QUESTION 1

What is the statute of limitations or statutes of repose in construction cases?

ANSWER:

As one would expect, there will be different statute of limitations periods applicable to the various claims typically seen in the construction context. The applicable periods for some of the more common claims are as follows:

TYPE OF CLAIM	PERIOD	AUTHORITY
Bodily injury or injury to personal property	2 years	R.C. §2305.10
Wrongful death	2 years	R.C. §2125.02
Employer Intentional Tort	2 years	R.C. §2305.10
Damage to Real Property	4 years	R.C. §2305.09
Violation of Ohio's Consumer Sales Practices Act	2 years	R.C. §1345.10
Professional Negligence Claims Against Design Professionals	4 years	R.C. §2305.09(D)

Pursuant to Ohio's Statute of Repose, no cause of action exists for real or personal property damage, bodily injury, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property against a person who performs services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than 10 years from the date of substantial completion. R.C. §2305.131(A)(1). However, if a claimant discovers a defective and unsafe condition of an improvement to real property during the 10-year period, but less than 2 years prior to the expiration of that period, may pursue a claim within 2 years from the date of discovery of the defective and unsafe condition. R.C. §2305.131(A)(2). The Statute of Repose, however, does not apply to claims against an owner, tenant, landlord, or other person in possession and control of an improvement to real property that is in actual possession and control at the time the defective and unsafe condition constitutes the proximate cause of bodily injury, injury to real or personal property, or wrongful death that is the subject matter of the claim. R.C. §2305.131(B). The Statute of Repose does not bar claims against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than the statutory 10-year period and whose warranty or guarantee has not expired at the time of the bodily injury, injury to real or personal property, or wrongful death. R.C. §2305.131(D). The Statute of Repose is purely remedial in operation and applies to any claims commenced on or after its effective date.

QUESTION 2

What standard of care exists for design professionals?

ANSWER:

When rendering design services, a design professional such as an architect or engineer has a duty to exercise that degree of care, skill, and diligence as those in his profession ordinarily exercise under similar circumstances. Whether a design professional is found to have exercised reasonable care in the preparation of plans and specifications depends on the standard of care that the design professional must follow. Typically, expert testimony is required to establish that standard of care unless the lack of skill or care of the design professional is so apparent as to be within the comprehension of a layperson, and requires only common knowledge and experience to understand it. *Cincinnati River Front Coliseum, Inc. v. McNulty Co.,* 28 Ohio St.3d 333 (1986); *Simon v. Drake Constr. Co.,* 87 Ohio App.3d 23 (1993).

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As to negligence claims against design professionals, in the absence of privity of contract, no cause of action exists in tort recover economic loss damages against design professionals involved in drafting plans and specifications. *Floor Craft Floor Covering, Inc. v. Parma Comm. Gen. Hosp. Ass'n.,* 54 Ohio St.3d 1 (1990). However, subsequent to *Floor Craft*, courts have held that a design professional may be subject to suit for economic loss damages in the absence of privity of contract, "if a sufficient nexus exists between them that can serve as a substitute for contractual privity." *Clevecon, Inc. v. Northeast Ohio Reg. Sewer Dist.*, 90 Ohio App.3d 215 (1993).

QUESTION 3
Does the *Spearin* Doctrine apply in Ohio?

ANSWER:
In 1918, the Supreme Court of the United States, in the case of *U.S. v. Spearin* (1918), 248 U.S. 132, held that if a contractor is required to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. The U.S. Supreme Court's holding in *Spearin* was subsequently adopted by the majority of jurisdictions in the United States, including the State of Ohio. In Ohio, courts held that, when an owner furnished plans and specifications for a project, the owner warranted the accuracy, completeness, and suitability of the plans and specifications. *Central Ohio Joint Voc. Dist. Bd. of Educ. v. Peterson Constr. Co.* (1998), 129 Ohio App.3d 58; *Valentine Concrete, Inc. v. Ohio Dept. of Admin. Serv.* (1991), 62 Ohio Misc. 2d 591; *Condon-Cunningham, Inc. v. Day* (1969), 22 Ohio Misc. 71. This responsibility of the owner was not overcome by the usual clauses requiring the contractor to visit the site, check the plans, and to inform itself of the requirements of the work. *Condon-Cunningham, supra.*

Following Ohio's adoption of the Spearin Doctrine, contractors and subcontractors wishing to assert delay claims against the owner used the Spearin Doctrine as the basis for its entitlement to recovery of their delay damages. However, in the recent Ohio Supreme Court case of *Dugan & Myers Constr. Co., Inc. v. Ohio Dept. of Admin. Serv.,* 113 Ohio St.3d 226 (2007), the Ohio Supreme Court limited the application of the *Spearin* Doctrine as it relates to delay claims.

