OHIO

Ian H. Frank
Marc A. Sanchez
Nora E. Loftus[1]
FRANTZ WARD LLP
200 Public Square
Suite 3000
Cleveland, Ohio 44114
Phone: (216) 515-1550
Fax: (216) 515-1650
Email: ifrank@frantzward.com
msanchez@frantzward.com
nloftus@frantzward.com

I. MECHANIC'S LIEN BASICS

Ohio's mechanic's lien laws, like those in many states, are tricky. A lien claimant must strictly comply with the statutory requirements for perfecting a lien under Ohio law or risk the ability to enforce it. Statutory requirements relating to post-perfection issues are more liberally construed, but that is no relief for a claimant that has lost its rights. Ohio law provides for mechanic's lien rights at Ohio Revised Code ("ORC") § 1311.01, *et. seq*.

The purpose of mechanic's liens is to protect those whose claims accumulate daily and who have no other means to protect themselves.[2] Those with statutory lien rights can waive them in their written contracts[3]. They often do so unwittingly. Thus, the analysis should begin with a review of the pertinent contract terminology.

As discussed in more detail below, mechanic's liens against public property are not permitted. In lieu of that, Ohio law provides for liens (historically referred to as "attested account claims") against the project funds held by the government entity that owns the public project. Thus, there are two parallel but distinct frameworks for private project and public project liens. Furthermore, on private projects, the law distinguishes between residential projects, gas and oil projects, and other traditional commercial projects.

Practitioners and construction professionals must also be aware of distinct requirements that must be satisfied by certain deadlines. For instance, some documents must be "served" (i.e. by certified mail or otherwise) on certain defined persons, while others must be "recorded" at the County Recorder's office, and still others must be "filed" at the County Courthouse. Tracking the action required is as important as tracking the deadlines for each activity.

A. Requirements

1. Notice of Commencement

For the project owner, lien-related duties commence prior to the initial project activity.

Prior to commencement, an owner must prepare a Notice of Commencement ("NOC"). For private projects, the NOC must state:

> To Lien Claimants and Subsequent Purchasers:
>
> Take notice that labor or work is about to begin on or materials are about to be furnished for an improvement to the real property described in this instrument. A person having a mechanics' lien may preserve the lien by providing a notice of furnishing to the above-named designee and the above-named designee's original contractor, if any, and by timely recording an affidavit pursuant to section 1311.06 of the Revised Code.
>
> A copy of this notice may be obtained upon making a written request by certified mail to the above-named owner, part owner, lessee, designee, or the person with whom you have contracted.[3]

The NOC must be recorded with the County Recorder, posted on the job site, and made available upon request.[4] "Home construction projects" are exempt from this requirement, unless the lender elects otherwise.[5]

2. Notice of Furnishing

For subcontractors, laborers, and material and equipment suppliers, there is a pre-lien notice requirement known as a Notice of Furnishing ("NOF").

For private projects, the NOF must state:

> To: .....
> (Name of owner, part owner, or lessee or designee from the notice of commencement)
> (Address from the notice of commencement)
>
> To: .....
> (Name of original contractor from notice of commencement)
> (Address of original contractor from notice of commencement)
>
> Please take notice that the undersigned is performing certain labor or work or furnishing certain materials to .....
> ……(name and address of other contracting party) ..... in connection with the improvement to the real property located at..... ..... The labor, work, or materials were performed or furnished first or will be performed or furnished first on ..... (date). WARNING TO OWNER: THIS NOTICE IS REQUIRED BY THE OHIO MECHANICS' LIEN LAW. IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS AND DUTIES UNDER THESE STATUTES YOU

SHOULD SEEK LEGAL ASSISTANCE TO PROTECT YOU FROM THE POSSIBILITY OF PAYING TWICE FOR THE IMPROVEMENTS TO YOUR PROPERTY.[6]

Any project participant who does not have a contract with the record owner of the project must serve a NOF upon the owner and the original contractor in its chain of privity.[7] If a NOC is not recorded, the NOF is not required.[8]

On private projects, lien claimants must serve the NOF within 21 days of the date that they first provide services, labor, or materials.[9] Lien claimants should not serve the NOF before the first day they provide services, labor, or materials. If they do, the NOF may be invalid.[10] If the lien claimant serves the NOF after the 21-day deadline, their lien will only cover the value of services, labor, or materials provided during or after the 21-day period before serving the NOF.[11] Service is to be made via certified mail, or another method which provides a written evidence of receipt.[12]

Laborers are not required to serve a NOF, regardless of project type or privity relationship.[13]

3. Affidavit of Lien

The Affidavit of Lien must be recorded with the Recorder of the county where the project is located within 60 days of the last date of work on a residential project, within 120 days of the last date of work on a gas or oil project, and within 75 days from the last date of work on other projects (including commercial projects).[14] The Affidavit of Lien must be served via certified mail (or other method which provides written evidence of receipt) on the owner's designee identified in the NOC or the owner, part owner or lessee, if no designee is identified within 30 days of the date it was recorded.[15]

B. Enforcement and Foreclosure

After a lien is recorded, an owner, contractor, or any other person with interest in the real property may serve a Notice to Commence Suit on the lien claimant.[16] The lien claimant has 60 days to commence an action to enforce the lien after service of the Notice to Commence Suit or else the lien is void and the property discharged.[17] A lien will encumber the property for 6 years before it is released by operation of statute if not discharged through a Notice to Commence Suit.[18]

Typically, foreclosure actions must be accompanied by a title report. This requirement varies based upon the local rules of the appropriate court. The plaintiff/lien claimant must name as defendants all parties with an interest in the liened property. This includes the owner, lenders with secured interests, and other lien claimants.[19]

C. Ability to Waive and Limitations on Lien Rights

Potential claimants may waive their lien rights in a written agreement.[20]

On residential projects, homeowners are protected from double payment, but commercial owners are not. If a homeowner can demonstrate that he or she has paid the prime contractor for the labor, services, equipment, or materials that are the subject of the lien, then the lien claim will fail.[21]

Ohio does not have a statutory form of lien waiver for use with progress payments. Claimants must therefore be sure that they understand what they are signing when they receive a progress payment. Lien waiver forms are often characterized by the use of the terms "Conditional" or "Unconditional" and "Partial" or "Final." "Unconditional" waivers are used where the funds are in the bank. A "Final" lien waiver is only appropriate if the funds being paid are in fact the last and final payment.

