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Fall 2016

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**2016 OACTA
Annual Meeting**

November 10-11, 2016

The Sheraton Columbus

PRESIDENT'S MESSAGE

By **John J. Garvey, III**
2016 OACTA President

In a few days OACTA's officers and many fellow Ohioans will be in Boston at the DRI Annual Meeting, representing the great Buckeye State to the nation and trumpeting news of our 50th Anniversary year and upcoming celebrations. Last year in D.C. we officially started our golden jubilee with a solemn trip to the Tomb of the Unknowns at Arlington National Cemetery. In just a month we will gather in the Statehouse Rotunda for our Gala, where the half century of countless good works of OACTA will be remembered and celebrated. Do plan on joining us for our Annual Meeting at the downtown Sheraton Hotel on November 10-11, where, along with the usual stellar CLE programming, we will have our Annual business meeting and awards presentations during lunch, and then a rousing 50th Anniversary Gala at the Statehouse.



[Read More](#)

Register Now To Attend The 2016 OACTA Annual Meeting

The Sheraton Columbus at Capitol Square will be the site for this year's Annual Meeting! An outstanding educational program has been planned, including up to 9.0 hours of CLE, including 1.5 hours of attorney professional conduct instruction. The OACTA Annual Awards Luncheon and Business Meeting will provide an opportunity to recognize your esteemed colleagues for their contributions!

[Download the registration brochure](#)

Click [HERE](#) to Register to attend this year's OACTA Annual

Ohio Supreme Court Addresses Liquidated Damages

By: Andrew L. Smith, Esq.

In *Boone Coleman Constr., Inc. v. Vill. of Piketon*, 2016-Ohio-628, the Ohio Supreme Court revisited the concept of liquidated damages clauses, and confirmed enforceability of liquidated damages clauses must be viewed from the time the parties entered into the contract, rather than in hindsight, regardless of the total amount of assessed liquidated damages.

In that case, the village of Piketon, solicited bids for the “Pike Hill Roadway and Related Improvements” project. The project included the installation of a traffic light at the intersection of U.S. Route 23 and Market Street in Piketon and improvements to the roadway. Boone Coleman Construction, Inc., 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 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 be substantially completed by November 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 Boone Coleman it would assess the 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. Boone Coleman did not complete the project until July 2, 2009, exactly 397 days after the parties’ extended completion date of May 30, 2008.

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 for summary judgment and awarded Piketon \$ 277,900 in liquidated damages.

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. And because of this, courts are justified in determining the provision to be an unenforceable penalty.

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 is 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.

Id. at ¶17-18.

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.” *Id.* at ¶31. 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.

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).

Id. at ¶37.

Ultimately, the Ohio Supreme Court remanded the case to the court of appeals for further evaluation. *Boone* is important in that the case confirms the enforceability of liquidated damages clauses must be viewed from the time the parties entered into the contract, and not in hindsight as attempted by the appellate court.

Andrew L. Smith is an associate in the Cincinnati, Ohio office of Smith, Rolfes & Skavdahl Company, LPA who concentrates his practice in the areas of construction law, insurance defense, and bad faith litigation defense. He is the creator of the AGC of Ohio construction law blog, Between the Law and a Hard Hat, and the co-host of BearcatsSportsRadio.com.