In Dugan & Myers, the Ohio Supreme Court considered *Dugan & Myers'* claims for delay and impact costs resulting from alleged deficiencies in the plans and specifications provided by the owner. The decision was long awaited by the Ohio construction community, as evidenced by the filing of 48 amicus curiae briefs. In *Dugan & Myers*, the Ohio Supreme Court declined "the opportunity to extend the Spearin Doctrine from jobsite conditions cases to cases involving delays due to plan changes." Moreover, the Ohio Supreme Court cited Spearin for the proposition that "where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." The Ohio Supreme Court also noted that the record failed to demonstrate that problems with the plans and specifications rendered the furnished plans unbuildable or otherwise wholly inadequate to accomplish the purpose of the contract.

One other aspect of the Court's decision in the *Dugan & Myers* case that is significant relates to whether the failure to comply with contractual notice provisions could be used to bar otherwise valid claims. Specifically, the Court addressed whether Dugan & Myers was entitled to recover its delay damages, even though it had not complied with the specific change order procedures for requesting extensions. This was based on the notice that the State had actual notice of the need for the changes to the project deadline so therefore, any failure to comply with the change order procedures was harmless error. In barring the claim for failure to comply with the contractual notice provisions, the Court noted that there was no evidence of either an affirmative or implied waiver of that requirement by the State and that Dugan & Myers agreed to contractual language stating that the failure to provide written notice shall constitute a waiver by the contractor of any claim for a project extension.

QUESTION 4
Are home office overhead damages recoverable for claims involving project delays?

ANSWER:
Before a contractor is allowed to pursue a home office overhead claim pursuant to the Eichleay formula, it must demonstrate, a) that it was on "standby" during the period of owner-caused delay, and b) that it was unable to take on new work while on standby. *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.,* 94 Ohio St.3d 54 (2002). A contractor is deemed to be on standby when project work is suspended for a period of uncertain duration and the contractor can, at any time, be required to return to work immediately. Generally, the contractor has to show it remains bound to the project even though it is not working and that it must be ready to immediately resume performance at any time.

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Moreover, the contractor must show that it was unable to commit to replacement work due to delays of uncertain duration. Impracticality, rather than in possibility, of taking on other work is the standard, and the contractor is entitled to damages only if its inability to take on additional work results from its standby status. *Complete Gen., supra*. The mere existence of a delay does not entitle an affected contractor to damages for unabsorbed home office overhead. *Royal Elec. Constr. Corp. v. Ohio St. Univ.* (Dec. 21, 1993) Franklin App. Nos. 93 AP-399, 93 AP-424. Instead, the contractor must demonstrate that the delay caused some portion of its home office overhead to be unabsorbed before the contractor can use a formula to calculate the amount of recovery. *Id*.

QUESTION 5
Is indemnity permitted?

ANSWER:
R.C. §2305.31 prohibits clauses in construction contracts that require a party to be indemnified for its own negligence for damages arising out of bodily injury to persons or damage to property. The statute applies to all contracts relating to the design, planning, construction, alteration, repair, or maintenance of a building, structure, and roadway, including demolition and excavation.

Since R.C. §2305.31 was enacted, there has been a body of case law in Ohio addressing the validity of “additional insured” and “defense/indemnification” clauses typically found in construction contracts. As to additional insured provisions, the definition of who is an insured under the policy will determine whether the additional insured clause violates R.C. §2305.31. If the clause requires the promisor to purchase insurance for the promisee for the promisee’s own negligence, whether sole or concurrent, it will be deemed to violate the statute. However, if the clause requires the promisor to purchase insurance for the promisee for liability solely arising out of the promisor’s negligence, the clause will be deemed valid. In other words, if the additional insured provides coverage to the promisee for the promisee’s passive, secondary, and vicarious liability to the primary liability of the promisor, it will be valid. *Buckeye Union Ins. Co. v. Zavarella Brothers Constr. Co.,* 121 Ohio App.3d 147 (1997); *Liberty Mut. Ins. Group v. Travelers Property & Casualty,* 2002 WL 1933244 (Ohio App. 8 Dist.).

As to indemnity clauses in construction contracts, the focus, once again, is on whether the indemnity clause requires the promisor to defend and indemnify the promisee for claims arising from the promisee’s negligence, whether sole or concurrent. In short, if the indemnity clause in any way requires the promisor to defend and indemnify the promisee for its negligence, the clause will be deemed to violate R.C. §2305.31. *Kendall v. U.S. Dismantling Co.,* 28 Ohio St.3d 61 (1985); *Kemmeter v. McDaniel Backhoe Service,* 89 Ohio St.3d 409 (2000).