II. PUBLIC PROJECT CLAIMS

Mechanic's liens against public property are not permitted. You cannot lien public property in Ohio. Instead, Ohio law provides for liens against the public fund, historically called "attested account claims." When a project is originally let, the public agency has to certify the funds are available to pay the contract sum; an attested account claim acts as a lien on those funds. Keep in mind that the fund depletes as the project moves forward and payments are made. Late project lower-tiers may find little funds left to lien, especially where the owner claims rights to use the funds to correct prior non-conforming work. To provide alternative security to the subcontractors and lower-tiers, general contractors are required to provide a payment bond upon which subcontractors and suppliers (at any level) can make claims via Ohio's Little Miller Act.[22]

A. State and Local Public Work

1. Notices and Enforcement to Preserve Claims

a. Notice of Commencement

Just as with private projects, a public owner must prepare a Notice of Commencement ("NOC") prior to commencing work.

For public projects, the NOC must state:

(1) The name, location, and a number, if any, used by the public authority to identify the public improvement sufficient to permit the public improvement to be identified;
(2) The name and address of the public authority;
(3) The name, address, and trade of all principal contractors;
(4) The date the public authority first executed a contract with a principal contractor for the public improvement;
(5) The name and address of the sureties for all principal contractors;
(6) The name and address of the representative of the public authority upon whom service shall be made for the purposes of serving an affidavit pursuant to section 1311.26 of the Revised Code.[23]

The NOC need not be recorded or posted on the site, though it must be made available on request.[24]

b. Notice of Furnishing

Also like with private projects subcontractors, laborers, and material and equipment suppliers must service of a Notice of Furnishing ("NOF") in order to preserve lien rights.

For public projects, the NOF must state:

> To: .....
> (Name of principal contractor)
> .....
> Address of principal contractor)
>
> The undersigned notifies you that the undersigned has furnished or performed or will furnish or perform (describe labor, work, or materials) for the improvement of real property identified as (property description or address) under order given by (name of subcontractor or material supplier). The labor, work, or materials were first furnished or performed or will be furnished or performed on (date).[25]

Any project participant who does not have a contract with a prime contractor on a public project must serve a NOF upon "the principal contractor whose contract with the public authority is the contract under which the subcontractor or materialman is performing labor or work or furnishing materials."[26]

On public projects, lien claimants must serve the NOF within 21 days of the date that they first provide services, labor, or materials.[27] Lien claimants should not serve the NOF before the first day they provide services, labor, or materials. If they do, the NOF may be invalid.[28] If the lien claimant serves the NOF after the 21-day deadline, their lien will only cover the value of services, labor, or materials provided during or after the 21-day period prior to service of the NOF.[29] Service is to be made via certified mail, or another method which provides a written evidence of receipt.[30]

Laborers are not required to serve a NOF, regardless of project type or privity relationship.[31]

While failure to serve a NOF bars a valid lien claim, for lower-tiers supplying less then $30,000.00 of labor or materials, a bond claim remains available.[32]

B. Claims to Public Funds

1. Notices and Enforcement of Lien Claims

a. Affidavit of Lien

On public projects, the lien claimant (i.e. anyone but the prime contractor) must serve the Affidavit of Lien on the public owner of the project within 120 days of the last date of work.[33] The Affidavit of Lien must be served on the representative of the public authority at the address set forth in the NOC.[34] To ensure the maximum possible recovery from the public funds, the lien claimant should also record, with the Recorder of the county where the Project is located, the Affidavit of Lien within 30 days of the date of service.[35] Recording the Affidavit of Lien provides the lien claimant preference to funds over non-recorded lien claimants.

b. Enforcement and Foreclosure

On public projects, the owner's receipt of the Affidavit of Lien starts the clock running on its obligations. The public owner must immediately escrow the claimed amount.[36] Within 5 days, the owner must provide a copy of the Affidavit to the prime contractor.[37] The prime contractor then has 20 days to inform the owner if it intends to dispute the claim.[38] If the prime contractor misses its deadline or elects not to dispute the lien, the prime contractor is deemed to have assented to the correctness of the claim, and the owner can release the funds to the claimant.[39] The contractor can discharge the lien by providing a bond and issuing a Notice to Commence Suit.[40] Either the owner or the prime contractor can independently issue a Notice to Commence Suit.[41] If the claimant does not file a lawsuit within 60 days, the claim is waived and the funds are released.[42]

If a lien discharge bond is in place, then the lien claimant must file suit against the surety on the bond. If there is no lien discharge bond in place, the lien claimant or principal contractor may commence suit against the public entity and recover attorneys' fees if the court determines that the public authority improperly failed to discharge the affidavit and make payment.[43]

2. Notices and Enforcement of Bond Claims: Ohio's Little Miller Act

Those making lien claims often simultaneously make claims against the project bond. Subcontractors should request a notice of commencement (and serve the notice of furnishing) and a copy of the bond at the beginning of the project. The public owner must provide a copy of the bond in response to a request under Ohio's Public Records Act.[44] The prime contractor is required to provide a statutory bid/payment/performance bond to the public owner at the time of their bid.[45]

To make a claim against the project bond, a subcontract or other lower-tier must provide notice to the surety of the amount due the lower-tier. This notice must be provided not later than ninety days after completion of the work by the prime contractor and acceptance of the public improvement.[46] Acceptance of the public improvement may need to be determined by extrinsic evidence, such as the date of final payment or beneficial use of the improvement. The surety has 60 days to investigate the claim before a lawsuit can be brought against the surety under the bond; any such lawsuit must be brought within one year from the date of acceptance of the public improvement.[47]

A notice of furnishing is required to preserve a bond claim for any contract exceeding $30,000.00. Those supplying materials and labor under $30,000.00 can make a bond claim even

if they failed to serve a notice of furnishing.[48] A lower-tier can also serve a late notice of furnishing that will preserve the lien and bond claim value of work in the prior 21 days as well as work succeeding service of the notice of furnishing.[49]

C. Public Project Retention Claims

1. Prime Contractor Retention

Ohio law controls the amount of retention a public owner can withhold from the prime contractor. An owner may hold eight percent of the contractor's labor billings until the contractor's work is fifty percent complete, at which time no additional retention can be held on labor.[50] Retention on delivered (but not yet installed) materials is eight percent for the entire project, but released once the material is installed.[51]

Once the project is fifty percent complete, all retained amounts shall be deposited into an escrow account, and no further amounts are retained.[52] Once a major portion of the project is substantially completed and occupied, or in use, or otherwise accepted, and there is no other reason to withhold retention, the retention held in connection with such portion shall be released to the contractor, holding only the amount necessary to assure completion.[53] The balance of the retention shall be paid, with any accumulated interest, to the contractor within thirty days of completion, acceptance, or occupancy.[54]

If the public owner fails to pay the retainage as required or deposit it into an escrow account, then the public owner must pay the contractor an amount equal to eight per cent annual interest compounded daily.[55]

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

Disputes concerning Ohio construction projects are subject to Ohio law, regardless of any choice of law provision in the contract. ORC § 4113.62. This statutory requirement cannot be waived. However, disputes governed by the Federal Arbitration Act may pre-empt, and nullify, this statute. For claims typically at issue on construction projects, Ohio provides the following limitations periods:

