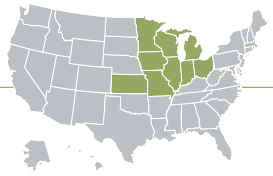

Hammer Time

Recent Court Rulings

Ohio Judge Permits Contractor-Residency Ordinance

A judge for the Cuyahoga County Common Pleas Court in late August put a temporary hold on a new state law that bars local governments from requiring that local residents make up a specified percentage of contractors hired for public projects. Judge Joseph Russo found the new law, HB 180, which was signed by Gov. John Kasich in May and was set to become effective in early September, unconstitutional based on home-rule provisions in Ohio's Constitution. The city of Cleveland sued the state in August to protect its ordinance requiring projects of $100,000 or more to have at least 20% of work hours performed by Cleveland residents or face a fine. Russo wrote that Cleveland's hiring ordinance is a job creation tool affecting how public funds are expended and is not an exercise of the city's police power. Russo gave an early peek into his thinking, saying he expected the city would win its case, and he rejected the state's argument that Cleveland officials waited too long to file their complaint. He additionally said he thinks HB 180 doesn't serve the betterment of Cleveland's public-works employees who have benefited from the city's ordinance, though—ironically—he added that employees who are excluded from work because of the geographic prescriptions in Cleveland are "no more likely to be employed" under either the city ordinance or the state law.

Court Blinded by Hindsight

The Ohio Supreme Court tells an appellate court not to play Monday-morning quarterback in a liquidated damages case.

BY ANDREW SMITH

In *Boone Coleman Constr., Inc. v. Vill. of Piketon*, the Ohio Supreme Court revisited the concept of liquidated damages clauses and confirmed their enforceability must be viewed from the time the parties entered into the contract, not in hindsight, regardless of the total assessed liquidated damages.

In *Boone*, the village of Piketon solicited bids for the Pike Hill Roadway and Related Improvements project. Boone Coleman Construction submitted the lowest bid and was hired for the project.

The parties entered into a contract in which Piketon agreed to pay Boone Coleman $683,300 to complete the work. The contract expressly provided that the time for completing the project was "of the essence" and the project had to be substantially completed within 120 days of the date of commencement of the project. A liquidated damages provision made clear Boone Coleman would pay $700 to Piketon for each day after the specified completion date the contract was not substantially completed.

The date of commencement of the project was set for July 30, 2007, requiring the project would be substantially completed by Nov. 27, 2007. Piketon granted Boone Coleman's first request for an extension, moving the completion date to May 30, 2008. But when Boone Coleman sought another extension, Piketon refused and notified the company it would assess the

STOLEN STEEL

A man who is building a 72,000-square-foot mansion in the Missouri Ozarks is now suing a cement company and construction products firm seeking a tear-down and rebuild because the builder shorted the castle, called Pensmore, more than 70,000 pounds of steel-fiber critical in reinforcing the energy-efficient and tornado-resistant concrete the house is made from. Ironically, "Pensmore was to be the model, designed to change the very nature of safety and energy standards in constructing schools, hospitals and homes," the lawsuit states.

Pensmore's owner fingers an employee in the company that mixed the concrete, saying he sold off about a third of the Helix, a steel-fiber alternative to rebar, that was meant for Pensmore's concrete. It further alleges the employee sent the pilfered material to multiple other construction projects, leaving Pensmore with reduced protection. A whistleblower was the first to alert the project owner of the theft, and—according to the lawsuit—scientific testing confirms the Helix is missing from the concrete. The defendants are denying the claims. ■

contractually specified liquidated damages of $700 per day if the project was not completed by May 30, 2008. Boone Coleman did not do so, and on July 7, 2008, Piketon informed Boone Coleman that it was assessing damages of $700 per day, as of May 31, 2008, until the completion of the project. The contractor did not complete the project until July 2, 2009, exactly 397 days after the parties' extended completion date of May 30, 2008, leading to a total of $277,900 in liquidated damages.

Boone Coleman brought suit against Piketon in the Pike County Common Pleas Court. Among other things, it alleged that Piketon had improperly failed to pay $147,477 of the contract price. Piketon filed a counterclaim for liquidated damages and moved for summary judgment. The trial court granted Piketon's motion and entered judgment in its favor, awarding Piketon $277,900 in liquidated damages, but the court of appeals reversed the decision.

The appellate court based its decision on the application of the liquidated damages clause to the specific facts of the case and concluded the amount of damages was so disproportionate it was plainly unrealistic and inequitable. In a finding such as this, courts are justified in determining the provision to be an unenforceable penalty.

Piketon then turned to the Supreme Court of Ohio. Upon review, the Ohio Supreme Court stated Ohio's three-part test to determine whether a contractual provision should be considered a liquidated damages provision or an unenforceable penalty as follows:

> Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.

According to the Ohio Supreme Court, "The appellate court's myopic focus on the reasonableness of the total amount of liquidated damages in application, rather than on the reasonableness of the per diem amount in the contract terms, was not proper." The correct analysis looks at whether it was conscionable to assess $700 per day in liquidated damages for each day that the contract was not completed rather than looking at the aggregate amount of the damages awarded. The Supreme Court found:

> Here, the appellate court improperly engaged in retrospective analysis, i.e., it looked, with hindsight, to the aggregate application of the per diem liquidated damages to conclude that the provision was unconscionable. But it did not determine that the per diem amount was unconscionable **at the time the parties entered into the contract**. The question whether the liquidated damages provision is conscionable "must be viewed by the court from the standpoint of the parties at the time of the contract, and not *ex post facto* when the litigation is up for trial. Contracts are always so construed, and a stipulation for liquidated damages is no exception." (emphasis added)

Ultimately, the Ohio Supreme Court remanded the case to the court of appeals for further evaluation. *Boone* is important in that the case confirms that the enforceability of liquidated damages clauses is based on the reasonableness of the amount at the time the contract is entered into, irrespective of the grand total of damages. ■

Andrew Smith is an associate in the Cincinnati, Ohio, office of Smith, Rolfes & Skavdahl. asmith@smithrolfes.com

FEMA PROPOSES REWRITE OF 100-YEAR FLOOD STANDARD

The Federal Emergency Management Agency proposed in August setting new construction standards for companies and homeowners who build (or rebuild) in flood-prone zones using federal money. FEMA is piggybacking on a January 2015 executive order that included new flood protections for infrastructure projects that use federal funds. The proposed FEMA building rules offer three options: build standard projects two feet above the 100-year floodplain level (critical-action projects like hospitals and nursing homes must be three feet above floodplain levels); build to the 500-year floodplain requirements; or use the best available scientific models, which make predictions based on flood and sea-rise data. The proposed rules would not affect 100% privately funded projects. In addition, the proposal states, "FEMA does not apply Part 9 [FEMA Regulation 44 CFR Part 9: Floodplain Management and Protection of Wetlands] to non-grant, site-specific actions under the National Flood Insurance Program, such as the issuance of individual flood insurance policies, the adjustment of claims, or the issuance of individual flood insurance maps." The new standards are open for public comment through Oct. 21. ■