



Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association

July 2007

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ALP: The Fairness in Construction Act – With the Booming Local and Regional Construction, The Act Is A Benefit to All in Kentucky

By Denise McClelland

National news recently featured Lexington's booming downtown construction in a story on the effect of "baby boomers." According to NBC's May 14, 2007 "Nightly News" with Brian Williams, over 20 new retail and residential construction projects are near completion in downtown Lexington, Kentucky. But throughout Fayette County, extensive construction is in progress or recently completed. Every Fayette County citizen is touched by construction projects either as employees, consumers, or the benefit of the tax revenues by the massive construction expenditures in Fayette County.

Successful construction projects require a well-orchestrated flow of labor, materials, and eventually tenants. If not, construction costs spiral out of control from delay, rising prices and changing weather. To better protect contractors, and ultimately consumers, in the construction process, Kentucky recently adopted the Fairness in Construction Act. The legislation removes several adverse legal conditions and barriers that harmed contractors, and ultimately the public through higher costs for schools, hospitals, retail, housing, worship and recreation facilities. The Construction Act becomes effective July 1, 2007 and applies to all public and private projects, except solely residential projects. The new legislation features three new key protections: construction contract clauses requiring waiver of the

right to litigate, waiver of the right to file liens and waiver of damage for delay clauses are no longer enforceable; prompt payment to contractors generally within thirty 30 days of invoicing is the new standard; and the amount of retainage withheld is limited.

Eliminating Onerous Contract Clauses

Prior to the Construction Act, Kentucky courts enforced contracts that precluded contractors from resolving disputes through litigation. The new legislation proclaims it shall be against public policy and shall be void and unenforceable to require any contractor to waive or extinguish the right to resolve a dispute through litigation, except that the contract may continue to require disputes to be resolved through binding arbitration or non-binding alternative dispute resolutions such as mediation as a prerequisite to litigation.

A second right that could previously be restricted and judicially eliminated, were contracts that precluded contractors and subcontractors from filing liens on a construction project. Lien rights are considered the most effective means for contractors to obtain payment, as a lien creates a "cloud" on title for the construction project, precluding sale of the property until the "cloud" was removed either through payment or posting of a bond. The Construction Act now also prohibits any contractual elimination of lien rights, except as to

The Cincinnati Law Library Association

Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202

513.946.5300

Fax: 513.946.5252

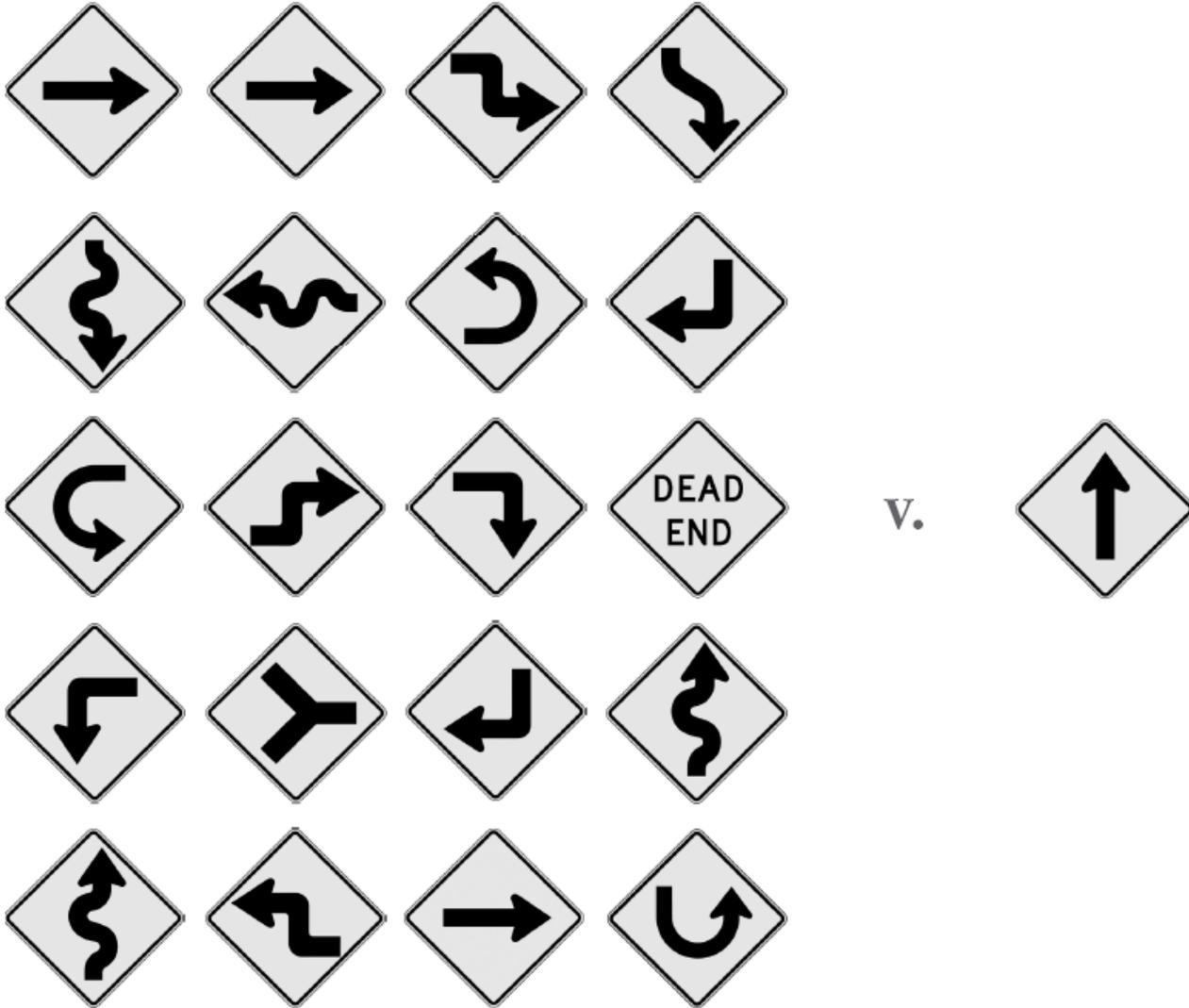
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Julie Koehne, Assistant Law Librarian