(1) For a written contract, 6 years, except for written contracts with the State of Ohio;[56]
(2) For an oral agreement, 4 years;[57]
(3) For unjust enrichment and action on an account, 6 years;[58]
(4) For breach of contract for sales covered by the Uniform Commercial Code ("UCC"), 4 years;[59]
(5) For certain torts, including the duty to perform construction work in a workmanlike manner and professional negligence (other than legal or medical malpractice claims), 4 years;[60]
(6) For personal injury or damage to personal property, 2 years;[61]

(7) For foreclosure of a mechanic's lien, 6 years;[62] and
(8) For violations of the Home Solicitations Sales Act and the Ohio Consumer Sales Practices Act, 2 years.[63]

Provisions in written agreements that shorten the applicable limitations period are typically enforced when they are between commercial entities, but may not be shortened to less than 1 year for contracts that fall under the UCC.[64]

The discovery rule applies to actions alleging damage to real property, and the effect of the rule is to delay the commencement of the statute of limitations until "it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property."[65] It is unnecessary that the full extent of damages be ascertainable and it is immaterial that additional damages may occur subsequently, when determining the accrual date of a cause of action for statute of limitations purposes. An accrual of a cause of action is not delayed until the full extent of the resulting damage is known.[66] Ohio courts are split on whether claims against design professionals accrue on the date services are provided or when the negligence is discovered.[67]

B. Statutes of Repose and Limitations on Application of Statutes

Ohio's statute of repose, ORC § 2305.131 (effective April 7, 2005), prohibits a claimant from bringing certain causes of action against a person that designed, planned, supervised, or constructed an improvement to real property more than 10 years from the date of substantial completion of the improvement:

> (A)(1) ... no cause of action to recover damages for ... an injury to real or personal property ... that arises out of a defective and unsafe condition of an improvement to real property ... shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.[68]

Substantial completion is defined in the statute as the date the property is first used, or available for use.[69] If the defective or unsafe condition is first discovered within 2 years of the expiration of the 10-year period, a claimant may bring a claim within 2 years of discovery even if it is past the 10-year limit.[70]

In July 2019, the Ohio Supreme Court held that Ohio's 10-year construction statute of repose is not limited to tort actions, but also applies to contract claims. The ruling now bars all claims, whether based in tort or contract, against construction professionals and sureties at 10 years after a project's substantial completion (with the limited 2-year discovery exception as set forth above). This ruling resolves a previous conflict between Ohio appellate courts as to whether the statute applied to only tort claims or to contract claims as well.[71]

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

Ohio Revised Code Chapter 1312 – Right to Cure

During the past few years, many states including Ohio, have enacted statutes known as "Right to Cure" statutes. The Ohio statute applies only to residential construction contracts. Chapter 1312 of the ORC sets forth the procedure under which an owner must provide notice and a residential contractor may cure a defect prior to an owner commencing arbitration proceedings or a civil action. It applies only to claims for construction defects and property damages and does not apply to personal injury claims.

ORC § 1312.03 requires residential contractors to provide owners with a statutory notice designed to alert the owner of the residential contractor's right to resolve any alleged construction defects before the owner pursues any legal action or arbitration. The contractor must provide the notice to the owner at the time of contracting, either in the contract or in a separate document. The owner must provide the residential contractor with written notice of the construction defect which would form the basis of legal action or arbitration against the residential contractor at least 60 days before filing suit or arbitration.[72] The notice must state information sufficient to respond to the notice.[73] If a contractor has filed a mechanics lien, an owner is exempt from having to provide the statutorily-required right to cure.[74]

After receiving notice from the owner, a residential contractor has 21 days to provide the owner with a "good faith" response. This response must contain an offer to do one of the following: (1) inspect the residential building; (2) compromise and settle the claim without an inspection; or (3) dispute the claim.[75] If the contractor fails to respond or disputes the claim, the owner is deemed to have complied with this chapter and may commence a lawsuit or arbitration without further notice to the contractor.[76] The owner is required to reject the contractor's offer in writing within 14 days, and may thereafter initiate a lawsuit or arbitration.

If the owner accepts the contractor's offer to inspect the building, the owner must notify the contractor of that acceptance within 14 days and allow the contractor reasonable access to the building during normal working hours.[77] The contractor must inspect it within 14 days of the owner's acceptance.[78] If the contractor properly performs the inspection, it must then provide the owner with one of the following within 10 days:

(1) A written offer to remedy the defects at no cost to the owner, . . . accompanied by an inspection report, a prediction of the additional construction work necessary to remedy each defect, and a timetable for completing the work necessary to remedy the defects.
(2) A written offer to settle the claims; or
(3) A written statement asserting that the contractor does not intend to remedy the defects.[79]

If the residential contractor fails to inspect, fails to file a written response, or fails to remedy the defect within these time frames, the owner may commence legal action or arbitration.[80] All applicable statutes of limitation or repose are tolled from the time the owner

sends a notice of defect to a contractor until the owner complies with this chapter.[81]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Prior to 2012, Ohio courts were split on the issue of whether or not a commercial general liability ("CGL") policy provided a contractor with coverage against claims alleging defective construction. Specifically, courts split on whether or not defective construction met the definition of "occurrence" in standard CGL policies.[82] In *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St. 3d 476, 2012-Ohio-4712, the Ohio Supreme Court concluded that defective workmanship, resulting in damage only to the contracted work, is not an "occurrence." This decision puts Ohio in the minority of states where defective construction does not trigger coverage under a contractor's CGL.

On October 9, 2018, the Ohio Supreme Court once again departed from the majority of states in *Ohio N. Univ. v. Charles Constr. Servc., Inc.*, 155 Ohio St.3d 197, 2018-Ohio-4057 when it held that a general contractor's commercial general liability policy does not cover claims for property damage caused by a subcontractor's faulty work because faulty work is not accidental or "fortuitous," as contemplated within the policy's definition of an "occurrence" triggering coverage.

However, most carriers in Ohio now offer "You Work" endorsements that close this coverage gap and provide coverage to a general contractor for property damage caused by a subcontractor's negligent work. These are not ISO forms and must be reviewed on a case-by-case basis.

B. Trigger of Coverage

The Ohio Supreme Court has yet to address trigger issues with respect to property damage caused by defective construction. There are, however, four (4) general theories as to how occurrence-based policies are triggered: manifestation, injury-in-fact, exposure and continuous trigger.

Two (2) Ohio appellate courts have held that coverage for property damage is triggered when the property damage first manifests itself. In *Stickle, supra*., the roof at East High School began leaking shortly after construction and continued for 13 years. The court held that where damage manifests itself immediately following completion of construction and continues unabated into a successive carrier's coverage, there is no "occurrence" under the subsequent policies. Alternatively, where resulting damage does not manifest itself until a new carrier is on the risk, the insurer on the risk when the first visible or discoverable manifestations of damage occur must pay the entire claim.

