



# BYHLAW

Legal News and Views from atop  
The American Book Building

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## No Damage For Delay/Acceleration Clause Void in Ohio

By Thomas R. Yocum

In *Cleveland Construction v. Ohio Public Employees Retirement System*, 2008 – Ohio – 1630; 2008 WL 885841 (Ohio App.10<sup>th</sup> Dist., April 3, 2008), the Court held that the contract provision which

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## Ohio Supreme Court Rules in Favor of the City of Cincinnati

By Thomas R. Yocum

In the case of *Cleveland Construction, Inc., v. City of Cincinnati*, 118 Ohio St. 3d, 283 decided on May 21, 2008, the Ohio Supreme Court ruled in favor of the City of Cincinnati and against

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## U.S. Supreme Court Limits Punitive Damages

By Thomas R. Yocum

In the historic case of *Exxon Shipping Company v. Baker*, the U.S. Supreme Court rendered a decision on June 25, 2008 limiting punitive damages to the amount of one times the amount of

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## Ohio Supreme Court Upholds Workers' Compensation Subrogation Law and the Ten-Year Statute of Limitation for Suing Manufacturers Damage Caps

By Timothy P. Heather

In its February 21, 2008 decision in Groch v. General Motors Corp., the Ohio Supreme Court affirmed the constitutionality of state statutes which allow the State of Ohio or a self-insured employer to recover (subrogate) workers' compensation payments which were made to an injured worker from the proceeds of a civil judgment or settlement

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## Importance of Filing EEO-1 Report

By Bradford C. Weber

The Federal government requires certain employers to file the EEO-1 Report (also known as the Employer Information Report). Generally, this Report is required of all employers with Federal government contracts of \$50,000 or more and 50 or more employees. The report is also required for employers who do not have Federal government contracts but have 100 or more employees. There are exceptions for state

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## No Damage for Delay, Continued from page 1

purported to prohibit recovery of acceleration damages was void and unenforceable. The Franklin County Court of Appeals addressed the relationship between delay claims and acceleration claims. The Court observed that delay and acceleration claims are two sides of the same coin.

At first glance, [accelerate and delay] appear to be antonyms. However, in this case it is more proper to view them as two sides of the same coin<sup>\*\*\*</sup>. The time compression that caused the acceleration<sup>\*\*\*</sup> was itself caused by delay.

The Court in Cleveland Construction reached a completely different result regarding interpretation and application of nearly identical contract provisions than the Ohio Supreme Court did in *Dugan & Meyers Construction Co., Inc. v. Ohio Dept. of Administrative Services*, 113 Ohio St.3d 226, 864 N.E.2d 68 (2007). The Court in Cleveland Construction based its opinion on application of Revised Code 4113.62 which was not in effect at the time of the Dugan & Meyers and Ohio State University contract. Ohio Revised Code 4113.62 became effective in 1998; whereas, the Dugan & Meyers and Ohio State University Contract was entered into in 1997.

As the Court in Cleveland Construction has now demonstrated, the enactment of Revised Code 4113.62 effectively nullifies, in large part, the Supreme Court's opinion in Dugan & Meyers, since a foundation of that opinion was the premise that "no damage for delay" clauses were valid and enforceable in construction contracts in Ohio (which they no longer are).

## Ohio Supreme Court Rules, Continued from page 1

Cleveland Construction Company, Inc.'s challenge as an unsuccessful bidder on a drywall contract for the convention center expansion.

The drywall contract was awarded to another bidder, even though Cleveland Construction submitted the lowest bid. However, the bid package provided that the contract would be awarded to the "lowest and best bidder". The Court held that given the extensive discretion of the City in considering bids, Cleveland Construction had no property right in the drywall contract at issue in the case. No property interest is created when a City properly exercises its discretion and does not award a contract to a party deemed not to have complied with the requirements of the invitation to bid.

The City of Cincinnati retains broad discretion to "reject any bid for any reason or all bids for no reason at all if acceptance of the lowest and the best bid is not in the best interest of the City".

Cleveland Construction had not complied with the Small Business Enterprise provisions in the bidding documents, and the City awarded the contract to the next lowest bidder who did comply with the SBE requirements.

