BYHLAW

Legal News and Views from atop
The American Book Building

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Ohio Mechanic's Lien Revisited for Commercial and Public Projects

By Richard O. Hamilton, Jr.

A periodic review of Ohio's Mechanic's Lien laws is helpful in preserving payment rights. Liens are an imperative tool in the collection of payment for improvements made to another's property.

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Ohio's Prevailing Wage Law

By Thomas R. Yocum

A. ORIGINS AND BACKGROUND

Prevailing wage laws were originally introduced in 1931 at the federal level by enactment of the Davis-Bacon Act. Ohio, as most other states, adopted a "little Davis-Bacon Act" which created

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Hamilton County Court of Appeals Holds That Insurer Must Afford Coverage to Parents Who Are Sued for Negligence Relating to the Intentional and Criminal Conduct of Their Child

By Timothy P. Heather

In its December 28, 2007 decision in Safeco Insurance Company v. Federal Insurance Company, 2007-Ohio-7068, the Hamilton County Court of Appeals was asked to determine whether a

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Ohio Supreme Court Upholds Tort Reform Damage Caps

By Bradford C. Weber

In a slip opinion decided December 27, 2007, the Ohio Supreme Court upheld legislative caps for non-economic damages and punitive damages.

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Ohio Law Allows for Estate Planning for Your Pet

By Lisa M. Bitter

You can now set up a pet trust fund as a part of your estate planning.

As of January of this year, Ohio joined 37 other states that now have passed pet trust legislation. As a result, pet owners in these states can officially name their pets as the beneficiary of a trust fund, which designates a trustee of the fund and a caregiver for the pet and provides specific instructions for their pet's care.

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Cell Phone Do Not Call List

Cell phone numbers went public in February 2008 and have been released to telemarketing companies. You probably will be (or may already be) receiving sales calls. These calls will use up your minutes and can cost you money. To prevent this, call the following number from your cell phone: 888-382-1222. It is the National DO NOT CALL list. It will take less than a minute of your time. It blocks your number for five (5) years. You must call from the cell phone number you want to have blocked. You cannot call from a different phone number. You may want to help others by passing this information on to your friends and relatives.

Ohio Mechanic's Lien, Continued from page 1

While nobody wants to see mechanic's liens filed on a project, they are a necessary tool. Liens are statutory creations that assist with securing payment for improvements to commercial and public projects (also for residential projects, which are not discussed here). The statute and case law interpreting Ohio mechanic's lien law mandate strict compliance with the statutory requirements in order to perfect the liens.

Purpose of a Mechanic's Lien- The purpose of a lien is to assist a claimant, whether contractor, subcontractor, materialman (supplier) or laborer, in obtaining payment by providing security for amounts that are due and unpaid for improvements to another's real estate. On a commercial project the lien literally attaches to the real estate that is improved, and is typically referred to as a "Mechanic's Lien". On a public project, the lien does not attach to the real estate improved, but rather attaches to the funds that are set-aside for the principal contractor and remain unpaid to the principal contractor. This lien is typically referred to as an "Affidavit for Lien on Public Funds".

Notice of Commencement- A Notice of Commencement is a statutory document created by the owner, its representative or designee, and provides specific information about the project. This information includes:

1. The name and location, and project identification number (on public improvements) of the project;
2. Name and address of the owner/tenant or public authority;
3. Name and address of the principal or principal contractors;
4. Date of the principal or principal contract;

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5. Name and address of financing companies on private projects;
5. Name and address of the surety(ies) on the project;
6. Name and address of the representative upon whom service must be made.

On public projects, the NOC must be made available to the public upon request. On commercial projects, the NOC must be recorded with the office of the Recorder in the County where the property is located in order for the owner to have the protections afforded by the mechanic's lien laws. If a private owner does not record its NOC, then claimants are not required to serve Notices of Furnishing.

Notice of Furnishing- A Notice of Furnishing ("NOF") is a statutory document created by the claimant and provides specific information about that subcontractor, materialman or laborer providing improvements to the real estate. The NOF provides the owner or principal contractor notice of who is working on the project. This information includes:

1. The name of the claimant;
2. The name of the original or principal contractor through whom the claimant is providing materials or services;
3. The name of the contractor with whom the claimant has a direct contract (which may or may not be the original or principal contractor);
4. The first date the claimant provided service or material on the project;
5. A description of the real estate or public project;
6. The book and page number, if any, the NOC was recorded.