The manifestation trigger has been questioned by more recent decisions. In *Plum v. Am. Ins. Co*. (1st Dist.), 2006-Ohio-452 at ¶¶ 16-24, the court held that the application of a "continuous-coverage trigger" was more appropriate where the damage did not manifest itself until after the policy period at issue. The court found that all policies in effect when property damage occurred were triggered. A different Ohio appellate court reached the same conclusion in *Westfield Ins. Co. v. Milwaukee Ins. Co*. (12th Dist.), 2005-Ohio-4746 at ¶¶ 11-16. There, the court held "where a structure suffers damage of a continuing nature, coverage must be apportioned between the insurance carriers that insured the property during the course of the damage." Thus, in Ohio, there is support for the application of a continuous trigger for property damage claims. *See also Cincinnati Ins. Cos. v. Motorists Mut. Ins. Co*. (9th Dist.), 2014-Ohio-3864.

C. Allocation Among Insurers

When different insurance policies are triggered for the same loss over multiple policy periods, the issue of allocation or apportionment becomes an issue. Classic examples involve environmental clean-up claims, long-term exposure toxic torts and defective construction.

In Ohio, a policyholder is permitted to pick one policy period and secure coverage under that policy up to the limits of those policies, including any excess or umbrella policies. This is called a "targeted tender." Ohio's allocation method is called the "all sums" or joint and several liability approach.[83] This is the minority approach across the country. The majority approach is "pro rata" which requires each insurer to pay only a portion of the loss "based on the duration of the occurrence during [that insurer's] policy period in relation to the entire duration of the occurrence," or on the limits available during the policy period versus the entire period of the loss.[84] The pro rata approach divides the loss "horizontally" among all triggered policy periods, with each insurance company paying only a share of the policyholder's total damages."[85] The "all sums" approach will be used unless the policy at issue contains express language limiting the insurer's liability, if the loss continues after the policy period.[86] The Court's rationale allows an insured to have reasonable expectations of adequate coverage, but allows the insurer to seek contribution from other triggered insurance policies.[87] Thus, the "all sums" approach effectively shifts the burden to the insurer to recover contribution or include express "pro rata" language in the policy.[88]

When choosing which policy (usually a tower of policies including excess or umbrella policies) to target, a policyholder must consider the policies' limits, any bankruptcies or receiverships in the tower, exhaustion from other covered losses, deductibles or self-insured retentions, and different coverage terms between the various policies. The question then arises how the targeted carriers can seek contribution from the other non-targeted carriers. This question was left unanswered until the Ohio Supreme Court rendered its decision in *Pa. Gen. Ins. Co. v. Park-Ohio Indus.* (2010), 126 Ohio St.3d 98, 2010-Ohio-2745.

In *Park-Ohio*, the policyholder was sued by an asbestos-claimant and tendered its defense to the targeted carrier. The targeted carrier paid its limits to settle the lawsuit. Approximately two years later, the policyholder provided the targeted carrier with information regarding its non-targeted carriers. The targeted carrier then filed suit against them for equitable contribution. The

non-targeted carriers argued that Park-Ohio failed to provide timely notice of the loss in breach of the terms of the policies. The trial court agreed and dismissed the targeted carrier's claim. The Eighth District Court of Appeals, however, reversed finding that the targeted carrier's claim was not based on the non-targeted carriers' policy language, but rather on a theory of equitable contribution per the holding in *Goodyear, supra*. The Ohio Supreme Court agreed.

The critical holdings in *Park-Ohio* are: (1) a policyholder must cooperate with the targeted carrier and identify its other carriers; (2) a targeted carrier is not bound by the notice provisions in the non-targeted policies; and (3) lack of notice to a non-targeted carrier will only bar a targeted carrier's equitable contribution claim if the non-targeted carrier is prejudiced.

VI. CONTRACTUAL INDEMNIFICATION

In Ohio, the validity of contractual indemnification agreements in construction contracts is governed by ORC § 2305.31, Ohio's Anti-Indemnity Statute.[89] Generally, the purpose of anti-indemnity statutes is to make construction jobsites as safe as possible by removing a party's ability to contract away its safety responsibilities. The Ohio statute prohibits indemnity agreements in construction contracts where the promisor (subcontractor or lower-tier contractor) agrees to indemnify the promisee (general contractor or upper-tier contactor) for damages caused by or resulting from the negligence of the promisee, regardless of whether such negligence is sole or concurrent.[90]

Of the approximately 43 states that have enacted some form of anti-indemnity legislation, only 6, including Ohio, prohibit a party from requiring another party to name it as an additional insured under a policy of insurance. Most Ohio appellate decisions addressing this issue have held that ORC § 2305.31 prohibits an upper-tier contractor from forcing a lower-tier contractor to name it as an additional insured on the lower-tier's commercial general liability policy.[91] As a practical matter, lower-tier insurance carriers rely on this statute to reject an upper tier's tender of defense and indemnity, unless it can be shown that the upper-tier is 0% at fault for the accident.

Where a contractual demand for indemnity is based upon a lower-tier employer's liability for injury or death to one of its employees, another Ohio statute must be considered. ORC § 4123.74 (and Section 35, Article II of the Ohio Constitution) grant workers compensation immunity to complying employers. Ohio law holds that this immunity, in addition to barring negligence claims by the lower-tier employee against her employer, bars contribution or indemnity claims against a complying employer. In practice, this means an employer that causes injury or death to its employee is immune from claims of contribution or indemnity from other project participants, unless that immunity has been specifically waived.[92]

VII. CONTINGENT PAYMENT AGREEMENTS

A. Enforceability

Contingent payment agreements or clauses that condition payment upon receipt of payment from the owner or another party in the contract privity chain are frequently used in construction contracts in Ohio. These provisions are valid and enforceable, provided that the contract terms are drafted clearly and enforced properly. There are two very distinct contingent

payment clauses used in construction contracts, which have vastly different consequences regarding the timing of payments and the parties' collection remedies. The two provisions are commonly referred to as a "pay-when-paid" provision or a "pay-if-paid" provision.

A pay-when-paid clause allows a party, such as a general contractor, to delay payment to its subcontractor for a "reasonable time" if payment for the subcontractor's work has not been received from the owner.[93] A typical pay-when-paid clause provides as follows: "General Contractor shall pay Subcontractor within ten days of receipt of payment for Subcontractor who work from the owner." A pay-when-paid clause represents an unconditional promise to pay a lower tier contractor whereby "the time of payment [is] postponed until the happening of a certain event, or for a reasonable period of time if it develops that such event does not take place."[94] Thus, the risk of non-payment by the owner falls upon the general contractor. The "reasonable time" period within which a party may withhold payment pursuant to a pay-when--paid clause is not a fixed duration and will depend on the facts and circumstances of each case. These facts and circumstances will include the efforts made to collect from the owner, the course of conduct or course of dealing between the parties, industry practices or norms regarding typical payment periods, and other relevant evidence.

