Conference Center of West Chester West Chester, OH	M. Evans; B. Hyden; S. Wampler	Bricker & Eckler LLP
05.25.10	Construction Claims	Bricker & Eckler LLP Columbus, OH	S. Davis; D. Shevelow; J. Rosati; S. Wampler	Bricker & Eckler LLP
06.07.10	Construction Claims	ESC Professional Development Center Valley View, OH	S. Davis; H. Reder; J. Rosati; D. Shevelow; S. Wampler	Bricker & Eckler LLP
06.11.10	Roofing/Bldg. envelope lunch program	Conference Center of West Chester West Chester, OH	M. Evans; B. Hyden; S. Davis; C. McCloskey; J. Rosati	Bricker & Eckler LLP
06.18.10	Roofing/Bldg. envelope lunch program	ESC Professional Development Center Valley View, OH	S. Davis; C. McCloskey; J. Rosati; H. Reder	Bricker & Eckler LLP
06.25.10	Roofing/Bldg. envelope lunch program	Bricker & Eckler LLP Columbus, OH	S. Davis; C. McCloskey; J. Rosati	Bricker & Eckler LLP
11.18.2010 (Full day program)	8th Annual Top Gun Construction Claims Seminar	The Conference Center at OCLC Dublin, OH	A. Balcar; K. Brown; D. Cullimore; S. Davis; M. Evans; S. Gillis; B. Hyden; C. McCloskey; H. Reder; J. Rosati; D. Shevelow; S. Wampler	Bricker & Eckler LLP

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