The Court held that the City of Cincinnati did not abuse its discretion in awarding the contract to the next lowest bidder who did comply with the SBE requirements, and that Cleveland Construction had not acquired any property interest in the contract.

The Court rendered judgment in favor of Cincinnati, and against Cleveland Construction. This case was litigated over a period of several years at considerable expense, and demonstrates the difficulty of "challenging City Hall" in contesting public contract awards.

## Punitive Damages, Continued from page 1

compensatory damages. This business-friendly decision continued a trend by the Supreme Court to place limitations on punitive damages.

The Exxon case arose out of the Supertanker Crude Oil spill in Prince William Sound, Alaska in 1989. Class actions were brought against Exxon by 32,000 plaintiffs consisting of commercial fishermen, native Alaskans and land owners who sought both compensatory and punitive damages arising from the 11,000,000 gallon crude oil spill into Prince William Sound.

The claim for punitive damages was based upon the alleged "reckless" acts of the tanker captain who had a blood alcohol content estimated at three times the legal limit for driving in most states at the time of the accident. The captain had a history of alcoholism, had completed a 28-day alcohol treatment program while employed by Exxon, but dropped out of prescribed follow-up program and stopped going to Alcoholics Anonymous. The evidence presented at trial to the jury showed that the captain continued to drink alcohol at many places, including aboard Exxon tankers. At the trial, witnesses testified that before the Valdez left port the night of the disaster, the captain downed approximately 15 ounces of 80 proof

Vodka.

As the Valdez left port, at a critical moment, the captain inexplicably exited the bridge, leaving a tricky course correction to unlicensed subordinates. Based upon the evidence, the jury awarded \$287 million in compensatory damages and \$5 billion in punitive damages against Exxon. The 9<sup>th</sup> Circuit Court of Appeals reduced the punitive damage award to \$2.5 billion.

The Supreme Court held that the punitive damages awarded against Exxon were excessive as a matter of maritime common law. In the circumstances of this case, the award should be limited to an amount equal to compensatory damages.

The Court discussed the nature of punitive damages which are intended to punish and deter defendants and certain conduct. A corporation may be held liable for the reckless acts of its employees in a managerial capacity while acting in the scope of their employment.

While there is a perception that runaway punitive damages are a recent American phenomenon, historical and recent statistical data is otherwise. Punitive damages have been provided for in legal codes from ancient times up through the Middle Ages and more recently (within the last 300 years) Anglo-American law. The Code of Hammurabi provided for ten-fold penalty for stealing the goat of a freed man. The statute of Gloucester in year 1287 provided for treble damages for waste of an interest in real property.

The Court noted that some states in the U.S. do not permit punitive damages at all, and some states, such as Ohio, place limitations on punitive damages as a matter of state law. Nevertheless, punitive damages overall are higher and more frequent in the United States than anywhere else.

Notwithstanding the perception of runaway punitive damage awards in America, statistical studies presented to the Court showed that the median ratio to compensatory awards has remained less than 1:1. Nor did the data presented to the Court substantiate a marked increase in the percentage of cases with punitive awards over the past several decades.

Notwithstanding this apparent restraint in the award of punitive damages, the Court expressed concern about the unpredictability, fairness and consistency of punitive awards.

While failing to cite any state court which had adopted a "limitation on punitive damages based upon a ratio of punitive to compensatory damages, the Court noted that a slim majority of state legislatures which had limited punitive damages did so based on a ratio of 3 times compensatory damages. Ohio's limitation on punitive damages is 2 times compensatory damages." O.R.C. §2315.21 (D)(2)(a).

The Court placed great weight on statistical evidence presented regarding

punitive damage awards in the U.S., and concluded that a ratio of 1:1 is a fair upper limit for an award of punitive damages in maritime cases. The 1:1 ratio would be applied against Exxon based upon the trial court's calculation of total relevant compensatory damages in the amount of \$507.5 million dollars.

Questions remain unanswered as to whether the 1:1 punitive damage limitation will be applied more broadly or limited to federal maritime cases. One point is clear, the Exxon decision marks an historical point in the trend of both courts and legislatures limiting punitive damages awards. While this trend will be generally welcomed in the business world as a "business friendly" decision, questions remain as to whether a 1:1 limitation is sufficient to deter certain wrongful conduct which may be fraudulent, or even criminal. Further, treble damage awards remain available based upon certain legislative remedies at both the state and federal levels.