The NOF is required on commercial projects when an NOC has been recorded, and for claimants not in direct contract with the owner. If an NOC is not recorded then the owner is not entitled to receive a NOF. On a public project, the public authority always (theoretically) has an NOC, so a NOF is always required when not in direct contract with the principal contractor.

Service must be completed within 21 days of first providing services or materials on the project, otherwise the claimant will lose lien rights for those services and materials provided more than 21 days prior to the service.

Mechanic's Lien- Securing your claim for money. The Mechanic's Lien or Affidavit for Lien on Public Funds are to follow a statutory form that provides information about the claimant's claim for money due. Essentially both lien types require:

1. The name and address of the claimant;
2. The name of the party with whom the claimant has contracted;
3. The first and last date services and/or material were provided on the project;
4. The amount due, including all credits and set-offs (an itemized statement is required for liens on public projects).

On commercial projects the lien must be recorded within 75 days of the last date of providing services or materials. The lien must then be served on the owner within 30 days after filing.

On public projects, the lien must be filed with the public owner within 120 days of the last date of providing services or material. The lien can also be recorded in the county recorder's office where the project is located within 30 days of filing the lien with the owner. By recording the lien, the

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claimant has a senior priority position over other claimants that fail to record their liens. The statute creates two classes of lien holders that share in pro-rata distribution in the event the public authority does not have sufficient funds remaining to pay all claimants. Those that record their liens have priority for payment over those that failed to record.

It is recommended to serve the public lien on all contracting parties, if known, within the claimant's contracting line, so as to put all parties on notice of the claim and trigger the time running within which the lien must be disputed. On public projects, the principal contractor must also provide a notice of dispute to the owner within 20 days of the lien service date, or the lien is determined valid and public authority is required to pay the money due directly to the claimant.

Conclusion- Form, notice and timing are everything. Strict compliance and timing are crucial for a valid mechanic's lien. Companies should have procedures in place for gathering the information necessary to provide the proper notices and liens. These procedures must be created in light of the strict timing requirements. If a claimant fails to comply with the strict form, notice, and timing requirements of the statutes, then an important payment guarantee will be lost. Of course, the claimant would still have its contractual rights (and possibly bond claim rights); however, a valid mechanic's lien not only provides security, but also brings to bear other pressures which frequently facilitate payment of amounts due.

Ohio's Prevailing Wage Law, Continued from page 1

prevailing wage laws applicable to public construction projects in the State of Ohio. This law requires (subject to various exceptions) that contractors performing work on projects where the improvement is constructed pursuant to a contract with a public authority must pay prevailing wage rates to workers on the project.

Administration and enforcement of Ohio's prevailing wage law is under the Wage and Hour Bureau of the Ohio Department of Commerce's Division of Labor and Worker Safety. The website address is www.com.ohio.gov/laws. The Director of the Department of Commerce is the chief administrative authority.

B. WHEN PREVAILING WAGE REQUIREMENTS ARE APPLICABLE

In order for prevailing wages to be applicable, the contract with the public authority must exceed certain thresholds. As of January 1, 2008, the applicable thresholds for construction of a public improvement are where the cost of the contract work exceeds: 1) $73,891 for new construction, or 2) $22,166 for reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting. Biennial adjustments to threshold levels are made according to the Price Deflator for Construction Index, U.S. Department of Commerce, Bureau of Census, but may not increase or decrease more than 3% for any year.

In 1997, Ohio Legislation passed excluding from application of the prevailing wage requirements projects for public improvements undertaken pursuant to a contract with or for a board of education. This change in the law exempted from prevailing wage requirements the massive improvements undertaken by the Ohio School Facilities Commission.

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C. ASCERTAINING THE PREVAILING WAGE RATES

Under Ohio law, the prevailing wage rates shall not be less than the rate of wages payable in the same trade or occupation in the locality (county) where the public work is being performed under collective bargaining agreements. If there are no collective bargaining agreements applying to that trade in that county, then the prevailing rates of wages in the nearest locality in which there are collective bargaining agreements shall be the applicable prevailing wage rate. The published prevailing wage rate is comprised of a basic hourly rate of pay and additional sums for fringe benefits (which may be paid in cash equivalent). The prevailing wage rates are required by law to be made a part of the specifications advertised for the project.

Prevailing wage rates are subject to adjustment periodically based upon changes in the collective bargaining agreements applicable to the different trades. These rates are determined by the Ohio Director of Commerce unless it is a Department of Transportation project, in which case the Department of Transportation establishes the prevailing wage rates.

