porterwright

Construction Law Bulletin

April 2013

Porter Wright's Construction Practice names Top 5 Construction Law Cases of 2012

2012 saw several major cases decided by Ohio courts that impact Ohio construction law and the way you do business. Here are Porter Wright's Top 5 court cases in '12:

#1 *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476 (Oct. 16, 2012).

Key Holding — Ohio construction companies may not be able to rely on their commercial general liability policies to cover claims for alleged defective work.

This case brought to the Ohio Supreme Court the much debated question of whether a standard commercial general liability insurance policy covers claims against a contractor for alleged defective and improper work. The court held that the policy does not cover such claims. The court based its ruling on its determination that the claims did not arise from an "occurrence," which is defined in the policy to mean an "accident." Because the work itself was not an "accident," there was no coverage under the policy.

Takeaway: Meet with your insurance professionals to review your coverage and address this crucial issue. Do you have coverage for defective workmanship claims?

#2 *Jones v. Centex Homes*, 132 Ohio St.3d 1 (Mar. 14, 2012).

Key Holding — Homebuilders (and, potentially, all Ohio contractors) cannot contract away their implied obligation to build in a workmanlike manner.

Ohio has long held that builders have an implied duty to construct in a workmanlike manner. This case answered the question whether this is a "duty," which is implied in every contract, or is instead a "warranty," which can be disclaimed by contract. The Ohio Supreme Court held that this obligation is a duty, rather than a warranty. As such, every homebuilder (and, potentially, every contractor) has an implied duty to construct in a workmanlike manner, and this duty cannot be disclaimed or altered by contract.

Takeaway: Contractors should understand that, regardless of what their contract says or disclaims, Ohio law enforces an "implied" and unwritten duty to build in a workmanlike and proper manner. It is a duty that cannot be disavowed.

Brian Buzby
614.227.1995
bbuzby@porterwright.com

Ryan Sherman
614.227.2184
rsherman@porterwright.com

Please see our other publications at http://www.porterwright.com/pubs.

porterwright

#3 *Ohio Farmers Insurance Co. v. Ohio School Facilities Commission*, 10th Dist. No. 11AP-547, 2012-Ohio-951 and N.L. Construction Corp. v. Ohio Dept. of Admin. Services, Ct. of Claims, 2011-08318.

Key Holding — Ohio courts are taking a very strong position that written contracts mean exactly what they say. If your contract has specific time deadlines for making claims and giving notice, follow those time limits and deadlines to the tee. Courts will strictly enforce the terms of the contract against both contractors and owners.

In Ohio Farmers, the contractor lost its entire claim against the project owner for alleged multiple delays on a construction project because the contractor failed to serve a timely and proper notice of those claims on the project. In N.L. Construction Corp., the project owner attempted to terminate the contractor for failing to correct certain work. However, the contract did not require the contractor to correct any work unless and until it was given a 72-hour notice to correct. Since the owner had not provided that notice, the court held that it had not effectively terminated the contract. As a result, the termination was deemed invalid, the owner's claims were dismissed from the lawsuit, and the contractor was free to proceed with its own claims for damages.

Takeaway: These cases emphasize what should be the fundamental rule in construction contracting — know and follow the contract, especially with regard to claim notices. If you don't, you may lose your claims and remedies for default.

#4 *Jatsek Construction Co., Inc. v. Burton Scot Contractors, LLC*, 8th Dist. No. 98142, 2012-Ohio-3966.

Key Holding — A contractor can be bound to a written contract that it never signed. Actions sometimes speak louder than words, and those actions can create a contract even in the absence of a signed agreement.

This case highlights the importance of reading a contract's "fine print" before performing under it, even if the agreement has not yet been signed by both parties. The court held in Jatsek that a subcontractor was bound by an arbitration clause contained in the written draft contract with the general contractor — even though the general contractor had never signed the contract — because the subcontractor had performed under the contract.

Takeaway: The lesson of Jatsek is to always iron out the details of a contract before beginning performance. Starting performance may be the equivalent of signing the contract, binding the parties to fine print they might not have otherwise agreed to.

#5 *Transtar Electric, Inc. v. A.E.M. Electric Services Corp.*, 6th Dist. No. CI0201006750, 2012-Ohio-5986.

Key Holding — Ohio courts do not favor "pay if paid" clauses and will view them very critically.

Contractors often try to protect themselves from the risk of owner non-payment by stipulating in their subcontractor contracts that the sub will only be paid for its work if the contractor is paid by the owner — a "pay-if-paid" clause. While Ohio law permits such clauses, Ohio courts view these clauses very critically and often strike them down as invalid. In Transtar, the court struck down what otherwise appeared to be a valid "pay-if-paid" clause — the contract conditioned subcontractor payment on owner payment. The court, however, found that this language was not specific enough to put the subcontractor on notice that the risk of non-payment had been shifted to it. Because the contractor did not provide in its contract "a clear and unambiguous statement that the subcontractor will not be paid if the owner does not pay," the clause was deemed a pay-when-paid clause (requiring payment after a reasonable amount of time), rather than a pay-if-paid clause. The contractor was ordered to pay the sub, even though the contractor had not been paid by the owner.

Takeaway: If you're a contractor seeking the protection of a "pay-if-paid" clause in your contracts with subs and suppliers, you should carefully review your contract language with counsel to assure that it complies with the very strict requirements of Transtar and similar Ohio cases.

As always, we welcome our feedback and invite you to share your thoughts, topics of interest, and concerns with us – please consider contacting any of our group members.

Construction Practice Co-Chairmen, Brian L. Buzby and Ryan P. Sherman

Porter Wright Morris & Arthur LLP
www.porterwright.com

Cincinnati, Ohio 800-582-5813
Cleveland, Ohio 800-824-1980
Columbus, Ohio 800-533-2794
Dayton, Ohio 800-533-4434
Naples, Florida 800-876-7962
Washington, DC 800-456-7962