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Porter Wright Construction Law Bulletin

Warranty Disclaimers: Jones v. Centex Homes, 2012-Ohio-1001

The Ohio Supreme Court recently issued a very important ruling for home builders and contractors throughout Ohio. Centex Homes, a residential home builder, in its contract with its buyers attempted to disclaim all construction warranties and limit the buyers to certain specific written warranties. Jones and other claimants, however, brought claims for construction defects they felt were outside the warranties. Centex Homes argued that the warranty disclaimer prevented the claims from being filed. The trial court and court of appeals agreed, dismissed the claims, and upheld the written warranty disclaimers.

But, the Ohio Supreme Court disagreed and reinstated the plaintiffs' claims. The Ohio Supreme Court reaffirmed that, throughout Ohio, there is an implied "duty" on the part of every home builder to construct in a workmanlike manner and that, if that duty is violated, the homeowner has a claim for the breach of that duty. This is a "duty," not a warranty and, thus, cannot be excluded by written contract disclaimer.

In light of the Centex Homes ruling, all homebuilders operating in Ohio should carefully review their contracts to determine whether their warranty disclaimers are now appropriate and enforceable. And, most important, all contractors throughout Ohio 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.

Construction Reform: The Ohio State University – Project One

Well-known to most in the construction industry, the State of Ohio is implementing a **Construction Reform** package affecting all Ohio public works projects. Those changes are being implemented in 2012, and contractors working in any area of public contracting should make sure they have a firm understanding of the changes.

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The first public project to implement these reforms was The Ohio State University's "Project One" – a $1 billion expansion of its medical center. When the University was faced with two significant lawsuits on the project, it turned to Porter Wright to serve as its special counsel and work with the Attorney General's Construction Litigation Group. The first "Project One" lawsuit was filed by the Architect of Record on the project following its termination by the University. The Architect sought $32 million in damages from the University, claiming that it was unfairly and unlawfully terminated from the Project. Porter Wright argued on the University's behalf that the termination was appropriate and consistent with the terms of the agreement between the University and the Architect. The Court of Claims agreed with Porter Wright and the Attorney General's argument and dismissed all termination-related claims against the University.

Porter Wright was again called upon to defend the University in a similar manner, this time in the Ohio Supreme Court, in an action contesting Ohio State's decision not to require its Construction Manager at Risk to obtain a payment and performance bond on the project. The plaintiffs in the case argued that the temporary reform law mandated the issuance of such a bond. Porter Wright and the Attorney General asserted on the University's behalf that no such bond was required by the statute. Once again, the Court agreed with Porter Wright, and denied the plaintiffs' request for a writ requiring such a bond. The victory saved Ohio State, and the public, approximately $12 million in additional costs.

Ohio public works Construction Reform likely will be the key issue for the Ohio construction industry in 2012. Porter Wright is already ahead of the curve in dealing with these issues.

Public Bidding Disputes: Suburban Maintenance & Construction Co. v. The City of Cleveland, Cuyahoga Cnty C.P. Ct., CV 12 777280, 3-22-12

It is very difficult to disturb a public owner's broad discretion and reverse a decision to award a contract to a higher bidder on a public project, but Porter Wright succeeded in doing just that in a recent bid dispute involving work on Cleveland Browns Stadium. Porter Wright represented Suburban Maintenance & Construction in its challenge against the City of Cleveland's decision to award a construction contract to a higher bidder than Suburban Maintenance's bid.

Suburban Maintenance's low bid for a capital repairs and improvement project for Cleveland Browns Stadium was rejected by the City of Cleveland based on a determination that Suburban Maintenance had not made a "good faith" effort to comply with certain small business and minority business goals. The City determined to give the contract to a higher bidder. Porter Wright persuaded the Cuyahoga County Court of Common Pleas to void the decision and prevent the City from giving the contract to the higher bidder. The matter was then resolved successfully when Suburban Maintenance joined with the higher bidder to jointly perform the contract work so that the work could be performed without any delay to the project.

Payment to Subcontractors: Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd., 2011-Ohio-4979

A recent decision by the Franklin County court of appeals offers a reminder about the importance of contract language in determining when, and even whether, a subcontractor will get paid. The issue turns on whether the contract's payment language is deemed a "pay-when-paid" clause or a "paid-if-paid" clause. In the former situation, the general contractor has a reasonable time to make payment, but must pay even if the general contractor never gets paid by the owner. In the latter situation, by contrast, the subcontractor will not get paid unless the general contractor gets paid. Thus, the court's analysis of the contract language will determine whether the risk of loss for owner non-payment falls on the general contractor or the subcontractor.

In the Triad case, an architectural firm subcontracted with a civil engineering firm. The firms used the American Institute of Architects (AIA) Standard Form, which provided that payments to the engineering firm "shall be made promptly after the Architect is paid by the Owner" and that "the Architect shall exert reasonable and diligent efforts to collect prompt payment from the Owner." The AIA Standard Form also provided: "The Architect shall pay the Consultant in proportion to amounts received from the Owner which are attributable to the Consultant's services rendered." The firms added a provision that the engineering firm "shall be paid for their services . . . within ten (10) working days after" the architectural firm received payment from the owner.

The owner never paid the architectural firm, so the architectural firm never paid the engineering firm. When the engineering firm filed suit to collect payment, the architectural firm argued that it was not obligated to make any payment because it was never paid.

The issue for the court of appeals was simple, but important – does the foregoing language constitute a pay-when-paid clause or a pay-if-paid clause? The appeals court offered an example of a pay-when-paid provision: "Contractor shall pay subcontractor within seven days of contractor's receipt of payment from the owner." In Ohio, this type of provision "means that the contractor's obligation to make payment is suspended for a reasonable period of time for the contractor to receive payment from the owner." After a reasonable period of time has passed, however, the contractor must pay the subcontractor regardless of whether the owner has paid.

On the other hand, a pay-if-paid provision shifts the risk of the owner's nonpayment from the general contractor to the subcontractor. To be enforceable, Ohio courts require that pay-if-paid provisions "clearly and unambiguously condition payment to the subcontractor on the receipt of payment from the owner." The appeals court offered the following example of a clear and unambiguous pay-if-paid provision: "Contractor's receipt of payment from the owner is a condition precedent to contractor's obligation to make payment to the subcontractor; the subcontractor expressly assumes the risk of the owner's nonpayment and the subcontract price includes this risk."

In this case, the appeals court concluded that the payment provision in the contract between the architectural firm and engineering firm amounted to a pay-when-paid provision. The appeals court said the payment provision added by the firms was a "prototypical pay-when-paid provision" and that the AIA Standard Form's payment provision was "not explicit enough" to constitute a pay-if-paid provision.

The lesson from the case — always pay close attention to payment provisions. Even minor changes in wording can have a significant impact on a general contractor or subcontractor's payment risk.

Porter Wright's Construction Practice Group

Our attorneys have collectively practiced for decades in various areas of construction law -- from project financing and development to contract negotiation and claim resolution. Please don't hesitate to contact us with any construction-related issue or concern.

Our experience includes:

- Real estate development
- Zoning and land-use planning
- Environmental issues
- Construction contracts
- Construction claims and payment disputes
- Labor disputes
- Mechanic's liens
- Product liability
- Public construction liens
- Warranty claims
- Arbitrations and mediations
- Surety and bond claims
- Workers' compensation