



# Bricker Construction Law

Legal developments and best practices for construction projects

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## Ohio Supreme Court upholds per day liquidated damages



By Laura Bowman

Recently in *Boone Coleman Constr., Inc. v. Vill. of Piketon*, 2016-Ohio-628 (Ohio Feb. 24, 2016)\* the Ohio Supreme Court enforced a liquidated damages provision in a public works contract and held that when analyzing the enforceability of liquidated damages, Ohio courts must look at the *per-day* amount agreed upon at the start of the project, not the *cumulative* amount of liquidated damages when the project is complete.

In 2007, the Village of Piketon, Ohio received competitive bids for a traffic light and road improvement project. The winning bidder, Boone Coleman signed a contract with the Village for the project. This contract included a substantial completion date and liquidated damages of \$700 per day for each day beyond that date if the project was not finished on time.

During construction, Boone Coleman requested an extension for additional time to complete the project and the Village agreed to that extension. Then, Boone Coleman requested a second extension but the Village refused this second extension and notified the contractor that the Village would be assessing the \$700 per day liquidated damages under the contract. In the end, Boone Coleman did not complete the project until 397 days after the extended deadline.

Boone Coleman brought a lawsuit against the Village and claimed that the liquidated damages should not apply. The Village argued that it was owed \$277,900 under the liquidated damages provision of the contract (\$700 per day for 397 days.) Under Ohio law, the amount of liquidated damages cannot be a “penalty.” To decide whether the liquidated damages provision is an unfair penalty, Ohio courts apply a test that was developed by the Supreme Court of Ohio in 1984 and that was based on a prospective analysis of whether such damages constituted a penalty. Applying this test, the trial court held that the liquidated damages in this case were enforceable. On appeal, the Fourth District Court of Appeals focused on the retrospective total amount of the \$277,900 liquidated damages, compared to the total value of Boone Coleman’s contract which was \$683,300. The Appeals Court held that the \$277,900 liquidated damages were unfair and could not be enforced.

The Village appealed the case to the Supreme Court of Ohio. The Supreme Court held in favor of the Village, deciding that parties may agree to a per-day liquidated damages amount when entering into a contract and the enforceability test should not be applied to the total amount of the liquidated damages after a breach, but rather the per-day amount that was in the contract.

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The Court confirmed that Ohio courts must examine a liquidated damages provision based on what the parties knew at the time the contract was formed, not what the court may know in hindsight. Under this ruling, when determining the enforceability of

liquidated damages, Ohio courts must look at the *per day* liquidated damages amount, not the total amount of assessed damages in order to determine whether it constitutes an unenforceable penalty.

\* Jack Rosati of Bricker & Eckler, LLP argued for amici curiae, County Commissioners Association of Ohio, Ohio Municipal League, Ohio School Boards Association, and Ohio Township Association, in support of the Village of Piketown's position, in this case.

## Ohio appellate court upholds waiver of claims clauses



By Michael Katz

An Ohio appellate court recently held that by failing to comply with contractual notice requirements, a contractor waived its right to bring claims associated with the contract.

In *IPS Electric Services, LLC v. University of Toledo*, Case No. 15AP-207, 2016-Ohio-361, the University of Toledo (UT) hired IPS Electric Services to perform electrical work on existing buildings and within remodeled building space at the UT Health Science Campus. Problems arose throughout the project, which caused the required completion date to be pushed back. In a number of letters to the university, IPS asserted that these delays were caused by the university's late delivery of materials or the university's slow response time to IPS communications. Most of these letters stated that IPS was incurring "additional costs" without providing a specific amount.

IPS then sent the university a more detailed letter asserting that their claims totaled nearly \$500,000 and later sued UT for breach of contract. The university asserted that IPS had failed to meet the claims requirements under the "Dispute Resolution" sections of the parties' contract. These provisions provided that a failure by IPS to properly initiate, substantiate or certify claims arising from the contract would result in an irrevocable waiver of those claims. The Court of Claims found these provisions controlling and entered judgment in favor of the university.

IPS appealed and argued that the contract provisions relied upon by the university were unlawful "no damages for delay" clauses. (A "no damages for delay" provision is one that prevents a contractor from recovering damages where a delay was caused by the

public owner.) However, the Tenth District did not agree with IPS. The court noted that Ohio law prohibits "no damages for delay" language that bars claims based on the *substance* of the claim. Here, the provisions limited or barred a contractor's claims for failing to comply with *procedural* requirements.

IPS also asserted that it failed to meet the procedural requirements, because it did not know the extent of its damages until the end of the project. Again the court disagreed, stating that IPS did not need to know the total damages in order to comply with the contractual notice requirements and inform the university of its claims.

This case confirms that a contractor can waive its right to claims for additional time or money, if the contractor fails to meet the notice requirements in the contract.

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