A pay-if-paid clause, in contrast, allows a party such as the general contractor to avoid payment to its subcontractor if the owner fails or refuses to pay for the subcontractor's work.

B. Requirements

The requirements for a valid pay-when-paid clause are quite simple. The parties must include a contract provision which states that payment will be made after, or within a certain time period following receipt of payment from the owner.

In order to invoke the substantial protections of a pay-if-paid clause, the parties' written agreement must contain language stating that payment from the owner or another third party is a condition precedent to the payor's obligation to pay. In other words, in order to enforce a pay-if-paid clause, it must be "express" enough to create a contingent payment provision, and courts will strictly construction such clauses.[95] In *Transtar Elec. v. A.E.M. Elec. Servs. Corp*, 140 Ohio-St. 3d 193, 2012-Ohio-3095, the Supreme Court of Ohio solidified Ohio's enforcement of pay-if-paid provisions and reduced the contract language requirements to demonstrate a pay-if-paid clause. The contract at issue contained the provision that: "Receipt of Payment By Contractor From The Owner For Work Performed By Subcontractor Is a Condition Precedent To Payment By Contractor To Subcontractor For That Work." The Court found this to be a valid and binding pay-if-paid clause. The provision lacked additional risk shifting language (such as "Subcontract accepts the risk of Owner non-payment for Subcontractor's work or Owner insolvency") required by prior lower-court decisions. The Court determined that the "condition precedent" itself was adequate because it clearly and unequivocally shows the intent of those parties to transfer risk of the project owner's nonpayment from the general contractor to the subcontractor.

A party may be able to challenge the enforcement of a pay-if-paid provision where the owner's failure or refusal to pay is the direct result of the general contractor's breach or other conduct that has effectively prevented the occurrence of this condition precedent (e.g., owner

payment). The case law relating to this enforcement issue is not as well-developed in Ohio as in other jurisdictions though, so practitioners are advised that the ability to avoid enforcement of a pay-if-paid provision in Ohio is difficult.

While contingent payment clauses are valid and enforceable in Ohio, they cannot be used to prevent a party from perfecting its public or private lien rights, or its payment bond claim remedies. Pursuant to Ohio's Fairness in Contracting Act, a party may still perfect these remedies within the time periods set forth in the relevant statutes even if payment is not yet "due and payable" because the general contractor has not received payment from the owner.[96]

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

In Ohio, the proper measure of damages for a construction defect claim against a contractor is the reasonable cost of placing the building or structure in the condition as intended by the parties at the time they entered into the contract.[97] The burden of proof is on the party seeking damages, who must prove by a preponderance of the evidence the necessary and reasonable cost to complete the building in accordance with the original contract.[98] Where the costs of repair would create "economic waste," the court will use the fair market value test, which measures damages using the fair market value of the structure as it should have been constructed less the value of the imperfect structure.[99]

Compensatory damages for construction tort claims, such as negligent workmanship and construction defects, can also be measured using the fair market value test if the damage to the property is irreparable.[100] But where restoration of the damaged building is practicable, damages should be the reasonable cost of restoration.[101] In other words, the Court will first look to restoration. If restoration is practical, then damages are the reasonable cost of restoration. However, if the restoration is impracticable, the Court will utilize the fair market value test.[102] Thus, only when the restoration is impracticable are damages to be proven by the fair market value test.

Damages relating to personal injuries sustained in connection with construction work in Ohio, which are not subject to worker's compensation relief, are subject to Ohio's tort reform, which caps noneconomic damages (e.g., pain and suffering damages, mental anguish, loss of consortium) at three times the economic loss, up to $350,000, or $250,000, whichever is higher.[103]

Ohio's tort reform statutes also: (a) permit judges to reduce awards they deem excessive;[104] (b) limit punitive damages to no more than double economic damages;[105] and (c) lower limits on punitive awards against small businesses, capped at double the economic damage or 10 percent of the business net worth up to a maximum of $350,000, whichever is smaller.[106] But there are no limits applicable to compensatory damages for personal injuries, such as medical expenses and lost wages.[107]

B. Attorney's Fees Shifting and Limitations on Recovery

Ohio common law typically follows the American Rule regarding recovery of legal fees, i.e. "a prevailing party may not recover attorney fees as costs of litigation in the absence of statutory authority unless the breaching party has acted in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons."[108] Ohio's Prompt Payment Act is one statute that provides authority for a claimant to recover attorney fees.[109] Ohio's Mechanic's Lien Laws includes another such statute that permits a lien claimant to recover attorney fees in a lien foreclosure action.[110]

Attorney fee-shifting provisions in a written contract are enforceable in Ohio.[111] While some states will permit both parties to benefit from a provision that is worded as unilateral (i.e. only one party may recover fees), Ohio does not do so.[112]

C. Consequential Damages

A party can recover consequential damages in a breach of contract action, but Ohio's courts will enforce contractual provisions that waive such damages, which are typical in the standard agreements within the construction industry.[113]

D. Delay and Disruption Damages

Likewise, a party can recover delay damages absent a contractual provision barring delay damages. But, under Ohio's Fairness in Contracting Act, a "no damage for delay" clause is unenforceable if the cause of the delay is the action or inaction of the party attempting to enforce it.[114]

E. Economic Loss Doctrine

Ohio recognizes the Economic Loss Doctrine, which prohibits tort claims for economic loss only (claims that are not arising from personal injury or property damage), and will ordinarily prohibit claims between non-contracting parties that arise in tort. The Ohio Supreme Court most recently addressed the issue of tort claims in the construction area as follows:

> Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.[115]

When construing the validity of a negligence claim against a design professional in the construction context, the Ohio Supreme Court held:

> In the absence of privity of contract between two disputing parties, the general rule is there is no *** duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.[116]

The Court further noted that duties on construction projects "[a]re governed by the

contracts related to the construction project. While such a duty may be imposed by contract, no common law duty requires [one party] to protect [another] from purely economic loss."[117] Given the policy considerations underlying tort law, the Ohio Supreme Court unequivocally concluded "that recovery for economic loss is strictly a subject of contract negotiation and assignment. Consequently, in the absence of privity of contract, no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications."[118]

Courts may also dismiss negligence claims against contracting parties if one party is seeking purely economic damages in tort. For example, in *Bd. of Educ. of Greenview Local Sch. Dist. v. Staffco*,[119] a school board sued a contractor it had hired to perform certain repair work. The contractor counterclaimed and alleged that the Board failed to properly inspect or maintain the premises. The Board sought to dismiss on the grounds of sovereign immunity. Staffco argued that sovereign immunity does not apply since they are alleging negligence. The Court held that since there can be no recovery in negligence due to the lack of physical harm to persons and tangible things, the purely economic damages asserted by Staffco could not be used as basis upon which to assert an exception to the Board's immunity to tort claims.