D. CASH PAYMENTS AND FRINGE BENEFITS

Payment of the prevailing wage rate can be in the form of a combination of cash payments directly to the employee and payment of fringe benefits.
Ohio Revised Code Section 4115.03 provides:

…(E) "Prevailing wages" means the sum of the following:
(1) The basic hourly rate of pay;
(2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;
(3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected:
(a) Medical or hospital care or insurance to provide such;
(b) Pensions on retirement or death or insurance to provide such;
(c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;
(d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;
(e) Life insurance;
(f) Disability and sickness insurance;
(g) Accident insurance;
(h) Vacation and holiday pay;
(i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;
(j) Other bona fide fringe benefits.
None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires

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contractors or subcontractors to provide any of such benefits.

Ohio Revised Code Section 4115.031 provides:

The obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the director of commerce, insofar as Chapter 4115. of the Revised Code is concerned, may be discharged by the making of payments in cash, by the making of contributions of a type referred to in division (E)(2) of section 4115.03 of the Revised Code or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in division (E)(3) of section 4115.03 of the Revised Code, or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in division (E)(1) plus the rates referred to in divisions (E)(2) and (3) of section 4115.03 of the Revised Code.

An area of frequent disagreement arises in connection with fringe benefits. Contractors who do not pay fringe benefits pursuant to a collective bargaining agreement may establish their own fringe benefit plans for which they seek to take credit as counting towards payment of the prevailing wage requirements. However, in order to count, the payment must either be made to a trustee or other third person pursuant to a fund, plan or program or pursuant to an enforceable written commitment communicated to workers. Failure to follow these requirements can result in those fringe benefits payments not counting, and in effect, forcing the contractor to make double payment of fringe benefits.

E. PUBLIC AUTHORITY'S RESPONSIBILITIES AND CERTIFIED PAYROLL

The contracting public authority must designate a prevailing wage coordinator who is responsible to monitor compliance with the prevailing wage law. Duties of the coordinator include obtaining certified payroll reports from the contractor. The certified payroll is sworn to and signed by the contractor to demonstrate compliance with the requirements.

On jobs of duration in excess of four months, the certified payroll reports may be filed once per month. On jobs of less than four months duration, the prevailing wage reports must be filed weekly. The prevailing wage coordinator is responsible to compare the reported wage and fringe benefit information to the rates in the prevailing wage schedule for the project.

If the prevailing wage rate changes during performance of a contract, the Director of Commerce is to notify the public authority, who (through the coordinator) shall within seven days notify all affected contractors. The contractors are required to make the necessary adjustments in the prevailing wage rates. If a contractor is found to have violated the law due to failure of the public authority to notify the contractor of such a change, then the public authority is liable for the back wages, fines, damages, court costs and attorney fees. If timely notice is given by the public authority, then the contractor may be able to request a change order increasing the contract amount (since this represents a change in the specifications), although this remedy is not expressly provided by statute.

F. TRAPS FOR THE UNWARY

In addition to potential problems arising out of claiming credit for fringe benefit payments,

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Ohio's prevailing wage law has many other potential traps for the unwary contractor. Issues frequently arise as to the proper classification of employees. The nature of the work performed by the employee should establish the trade and applicable prevailing wage rate. Unfortunately, trade descriptions are sometimes vague and disagreements arise as to which trade rate is applicable which may have significant financial implications.

Issues may arise as to whether someone performing labor is an employee or independent contractor. Another potentially troublesome area relates to required ratios of craftsmen/ mechanics to apprentices/helpers. These requirements are also taken from the union contracts, are published and must be followed.

G. VIOLATIONS AND PENALTIES

Any employee or other interested party may file a complaint alleging violations for failure to comply with the prevailing wage law. Serious sanctions exist for violation of the prevailing wage law. The violator is liable for an amount equal to twice the difference between the established prevailing rate of wages and the amount actually paid, plus attorney fees and court costs. In addition, work can be halted, and the public owner can place a hold on payments to the contractor. Ohio's Prevailing Wage Law has been interpreted to impose liability upon contractors for prevailing wage violations of their subcontractors unless there is an appropriate contractual provision relieving the contractor of such liability.

Upon a finding by the Director of an intentional violation, a contractor can be debarred. No public authority shall award a contract for a public improvement to any contractor or subcontractor whose name appears on the list of debarred contractors. Notice of convictions are filed with the Secretary of State by the Ohio Department of Commerce.