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General Topics

On Off

- Case Law Updates
- Newsletter and General Information
- Journal Watch (Tables of Contents)

Substantive Topics

On Off

- Criminal Law
- Employment and Labor
- Estates and Trusts
- Family Law
- Intellectual Property
- Pension Benefits
- Real Estate
- Tax
- Torts
- Workers' Compensation

Cincinnatiaw: The Cincinnati Law Library Association List

About Cincinnatiaw

This list is needed for the members of the Cincinnati Law Library Association, to receive updates on recent legal news and information as well as communications from the Association.

This is a private, broadcast-only list, and only members of the Association (including officials designated by statute) may subscribe. Messages will only be sent by Library staff and on topics related to legal research and information in a variety of practice areas.

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Law Library: Changes, New Directions

David Whelan, Law Librarian

The Law Library has served attorneys in Hamilton County since it was created in 1834. I am proud to be the 10th Law Librarian in the Library's history, and it is with mixed feelings that I have resigned, effective August 3d. Our members are fortunate that the Library Association's Board of Trustees has spent a lot of time planning for the Library's future, and the 11th Law Librarian will be able to build on the services to which you have become accustomed. The past three years have seen a dramatic change in the services and resources available to our patrons. Law Library members have seen a surge in electronic resources, and can now able to access electronic materials 24 hours a day over the Web. Our county colleagues in the courts and other departments have unprecedented, desktop access to the Library's electronic collection. We have maintained our strong print collection, and added new services, including electronic document delivery, wireless networking, and substantive CLE seminars. At the same time, we have been altering course to meet the requirements of legislative attacks on the county law library system. Amendments shift the cost of salaries onto the Law Library from the county's budget, and enable Hamilton County to charge the Library rent beginning in 2008. A recent task force recommendation will sever the private Library Association from the operations of the Law Library, replacing it with a Board of Trustees appointed by county elected officials. As each legislative idea has percolated up, the Law Library has had to plan for the potential impact: reduced fines, changed services, changes in types and quantity of materials purchased. I know that, no matter what legislation appears in the next year, the Law Library is well prepared to meet the challenges it will present. It has been an exciting three years and I know the Law Library will continue to receive the excellent support of the Greater Cincinnati legal community. I have gained much, personally and professionally, by working with all of you. Thank you.

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Circulation privileges to borrow from over 40,000 print volumes for **up to 6 weeks** at a time

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Inexpensive **CLE seminars** throughout the year, on legal research and substantive topics

In addition, solos and members whose firm has a membership have **24 hour remote access** to Fastcase.com case law and Aspen/LOISLaw treatises

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contractors and subcontractors. Under the Act, all balances due a contractor, except retainage, must be paid within 30 business days after receipt of a "timely, properly completed, undisputed request for payment." Owners failing to make timely payment will face 12% statutory interest beginning 31 days following elimination of lien rights, except as to partial release of liens as progress payments are received. The Construction Act now negates an owner and/or general contractor's request for a contractor or subcontractor to waive any damage for delay. These no damage for delay clauses previously limited a contractor's ability to obtain money damages or additional time for delay even when the delay was caused by the owner. Courts would enforce such clauses except in limited circumstances even when owners clearly caused the delay. The Construction Act eliminates this burden on contractors, but is careful, however, to preserve contract clauses requiring a contractor to notify the owner of any delay.

The New Standard for Prompt Pay Obligations

The prompt pay section of the Construction Act imposes timeliness, with incentives, for payments to general receipt of the payment request. Contractors must, however, provide owners with a certified letter on the 25th business day indicating the balance due and the date interest will begin to accrue. Similar payment provisions apply from the general contractor to its subcontractors and to sub-subcontractors, with failure to comply imposing the same 12% interest due on top of the withheld balance. Post-secondary institutions or board of educations may have up to 45 business days to comply. Retainage refers to withholding a portion of the balance due on a contract. Generally, construction contracts required that 10% of each payment made over the course of a project could be withheld until 90-95% of the job was completed. For example, on a \$2,000,000 project, up to \$200,000 of the contract balance was withheld until completion of the project. The Construction Act now limits the amount of retainage withheld. When work on a project is less than 50% complete, no more than 10% of the contract value can be retained. Once 50% or more of the project work is complete, no more than 5% of the contract value can be retained. After substantial completion, the entire balance must be released, less twice the amount of the value of the work needed to complete punch list items, based on the owner's estimation of the value of that work. The Act defines substantial completion the date on which approval from public authorities is given, the owner has received all required warranties and documentations and may occupy the project to use it for its intended purpose.

Incentives to abide by the Construction Act are at least twofold: One is the 12% statutory interest beginning on the 31st day if payment is not made. The other imposes payment of reasonable attorney's fees that may occur for bad faith violations of the Act.

The Fairness in Construction Act is an obvious new benefit to contractors, and was strongly encouraged by several construction related organizations, including the Kentucky Association of Building Contractors and the Kentucky Chapters of the Association of General Contractors. Contractors should be take in following the statutory requirements of the Construction Act in order to preserve their claims, since it applies only to construction contracts entered into after July 1, 2007.

Denise H. McClelland is a Member of Frost Brown Todd LLC and concentrates her practice in the area of commercial litigation.

August 2007 Law Library Newsletter

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