F. Interest

Absent a contractual provision or statute providing otherwise, claimants are entitled to the legal rate of interest established each year by the tax commissioner[120] for pre-judgment interest from the date the money "becomes due and payable."[121] The statutory rate for 2019 was 5%, for 2020 was 5%, and for 2021 is 3%.[122]

Ohio's Prompt Payment Act provides a penalty interest rate of 18%, which begins to accrue on the eleventh day of a general contractor's receipt of payment from the owner or subcontractor's receipt of payment from the general contractor.[123]

G. Punitive Damages

Punitive damages are available where there is proof of actual damages and a finding, by clear and convincing evidence, of "actual malice."[124] "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct."[125] Actual malice necessary for an award of punitive damages can be found when there is either (1) a state of mind from which a person's conduct is characterized by hatred, ill will, or revenge, or (2) a conscious disregard for the rights and safety of others that has a great possibility of causing substantial harm.[126]

H. Liquidated Damages

Penalty provisions in contracts are invalid on public policy grounds because a penalty attempts to coerce compliance with the contract instead of representing damages that may actually result from a failure to perform. Under Ohio law, liquidated damages are enforceable where: (1) the amount of actual damages would be uncertain or difficult to prove; (2) in the context of the contract as a whole, the amount of liquidated damages is not "manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties"; and (3) the parties intended for the amount set

as liquidated damages to apply in the case of breach.[127] This issue was recently re-visited by the Ohio Supreme Court[128]. There, the Ohio Supreme Court upheld a liquidated damage award by analyzing the *Samson Sales* factors and, specifically, looking at the reasonableness of the agreed upon amount at the time of contracting, not at the end of the project.

IX: CASE LAW UPDATE AND LEGISLATIVE UPDATE

Contract's Arbitration Provision Does Not Prohibit Mechanic's Lien or Foreclosure Action

In *Supply, Inc. v. T.H. Marsh Constr. Co*., 2020-Ohio-3922, a subcontractor filed a mechanic's lien on a project governed by an alternative dispute resolution provision requiring mediation, arbitration or litigation at the owner's sole discretion. In response to the subcontractor's lawsuit for breach of contract, violations of the Ohio Prompt Payment Act, and to foreclose its mechanic's lien, the project owner elected arbitration and moved to dismiss the lawsuit. The owner also argued that by filing the mechanic's lien, the subcontractor defaulted on the contractual dispute resolution provision and Ohio's arbitration statutes, Ohio Rev. Code §2711.01 *et seq*., because the mechanic's lien arose from a contractual claim. The trial court agreed with the owner and dismissed the subcontractor's entire lawsuit.

The subcontractor appealed, and the Twelfth Appellate District reversed the trial court's decision dismissing the lawsuit. The appellate court determined that because Ohio courts retain jurisdiction over construction contract disputes, even in the presence of arbitration provisions. It further held that upon application of one of the parties, a trial court must stay, not dismiss, the lawsuit pending the resolution of the arbitration process. Finally, the appellate court found that because the subcontract at issue did not include a lien waiver provision (enforceable in Ohio), the subcontractor did not waive its statutory right to file a mechanic's lien, e.g. the arbitration provision did not serve as a contractual mechanic's lien waiver. Furthermore, the mechanic's lien and the complaint did not prevent the project owner from exercising its right to arbitration, as the owner could simply elect arbitration and move to stay the lawsuit pending arbitration.

Demand Letter Threatening Litigation Does Not Waive Right to Arbitrate

On October 29, 2020, the U.S. Court of Appeals for the Sixth Circuit held that the owner of residential apartments did not waive its right to compel arbitration in a dispute with the property manager by sending a demand letter threatening litigation.

In *Borror Property Management, LLC v. Oro Karric North, LLC, et al.*, the Court of Appeals declared that pre-litigation demand letters are not binding on a party in litigation, and that even if they could be binding, there was no clear waiver of the right to arbitration and prejudice to the other party sufficient to constitute a waiver of the right to arbitration on the facts presented. Given the strong presumption in favor of arbitration under the Federal Arbitration Act, the Court of Appeals concluded that the lower court had erred in denying the owner's motion to compel arbitration.

In *Borror*, the owner sent a letter accusing the property manager of breach of contract and indicating that the owner planned to proceed with litigation. A week after receiving the owner's

letter, the property manager filed litigation in federal court, asserting its own claims for breach of contract. In response, the owner moved to compel arbitration.

In holding that the owner's demand letter did not waive its right to arbitration, the Court of Appeals noted:

- Demand letters serve a variety of purposes, including encouraging settlement, which would be diminished if such letters were determined to be binding representations made by a party in litigation;
- The demand letter at issue in *Borror* was not completely inconsistent with the owner's right to arbitrate;
- The property manager was not prejudiced by the owner's actions, since the owner immediately sought to compel arbitration once litigation was filed; and
- The owner did not expressly waive its right to arbitration in the demand letter.

Given the foregoing, coupled with the strong federal policy favoring arbitration when any ambiguity exists, the Court of Appeals found the lower court erred in refusing to compel arbitration. Thus, waiver of arbitration will not be implied simply from a letter making reference to planned litigation.

Violation of the Ohio Consumer Sales Practices Act, Ohio Revised Code §1345.03 -- Refusal to Withdraw Invalid Mechanic's Lien on a Residence

In *Nieman v. Tucker*, 2020-Ohio-4704, the Sixth Appellate District held that a lawn care contractor's refusal to remove an invalid mechanic's lien on a homeowner's property constituted a violation of Ohio's Consumer Sales Practices Act ("OCSPA") and entitled the homeowner to treble damages, non-economic damages and attorneys' fees.

There, a third-party contacted Tucker to perform lawn care services on the Nieman's property. The third-party stated that he was going to purchase the property from the Niemans. Tucker performed the services and the third-party did not pay. Tucker then sent the bill to the Niemans and was informed that they did not know the third-party and that he was not authorized to purchase services for their residence. This was an apparent phishing scheme.

Tucker liened the property based on this improper charge and refused to remove it. The Nieman's sold the residence and the lien was paid out the proceeds. Nieman sued Tucker to get the money back. The court found that the Tucker violated the OCSPA by refusing to withdraw the improper charge and by refusing to remove his mechanic's lien before receiving payment for the unauthorized services.

---

[1] This section of the ALFA Construction Law Compendium was prepared with the valuable assistance of Frantz Ward Partner Melissa A. Jones and Associate Joseph P. Guenther.