Violation of Ohio's Prevailing Wage Law can constitute a criminal violation that may be prosecuted. The author is personally aware of an incident of a filing of a criminal prosecution for alleged violation of Ohio's Prevailing Wage Law. If the contractor is convicted of violating the law or is found by the Director of Commerce to have intentionally violated the Prevailing Wage Law, then the contractor is prohibited from performing further Ohio public work. "Caution" is the operative word in navigating prevailing wage waters.

Hamilton Co. Court of Appeals, Continued from Page 1

homeowners' insurance policy and an umbrella policy obligated the issuing insurance company to defend and indemnify when its insureds were sued for negligence relating to the intentional and criminal conduct of their child, who also was an insured. The Court held that coverage was, indeed, afforded to the parents under the policies.

Benjamin White, who was then seventeen years old, tried to kill Casey Hillmer. He grabbed the thirteen year old while she was jogging, dragged her into the woods, and stabbed her repeatedly in the neck and her side. After this attack, White pled guilty to attempted murder and felonious assault and was sentenced to ten years in prison.

Casey Hillmer and her parents sued White and his parents, Lance and Diane White. In the lawsuit, the Hillmers claimed that Mr. and Mrs. White had been negligent for failing to properly supervise their son and for entrusting him with a dangerous instrument. The case proceeded to a jury trial and, through a jury interrogatory, the jury determined that Mr. and Mrs. White had been

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negligent and that their negligence had proximately caused injury to the Hillmers. The jury awarded 6.5 million dollars in compensatory damages to the Hillmers and determined that Mr. and Mrs. White were responsible for 70% of that amount.

The White's insurance policy excluded coverage for injuries caused by the intentional conduct of an insured. The policy also contained a severability of insurance clause which stated that "this insurance applies separately to each insured." The trial court concluded that the severability clause rendered the exclusion ambiguous.

The Hamilton County Court of Appeals agreed. First, the Court concluded that, "Ohio Public Policy permits a party to obtain liability insurance coverage for negligence related to intentional conduct when that party does not commit the intentional act." The Court then determined that the injury was an "occurrence" under the policy, stating that "when an insurance policy defines an "occurrence" as an "accident," that definition will include allegations of negligence even when the negligence relates to the failure to prevent intentional conduct."

Ohio Supreme Court, Continued from Page 1

In *Arbino v. Johnson & Johnson,* 2007-Ohio-6948, 2007 WL 4569719, the Ohio Supreme Court was asked by the United States District Court for the Northern District of Ohio to answer certified questions whether R.C. 2315.18 (Caps on economic damages), R.C. 2315.21 (Caps on punitive damages) and R.C. 2315.20 (Collateral Source Statute) were constitutional. These were statutory provisions passed in Senate Bill 80 that became effective April 7, 2005. In a reversal of its prior trend regarding statutory tort reform, the Supreme Court upheld the caps on punitive and non-economic damages. The Court declined to address the Collateral Source Statute for lack of standing.

Ohio Revised Code §2315.18 establishes caps on "non-economic loss" in a "tort action." Non-economic loss means non-pecuniary harm resulting from injury or loss to person or property including, but not limited to, pain and suffering, loss of society, consortium, companionship, education, disfigurement, mental anguish, and any other intangible loss. A tort action means any action for damages to person or property, but does not include, most significantly, actions for wrongful death, medical or dental malpractice or breach of contract. Non-economic loss is capped at $250,000.00 or an amount equal to three times the economic loss, whichever is greater, to a maximum of $350,000.00 for each plaintiff or a maximum of $500,000.00 for each occurrence that is the basis of the tort action. However, there is no limit for loss if there is a "permanent and substantial physical deformity, loss of use of limb or loss of bodily organ system or permanent physical functional injury preventing the injured person from being able to independently care for self and perform life sustaining activities."

If punitive damages are awarded, they are limited to two times the amount of compensatory damages. There is a further limit for individuals or "small employers" (less than 100 full time employees or, if a manufacturer, less than 500). If a defendant is an individual or a small employer, punitive damages are limited to the lesser of two times compensatory damages or

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10% of the employer's net worth, up to a maximum of $350,000.00. Also, there is no prejudgment interest to be calculated on punitive or exemplary damages.