### **Ohio Supreme Court Upholds Workers' Compensation, Continued from page 2**

which the injured worker subsequently obtains from the wrongdoer. In Groch, the Ohio Supreme Court also held that the ten-year statute of limitations for the accrual of a product liability claim against a manufacturer is valid. The Court held, however, that the retroactive application of the statute of limitations to bar a claim against a manufacturer for injuries which a plaintiff suffered before the statute took effect was unconstitutional.

S.B. 227 was legislation which took effect in April, 2003, which permitted employers to recover medical expenses and lost wages under Ohio's workers' compensation program from any damage award or settlement. S.B. 80, known as the "tort reform bill", took effect in April, 2005 and included a "statute of repose" provision to Ohio's product liability statute, which stated that, in any lawsuit commenced on or after the effective date, no user of a product has a cause of action against the manufacturer or any product-related injury which occurred more than ten years after the manufacturer first delivered the product to an end user. We now know that these statutory enactments are valid.

The Groch decision was decided by a 6-1 vote. In light of the conclusive nature of the decision, it is not likely that these issues will be brought back before the Ohio Supreme Court any time soon.

### **Filing EEO-1 Report, Continued from page 2**

and local governments, certain educational institutions and private clubs.

This report is a confidential report that is submitted annually. The report contains statistical data as to sex, ethnic and racial categories of employees as well as job categories. The report can be filed online. The website for online filing, or obtaining a copy of the EEO-1, is [www.EEOC.gov](http://www.EEOC.gov).

Failure to file a report can result in the Equal Employment Opportunity Commission compelling the filing of such report by order from the United States

District Court. Also, penalties for failure by a Federal contractor or subcontractor to comply may include termination of the Federal government contract and debarment from future Federal contracts.

The EEO-1 is a potential concern to large employers and those doing business with the Federal government. For more information regarding the EEO-1 and its requirements, you can contact the EEOC or your counsel.

### **In the Spotlight**

Tom Yocum and Julie Neuroth spoke at a Lorman Industries Seminar on May 20 regarding Bond Claims and Consensus Documents. Tom moderated the program that also included other speakers and a variety of lien law issues.

Tom Yocum organized and moderated a seminar for The American Subcontractor's Association of Ohio that was held at the The Queen City Club on May 22, 2008 regarding "How to Improve Your Banking and Bonding Positions In a Slow Economy and Tight Credit Market. This timely and interesting program included speakers who are leaders in the local banking and bonding industries.

Recently, the Cincinnati-Ukraine Partnership voted to add BYH attorney Chuck Hollis to its Board of Directors. Chuck, who speaks Russian fluently, also serves as Secretary for the Ohio Kentucky Indiana Sister City Coalition.

From June 23-28, Chuck attended the American Immigration Lawyers Association's Annual Conference, which was held in Vancouver, British Columbia. At the Conference, Chuck participated in numerous continuing legal education seminars developed for immigration law practitioners. He also met and conferred with immigration attorneys from many different states and countries.

BYH is very pleased to announce that its Senior Paralegal, José Pedro Santos, has recently become an Ohio State Bar Association Certified Paralegal. Since 2007 the OSBA has been credentialing paralegals to assist lawyers and law firms in identifying qualified paralegal professionals.

OSBA Certified paralegals meet objective and uniform standards of competence, ethics and professionalism in a field where no licensing or regulation has yet been established. There are currently 124 OSBA Certified Paralegals in Ohio. About 15 of those paralegals work in the Greater Cincinnati area. Mr. Santos is also an American Alliance Certified Paralegal or AACP, a national credential achieved by paralegals who have also met high standards of education, ethics and professionalism.

### Upcoming Events

Tom Yocum is organizing a seminar on behalf of the American Subcontractor's Association of Ohio regarding Sales and Use Taxes that will be held on September 10, 2008 in Cincinnati. Matthew Stamp and Lynne Froling of GBQ Partners, LLC will be speaking. Contact Tom for additional details.

Clients/Friends of BYH are invited to join the American Subcontractor's Association of Ohio for an evening dinner cruise on the Ohio River on July 31. Contact Lisa Williams at BYH (513) 721-5672 for additional details.

### About BYHLAW

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