[2] *Lee Turzillo Contracting Co. v. Cincinnati Metropolitan Housing Authority*, 10 Ohio St. 2d 5, 225 N.E. 2d 255 (1967)

[3] Ohio's Fairness in Contracting Act, voids contract provisions that waive rights under a surety bond. ORC §4113.62(A)

[4] ORC § 1311.04(A)(1), ORC § 1311.04(D), and ORC §1311.04(G)(1)

[5] ORC § 1311.04(O)
[6] ORC § 1311.05(B)
[7] ORC § 1311.05(A)
[8] ORC § 1311.05(H)
[9] ORC § 1311.05 & ORC § 1311.261(A)(1)
[10] *Halsey, Inc. v. Isbel*, 12th Dist. Warren No. CA2009-12-159, 2010-Ohio-2052 (NOF served one day prior to lien claimant's first date of project work rendered invalid, which, in turn, invalidated the mechanic's lien).
[11] ORC § 1311.05(D) & ORC § 1311.261(A)(2)
[12] ORC § 1311.19
[13] ORC § 1311.05(G) & ORC § 1311.261(F)
[14] ORC § 1311.06
[15] ORC § 1311.07
[16] ORC § 1311.11
[17] ORC §1311.11(B)
[18] ORC § 1311.13(C)
[19] ORC § 1311.16
[20] *Portsmouth Iron Co. v. Murray,* 38 Ohio St. 323 (1882); *J. J. Hammond Co. v. Jent Constr. Inc*., 10th Dist. Franklin No. 74AP-19, 1974 Ohio App. LEXIS 3563 (May 28, 1974); *Steveco, Inc. v. C&G Inv. Assoc.*, 10th Dist. Franklin No 77AP-101, 1977 Ohio App. LEXIS 7341 (August 4, 1977)
[21] ORC § 1311.011(B)(1)
[22] ORC §153.54 *et seq.*
[23] ORC § 1311.252(B)
[24] ORC § 1311.252(A)
[25] ORC § 1311.261(B)
[26] ORC § 1311.261(A)(1)
[27] ORC § 1311.05 & ORC § 1311.261(A)(1)
[28] *Halsey, Inc. v. Isbel*, 12th Dist. Warren No. CA2009-12-159, 2010-Ohio-2052 (NOF served one day prior to lien claimant's first date of project work rendered invalid, which, in turn, invalidated the mechanic's lien).
[29] ORC § 1311.05(D) & ORC § 1311.261(A)(2)
[30] ORC § 1311.19
[31] ORC § 1311.05(G) & ORC § 1311.261(F)
[32] ORC § 153.56(C)
[33] ORC § 1311.26
[34] ORC § 1311.26
[35] ORC § 1311.29; *B.F. Sturtevant Co. v. Board of Education of City School District of Cincinnati*, 51 Ohio App. 348, 1 N.E.2d 148 (1st Dist. 1935)
[36] ORC § 1311.28
[37] ORC § 1311.31
[38] *Id.*
[39] *Id.*
[40] ORC § 1311.311
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] ORC §149.43
[45] ORC §153.54. The form of bond is spelled out at ORC §153.57
[46] ORC §153.56(A)
[47] ORC §153.56(B)
[48] ORC §153.56(C)
[49] ORC §153.56(D)
[50] ORC §153.12
[51] ORC §153.14
[52] ORC §153.13
[53] *Id*
[54] *Id*

[55] ORC § 153.63(D)
[56] ORC §2305.06 (Senate Bill 13 shortened the statute of limitations for written contracts from 8 to 6 years for causes of action accruing (e.g. the breach occurs) after the effective date of the Act, which is June 14, 2021)
[57] ORC § 2305.07 (Same for oral agreements – 6 years to 4 years)
[58] ORC § 2305.07
[59] ORC § 1302.98(A)
[60] ORC § 2305.09
[61] ORC § 2305.10
[62] ORC § 1311.13(C)
[63] ORC § 1345.10(C)
[64] ORC § 1302.98(A)
[65] *Jones v. Hughey*, 153 Ohio App. 3d 314, 2003-Ohio-3184, quoting *Harris v. Liston* (1999), 86 Ohio St.3d 203, 1999-Ohio-159
[66] *Beavercreek Local Schools v. Basic, Inc*. (1991), 71 Ohio App. 3d 669, 595 N.E.2d 360
[67] *Coughlin v. Acock Assocs. Architects, LLC* (5th Dist.), 2011-Ohio-3212 (discovery rule applies to architectural negligence claims) and *Wooten v. Republic Sav. Bank* (2nd Dist.), 2007-Ohio-3804 (discovery rule does not apply to claims governed by ORC § 2305.09(D))
[68] ORC § 2305.131(A)(1); see also *Tutolo v. Young*, 11th Dist. Lake No. 2010-L-118, 2012-Ohio-121; but *see Oaktree Condo Ass'n v. Hallmark Bldg. Co.,* 139 Ohio St. 3d 264, 2014-Ohio-1937 (pursuant to the constitutional prohibition on the passage of retroactive laws, the statute of repose was not enforceable against a condominium association which discovered foundation defects 13 years after construction because the statute of repose was not in effect at the time of discovery of the defect, e.g. when the claim accrued. Thus, the association's filing of its lawsuit within four years after discovery of the defect was timely).
[69] ORC § 2305.131(G)
[70] ORC § 2305.131(A)(2)
[71] *New Riegel Local School Dist. Bd. Of Edn. v. Buehrer Group Architecture & Eng., Inc.,* 2019-Ohio-2851.
[72] ORC § 1312.04(A)
[73] ORC § 1312.04(B)
[74] ORC § 1312.04(D)
[75] ORC § 1312.05(A)
[76] ORC § 1312.05(B)
[77] ORC § 1312.06(A)
[78] *Id*.
[79] ORC § 1312.06(B)
[80] ORC § 1312.06(C)
[81] ORC § 1312.08(A)
[82] Some Ohio courts had held that defective workmanship is not an "occurrence": *Heile v. Herrmann* (1999), 136 Ohio App.3d 351, 736 N.E.2d 566; *Westfield Ins. Co. v. Riehle* (1996), 113 Ohio App.3d 249, 680 N.E.2d 1025; *Paramount Parks, Inc. v. Admiral Ins. Co.* (12th Dist.), 2008-Ohio-1351; *Westfield Ins. Co. v. R.L. Diorio Custom Homes, Inc*. (12th Dist.), 2010-Ohio-1007. Others held that "an insured's defective workmanship on a construction project constituted an insurable 'occurrence' under a commercial general liability policy": *Dublin Building Systems v. Selective Ins. Co. of America* (10th Dist.), 2007-Ohio-494; *Spears v. Smith* (1996), 117 Ohio App.3d 262, 690 N.E.2d 557; *United Steel Fabricators, Inc. v. Fid. & Guar. Ins. Underwriters, Inc.* (March 11, 1993), Franklin App. 92AP-1171, 1993 Ohio App. LEXIS 1422; *Bundy Tubing Co. v. Royal Indemn. Co*. (6th Cir. 1962), 298 F.2d 151; and *Ohio Cas. Ins. Co. v. Hanna* (9th Dist.), 2008-Ohio-3203. But, even the courts that had found faulty workmanship was not a covered occurrence had found coverage when there was consequential or resultant damage to property other than the insured's own work: *Paramount Parks, supra.*, *Heile, supra*. and *JTO, Inc. v. State Auto Mut. Ins. Co.* (11th Dist.), 194 Ohio App.3d 319, 2011-Ohio-1452
[83] *Goodyear Tire & Rubber Company v. Aetna Casualty & Surety Company* (2002), 95 Ohio St. 3d 512, 2002-Ohio-2842
[84] *Id.*
[85] *Id*. (internal citation omitted).
[86] *Id.*
[87] *Id.*
[88] For more discussion see Allocation of Insurance Coverage for Long Tail Losses in the Division 7 of the ABA