Although not before the Court in *Arbino*, another part of Senate Bill 80 includes the seatbelt defense. The seatbelt defense is codified at ORC §4513.263, and permits evidence of seatbelt non-use (in accidents occurring after April 7, 2005) to diminish recovery of compensatory damages for non-economic loss that could have been recovered but for a plaintiff's failure to wear "all of the available elements of a properly adjusted restraining device." Traditionally, evidence of seatbelt non-use was not admissible in Ohio, so this is another important change contained in Senate Bill 80.

This decision is a significant departure from the prior holdings of the Ohio Supreme Court that consistently found most previous attempts at tort reform unconstitutional. The Court seems to agree with the arguments and rationale of the legislature, that unrestricted jury verdicts in the areas of non-economic damages and punitive damages are injurious to the economy of the State of Ohio. This decision could potentially be important for individuals and employers who are defendants in actions involving bodily injury and property damage occurring after April 7, 2005. Please note that these caps are for punitive damages and non-economic damages only, so there is still no limit to the amount of actual, pecuniary damages that a jury can award (e.g. medical bills, wage loss), if a plaintiff meets his or her burden of proof.

Estate Planning for Your Pet, Continued from Page 2

Unlike a will, which takes weeks or months to be probated, the pet trust is a legally approved arrangement that takes effect immediately to help the person designated in the trust plan to care for the pet.

Needs of pets are similar to those of minor children who need a guardian and living expenses in the event of the death or incapacity of their caregiver. Except with a pet, the courts will not step in if you do not provide for your pet.

Selecting a friend, relative or other reliable person for the positions of trustee of the fund and caregiver for the pet is the most important step in setting up a pet trust fund. Once these individuals are selected, the pet owner, with the help of an attorney, puts every aspect of the pet's care in a detailed document. The amount of the trust is determined by the life expectancy of the pet based on current age, care requirements as the pet ages and the annual rate of inflation. A pet trust plan should include instructions on: type of food for the pet, the environment, exercise requirements, veterinary care and medications, emergency care instructions, special needs, burial or cremation information and designation of what to do with the money left in the fund the pet dies.

For more information, contact Lisa M. Bitter, Esq. 721-5672 or lmbitter@byhlaw.com.

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On A Personal Note

Jose Pedro Santos Becomes a United States Citizen on February 29, 2008.

Becoming a U.S. citizen is a very unique experience. I honestly was humbled by some of the new citizens who have struggled to reach the US while escaping certain death, torture, imprisonment or persecution by the governments in their own countries. Their teary eyes, heart-felt applause and sighs of relief and exultation were very contagious at the end of the ceremony.

The same way it is said that you cannot choose your family, no one can control in which country they will be born, let alone the nationality of their parents. Yet, we can always choose our friends. Thus, in my opinion, it becomes an act of ultimate freedom to choose the country that will consider you a citizen. I was fortunate that I did not have to escape a country ruled by tyranny or hatred. But I still feel excited and honored to have become part of this country's destiny.

Maggie Beck, Long-time BYH Secretary, Retires

Maggie Beck, one of our legal secretaries, retired on March 7, 2008. Maggie first started working for our firm in September, 1964, using a manual typewriter.

Maggie's first stint with us only lasted until 1968 when she left the work force to raise her children. She returned to our firm 11 years later, in 1979, and has worked continuously with us since that time. Throughout her extended tour of duty, she primarily worked as Jack Benjamin's secretary, and most recently worked as the secretary for Rick Hamilton and Brad Weber.

Maggie's retirement coincides with the onset of warm weather, which is fortuitous, as she loves to work outdoors and has one of the best looking yards in Anderson Township. Now, with her additional free time, she'll probably have one of the best looking yards in Hamilton County!

We at BYH will sorely miss this valuable member of our team, but she certainly deserves many years of happiness as she starts this new chapter of her life.

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In the Spotlight

Tom Yocum and Julie Neuroth presented a seminar sponsored by the Construction Specifications Institute, Cincinnati Chapter on February 21 regarding the Battle of the Contract Forms - AIA Documents v. ConsensusDOCS. The seminar which was presented in the state of the art learning facilities at the American Book Building covered multiple contract forms. The participants were particularly interested in hearing about the latest developments in the areas of Electronic Communications Protocol and the implications relating to building information modeling (BIM).

Upcoming Events

On May 20, 2008, Tom Yocum and Julie Neuroth will be speaking at a Lorman Education Services seminar in Cincinnati regarding Ohio Construction Law. Tom will be speaking regarding public liens and payment bond claims and Julie will be speaking about the ConsensusDOCS. Tom will be serving as moderator of the day long program. Contact Tom or Julie for more information.

About BYHLAW

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