



**THOMPSON
HINE**

September 2008

CONSTRUCTION UPDATE

Ohio Supreme Court Declines to Hear OPERS' Appeal on Enforceability of "Sole Remedy" Clause

In a decision dated September 10, 2008, the Ohio Supreme Court let stand a ruling from the Franklin County Court of Appeals in *Cleveland Construction, Inc. v. Ohio Public Employees Retirement Systems*, which dealt with whether loss of efficiency and acceleration claims are actually claims related to delay, and therefore not barred by virtue of a no-damage-for-delay clause in a contract.

In this case, the contractor had asserted claims for loss of efficiency and acceleration due to the owner's failure to properly schedule and coordinate the project's various tasks, which led to delays and out-of-sequence work. A jury found that the owner had materially breached the contract in failing to properly schedule the project, leading to labor inefficiencies that hindered the progress of the work and ultimately caused the contractor to incur higher costs. The jury also found that the contractor had no obligation to request an extension of time in writing and awarded \$640,000 in damages to the contractor.

On appeal to the Franklin County Court of Appeals, the owner did not dispute that it had materially breached the contract by failing to properly schedule and coordinate the project. Instead, the owner argued that the contractor's claims were barred by the contract clause that indicated that the contractor's sole remedy for interference, disruption or hindrance was an extension of time. The owner also argued that Ohio Revised Code section 4113.62, which bars no-damage-for-delay clauses, was not applicable because the contractor was seeking loss of efficiency and acceleration damages, not delay damages.

The Court of Appeals found that the owner's delays had given rise to different types of damages, including the contractor's loss of efficiency and acceleration damages. Because these damages had been caused by the owner's delay, the statute holding no-damage-for-delay clauses unenforceable was applicable and thus the "sole remedy" clause in the contract could not be enforced as a matter of law.

This decision is now the law in Ohio. It is significant in light of the owner's attempt to enforce the "sole remedy" clause that is prevalent in state contracts, only to be told that such a clause is unenforceable as an illegal no-damage-for-delay clause regardless of the types of damages that are incurred where the owner was the cause of the delay to the project. The Court also recognized that the recent Ohio Supreme Court decision in *Dugan & Meyers Construction Co., Inc. v. Ohio Dept. of Adm. Services* likely would have been decided differently if that contract's no-damage-for-delay clause would have been unenforceable.

© 2008 THOMPSON HINE LLP. ALL RIGHTS RESERVED.

ATLANTA BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

ATTORNEY ADVERTISING



FOR MORE INFORMATION

For more information, please contact:

Cleveland

Jeffrey R. Appelbaum 216.566.5548
Patrick J. Sweeney 216.566.5793
Daniel M. Haymond 216.566.5896

Jeff.Appelbaum@ThompsonHine.com
Patrick.Sweeney@ThompsonHine.com
Daniel.Haymond@ThompsonHine.com

Columbus

Peter Welin 614.469.3269
Michael W. Currie 614.469.3241
Daniel F. Edwards 614.469.3223

Peter.Welin@ThompsonHine.com
Michael.Currie@ThompsonHine.com
Dan.Edwards@ThompsonHine.com

Cincinnati/Dayton

Thomas J. Kirkwood 513.352.6728
Kimberly E. Ramundo 513.352.6656

Tom.Kirkwood@ThompsonHine.com
Kimberly.Ramundo@ThompsonHine.com

If you do not wish to receive future communications by email, please reply to this email with "unsubscribe" in the subject line.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2008 THOMPSON HINE LLP. ALL RIGHTS RESERVED.

