

Defining delay

Two lawsuits related to who has to pay for delays in construction projects have been winding through state courts:



April 2008: Ohio's 10th District Court of Appeals affirms Franklin County Court decision.

2003	2004	2005	2006	2007	2008
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October 2003: Ohio Court of Claims rules in favor of Dugan & Meyers Construction Company Inc. in a lawsuit against Ohio Department of Administrative Services.

July 2005: Ohio's 10th District Court of Appeals overturns Court of Claims decision in a victory for the state and other building owners.

April 2007: Ohio Supreme Court affirms appellate court decision.

July 2007: Cleveland Construction Inc. wins a case in Franklin County Common Pleas Court against Ohio Public Employees Retirement System in a victory for contractors.

Contractors win round in disputes over delay claims against owners

BY KEVIN KEMPER | BUSINESS FIRST

The thing about pendulums is they always swing back.

Construction contractors, upset by a court ruling last year that they say gave the state an unfair advantage in contract disputes, are finding that an appeals court appears to have moved the debate back to center.

"I think it's back to a level playing field," said Roger Sabo, attorney for the Associated General Contractors of Ohio, a trade group, and a partner at the Columbus law

firm Schottenstein Zox & Dunn Co. L.P.A.

Sabo said the decision gives contractors a chance to recover damages that are the fault of building owners.

Not everyone agrees.

The April 3 decision from Ohio's 10th District Court of Appeals in Franklin County broadly interpreted a piece of Ohio construction law, said Donald Gregory, an attorney for the state and a partner at Kegler Brown Hill & Ritter Co. L.P.A. The decision could lead to more lawsuits from contractors if it's not overturned, he said.

The decision stems from a suit filed by Cleveland Construction Inc. against the Ohio Public Employees Retirement System. Mentor-based Cleveland Construction won a \$6.3 million contract for interior work at the OPERS office building at 277 E. Town St. in Columbus. The agreed price, however, wasn't enough to cover construction costs because of repeated delays.

A Franklin County Common Pleas Court jury blamed poor scheduling by OPERS and its general contractor for the delays, which caused workers for Cleveland Construction to show up on certain days not knowing what they would be working on because other necessary work hadn't been completed. OPERS argued a clause in Cleveland Construction's contract waived the contractor's rights to collect damages.

The court disagreed and awarded Cleveland Construction about \$640,000.

OPERS appealed to the 10th District, arguing Cleveland Construction merely suffered from an "acceleration of costs" and faced less time to finish certain work due to the poor scheduling. Under Ohio's Fairness in Construction Contracting Act, the retirement system argued there is no liability for such costs. The appellate court disagreed.

"(OPERS's) argument that acceleration costs are unrelated to delay is unsustainable," the court wrote in its decision. "As we have discussed, acceleration costs are closely associated with project delay, and the statute's apparent purpose is to prevent owners from escaping liability when they have caused a project delay." "It's a very pro-contractor decision," Gregory said.

It's also a decision that appears to place contractors in a stronger position than after an April 2007 decision from the Ohio Supreme Court on a separate delay-related dispute. In that dust up, Dugan & Meyers Construction Company Inc. sued the state for \$3.5 million in lost profit after the state removed the construction company from general contracting duties on a project at Ohio State University after six months of delays.

The delays were caused by design flaws that the state was responsible for, but because Dugan & Meyers didn't notify the state in writing of possible delays as the contract demanded, the high court ruled the state didn't owe any lost profit to the company.

Gregory said OPERS hasn't decided whether to appeal its case to the state Supreme Court.

The things we do for the greater good.



D. Gregory: Court made a pro-contractor decision.

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