Forum on Construction Law Division newsletter dated February 2016
[89] ORC § 2305.31 states: "A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnities against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnities is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond."
[90] *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St.3d 61, 485 N.E.2d 1047; *Kemmeter v. McDaniel Backhoe Serv.* (2000), 89 Ohio St.3d 409, 2000-Ohio-209, and *City of Cleveland v. Vandra Bros. Constr., Inc.* (8th Dist.), 2011-Ohio-821
[91] *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co*. (Cuyahoga 1997), 121 Ohio App.3d 147, discretionary appeal not allowed by 80 Ohio St.3d 1449 (requirement by contractor that subcontractor name contractor as additional insured on its insurance policy was void as violating ORC § 2305.31); *Liberty Mut. Ins. Group v. Travelers Prop. Cas*. (8th Dist.), 2002-Ohio-4280, appeal not accepted for review by 98 Ohio St.3d 1410; *Waddell v. LTV Steel Co., Inc.* (Cuyahoga 1997), 124 Ohio App.3d 350, discretionary appeal not allowed by 81 Ohio St.3d 1457; *C.J. Mahan Constr. Co. v. Mohawk Re-Bar Servs.* (5th Dist.), 2005-Ohio-5427, discretionary appeal not allowed by 108 Ohio St.3d 1489, 2006-Ohio-962; *but cf. Danis Building Construction Co. v. Employers Fire Ins. Co.* (2nd Dist.), 2002-Ohio-6374, appeal not accepted for review by 98 Ohio St.3d 1512 and *Brzeczek v. Standard Oil Co*. (Lucas 1982), 4 Ohio App.3d 209 (requirement to name upper-tier contracting partner as an additional insured on lower-tier's insurance policy not a violation of Ohio's Anti-Indemnity statute)
[92] *Kendall, supra*., *Waddell, supra*., *Davis v. Consolidated Rail Corp*. (1981), 2 Ohio App.3d 475, 442 N.E.2d 1310, and *Hehman v. Maxim Crane Works*, (12th Dist.) 2010-Ohio-3562
[93] *Chapman Excavating Co., Inc. v Fortney & Weygandt, Inc.* (8th Dist.), 2004-Ohio-3867 at P23-24; *Power Pollution Serv., Inc. v. Suburban Power Piping Corp.,* 74 Ohio App. 3d 89, 91, 598 N.E.2d 89 (8th Dist. 1991); *The Thos. J. Dyer Co. v. Bishop Int'l Engineering Co.,* 303 F.2d 655, 661, 21 Ohio Op. 2d 235 (6th Cir. 1962)
[94] *Id.*
[95] See *Eagle Supply Mfg., L.P. v Bechtel Jacobs., LLC,* 868 F.3d 423 (6th Cir. 2017)
[96] ORC §4113.62 (E)
[97] *Jones v. Honchell*, 14 Ohio App.3d 120, 470 N.E.2d 219, syll ¶3 (12th Dist. 1984)
[98] *Id*.
[99] *Stackhouse v. Logangate Property Mgmt.*, 172 Ohio App. 3d 65, 2007-Ohio-3171, 872 N.E.2d 1294, ¶53 (7th Dist.)
[100] *Id.*
[101] *Id.* at ¶ 55, citing *Northwestern Ohio Natural Gas v. First Congressional Church of Toledo*, 126 Ohio St. 140, 150, 184 N.E. 512 (1933); *see also Marsilio v. Brian Bennett Constr.*, 7th Dist. Mahoning No. 06 MA 180, 2008-Ohio-5049
[102] *Marsilio*, 2008-Ohio-5049, at ¶¶ 29-30
[103] *See* ORC § 2315.18(B) (unless the injury constitutes as "catastrophic" under the statute); *see also Faieta v. World Harvest Church*, 147 Ohio Misc. 2d 51, 2008-Ohio-3140, 891 N.E.2d 370 (C.P.)
[104] ORC § 2315.19(A)
[105] ORC § 2315.21(D)(2)(a)
[106] *Id*. at (D)(2)(b)
[107] ORC § 2315.18(B)(1)
[108] *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St. 3d 65, 66, 521 N.E.2d 814 (1988)
[109] ORC § 4113.61(B)(1)
[110] ORC § 1311.16
[111] *Nottingdale Homeowners' Assoc. v. Darby*, 33 Ohio St. 3d 32, 33, 514 N.E.2d 702 (1987); *see also Buckeye Check Casing, Inc. v. Madison*, 8th Dist. Cuyahoga No. 90861, 2008-Ohio-5124, ¶ 24
[112] *GMS Management Co. v. K & K Industries, Inc*., 5th Dist. Stark No. CA 8279, 1991 Ohio App. LEXIS 2036 (April 29, 1991) (a unilateral attorney's fees clause is enforceable as long as fees awarded are fair, just and reasonable)
[113] *See Nottingdale* at 36 ("persons have a fundamental right to contract freely with the expectation that the terms of

the contract will be enforced")
[114] ORC § 4113.62
[115] *Corporex Dev.'t & Constr. Mngt., Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 413, 2005-Ohio-5409, 835 N.E.2d 701 (owner's claims directly against subcontractor were properly dismissed due to the absence of contractual privity)
[116] *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Assoc.*, 54 Ohio St. 3d 1, 3, 560 N.E.2d 206 (1990)
[117] *Id*. at 4
[118] *Id*. at 8
[119] *Bd. of Educ. of Greenview Local Sch. Dist. v. Staffco*, 2016-Ohio-7321, 71 N.E.3d 175 (Ohio Ct. App. 2016)
[120] ORC § 5703.47
[121] ORC § 1343.03
[122] For a list of the current year's rate, and all rates from the year 1983 to the present, go to http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx
[123] ORC § 4113.61
[124] See *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St. 3d 638, 635 N.E.2d 331 (1994)
[125] *Id*. at 651
[126] *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987)
[127] *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984)
[128] *Boone Coleman Construction, Inc. v. The Village of Piketon*, 2016-Ohio-628