



The Ten Commandments of Construction Law

A construction project can be a problem in progress. What separates successful owners, contractors and subcontractors from the others is their ability to effectively manage those problems.

Practitioners advising the construction industry frequently consult the relevant contract documents when dealing with these problems, but there are several key statutes that trump the contract that counselors should be familiar with.

Many of these statutes have been enacted in recent years and have changed the landscape of construction law.

Here are the top 10 “commandments” of construction law, which will assist in avoiding problems of biblical proportion.

1. Thou shall pay promptly. ORC §4113.61

Ohio requires contractors to pay their subs within 10 calendar days after receipt of the payment from the owner for that work, or face 18-percent interest per annum and attorney’s fees. The effectiveness of this statute was recently underscored by the Ohio Supreme Court in *Construction One v. Masiongale* (2004), 102 Ohio St.3d 1. The Ohio Supreme Court’s decision will go a long way in implementing the purpose of the statute, which is to promote prompt payment to subcontractors and material suppliers when the general contractor receives payment from the owner.

2. Thou shall not hide behind “no damages for delay.” ORC §4113.62(C) (1) & (2)

A “no damages for delay” clause is unenforceable if the cause of the delay is the owner’s “actions or inactions.” This provision is a part of the Fairness in Construction Contracting Act passed in 1998, representing the most dramatic change to Ohio construction law since the Prompt Payment Act and the Mechanic’s Lien Law changes in 1992. It recognizes that a time extension without additional compensation is often inadequate to make a contractor or subcontractor whole.

3. Thou shall not hide behind final payment. ORC §4113.62(B)

The Fairness in Construction Contract Act also prohibits owners and contractors from inserting clauses in their contract documents stating that all pending claims are waived by the receipt of final payment. Accordingly, Ohio does not recognize final payment as a defense when the construction claimant has provided prior written notice of a claim before final payment is received.

4. Thou shall be responsible for one’s own negligence in whole or in part. ORC §2305.31

Ohio’s anti-indemnity law makes unenforceable any indemnity provision in a construction contract that attempts to shift responsibility to another contractor or subcontractor for one’s own negligence for personal injury or property damage.

5. Thou shall be permitted to utilize a “pay if paid” provision in a contract (but liens still may be filed). ORC §4113.62(E)

Unambiguous “pay if paid” clauses are enforceable, but do not bar the timely filing of mechanic’s liens.

6. Thou shall go forth to arbitration ... and an order that denies this stay is a final appealable order. ORC §2711.01 and ORC §2711.02

Ohio’s public policy favors arbitration, and compels arbitration when there is a written agreement to arbitrate. Because Ohio wants to encourage arbitration, only an order that denies a stay pending arbitration is appealable. An order compelling arbitration is not appealable.

7. Thou shall sue in Ohio (on Ohio projects). ORC §4113.62(D) (2)

Disputes concerning Ohio construction projects are only supposed to be litigated in Ohio courts. Many construction contracts contain forum selection clauses requiring litigation to be commenced in a state far from the construction project. Like Ohio, many states have recently enacted similar statutes that require construction-related litigation to be conducted in the state where the project is located.

8. Thou shall apply Ohio law. ORC §4113.62(D) (1)

Contracts often state that a certain state law applies. This statute requires that Ohio law applies when the project is located in Ohio.

9. Thou shall not waive bond rights. ORC §4113.62(A)

In Ohio, a subcontractor cannot waive bond rights upfront in a contract. The deadline for filing a claim against a bond is 90 days after the public project is completed and accepted by the public authority. It is important to note that the timeline for a bond claim is not tied to the last date of work. Additionally, a claim against a payment bond lawsuit cannot be initiated until 60 days from the date of service of the claim on the surety and must be filed within a year from the date of acceptance of the public improvement.

10. Thou shall record a notice of commencement (owner) ORC §1311.04 or serve a notice of furnishing (subcontractor). ORC §1311.05

In Ohio, an owner should record a notice of commencement with the County Recorder prior to the start of construction in order to minimize its risk of mechanic's liens on the project. Anyone not in direct contract with the owner should file a notice of furnishing within 21

days of his first date of work based on the notice of commencement to preserve lien rights. Finally, the mechanic's lien must be filed within 60 days from the last date of work for residential work; within 75 days from the last date of work for commercial work; and 120 days from the last date of work on public projects.

These statutes demonstrate that Ohio has adopted much law-restricting "freedom of contract" in the construction industry in an effort to avoid inequitable contracting practices.

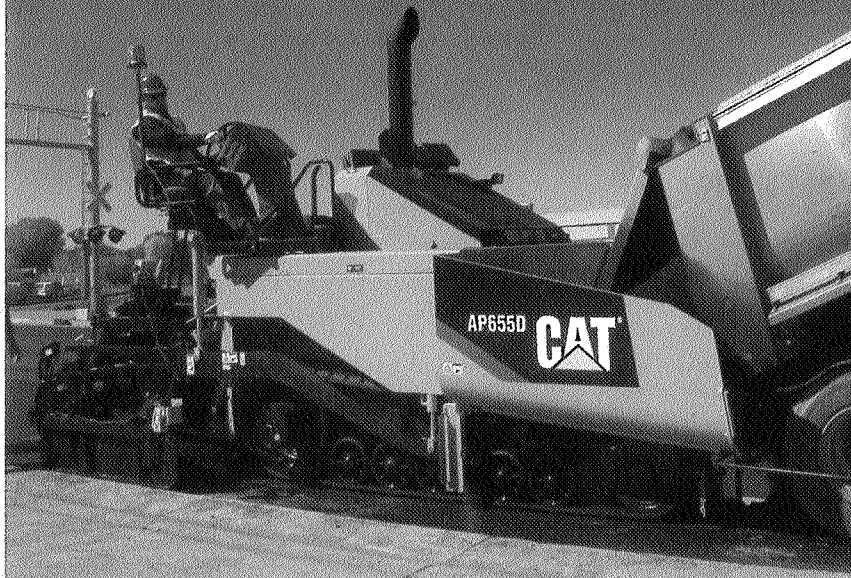


(Editor's note: We would like to acknowledge the recent accomplishments of Donald W. Gregory, Esq., a regular contributor to Ohio Asphalt. Gregory, who practices in the area of Construction/Surety law for the firm of Kegler Brown Hill & Ritter, was recently recognized among the "Best Lawyers in America" for 2008 by Best Lawyers, and among "Ohio Super Lawyers" for 2008 by Law & Politics Magazine.)



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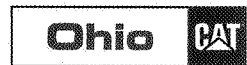


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