As a matter of practice, in situations where there were negligence allegations against the promisee, the promisor often used this as a basis to deny the promisee’s request for defense and indemnity. In these situations where the promisee later settles the claim, courts have held that the promisee waived its right to pursue a claim against the promisor to recover its fees and expenses based on the argument that the claim did not arise from the promisee’s negligence. *C.J. Mahan Constr. Co. v. Mohawk Re-Bar Svs., Inc.,* 2005 WL 2562600 (Ohio App. 5 Dist.). However, there is case law that stands for the proposition that, in situations where the promisee’s request for defense and indemnity was denied, but the promisee later proves (i.e., by summary judgment or verdict) that the promisee was not negligent, the promisor can be responsible for the promisee’s fees and expenses, provided the defense/indemnification clause excludes indemnification for the sole or concurrent negligence of the promisee. *Kovach v. Warren Roofing & Illuminating Co.,* 2007 WL 1508530 (Ohio App. 8 Dist).

QUESTION 6
Do you have comparative or contributory fault?

ANSWER:
On December 4, 2002, the Ohio Legislature passed Senate Bill No. 120 which significantly impacted the law of joint and several liability, comparative negligence, and contribution. Senate Bill No. 120 became effective April 9, 2003 and applies to all causes of action accruing after the April 9, 2003 effective date.

Prior to Senate Bill No. 120, the allocation of comparative fault was only attributed to the plaintiff and defendants to the action. Pursuant to Senate Bill No. 120, however, as it relates to the percentage of tortious conduct attributable to a party, a determination is made as to, (1) the percentage of tortious conduct attributable to the plaintiff, (2) the percentage of tortious conduct attributable to each party to the tort action pursuant to which the plaintiff seeks recovery, and (3) the percentage of tortious conduct attributable to each person from whom the plaintiff **does not** seek recovery. R.C. §2307.23(A).

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In that regard, "persons from whom the plaintiff does not seek recovery" includes, but is not limited to, (1) persons who have entered into a settlement agreement with the plaintiff, (2) persons whom the plaintiff has dismissed from the tort action without prejudice, (3) persons whom the plaintiff has dismissed from the tort action with prejudice, and (4) persons who are not a party to the tort action whether or not that person was or could have been a party if the name of the person had been disclosed prior to trial. R.C. §2307.011(H). A tort action is defined as a civil action for damages for injury, death, or loss to person or property. Moreover, a tort action does include a product liability claim but does not include an action for damages for breach of contract. R.C. §2307.011(K). Finally, pursuant to R.C. §2307.23(C), it is an affirmative defense that a specified percentage of the tortious conduct is attributable to one or more persons from whom the plaintiff does not seek recovery.

The contributory fault of a plaintiff may be asserted as an affirmative defense to a negligence claim, or other tort claims except an intentional tort claim. R.C. §2315.32(B). The contributory fault of a plaintiff does not bar the recovery of damages if the plaintiff's contributory fault was no greater than the combined tortious conduct of all other persons from whom plaintiff seeks recovery and all other persons from whom the plaintiff does not seek recovery. In short, if plaintiff's contributory fault is 51% or greater, there is no recovery. However, if it is 50% or less, the compensatory damages award is diminished by the percentage of tortious conduct attributable to the plaintiff. R.C. §2315.45.

QUESTION 7

Is there joint and several liability?

ANSWER:

By way of Senate Bill No. 120, the law of joint and several liability for tort actions changed significantly. In a tort action where it is determined that two or more persons are liable for the same injury, loss to person or property, or wrongful death, and more than 50% of the tortious conduct is attributable to one defendant, that defendant is jointly and severally liable for all compensatory damages that represent economic loss.[1] R.C. §2307.22(A)(1). In situations where a determination is made that more than 50% of the tortious conduct is attributable to one defendant, each defendant to whom 50% or less of the tortious conduct is attributable is liable to the plaintiff for its proportionate share of the compensatory damages that represent economic loss. R.C. §2307.22(A)(2). However, where 50% or less of the tortious conduct is attributable to a defendant against whom an intentional tort claim has been alleged and established, that defendant is jointly and severally liable for all compensatory damages that represent economic loss. R.C. §2307.22(A)(3). Finally, as to non-economic loss, each defendant found to be liable is only responsible for its proportionate share of the compensatory damages that represent non-economic loss. R.C. §2307.22.

QUESTION 8

Do owners and general contractors have tort liability to the employees of subcontractors?

ANSWER:

A construction site is an inherently dangerous setting. *Bond v. Howard Corp.,* 72 Ohio St.3d 332 (1995); *Whitelock v. Gilbane Bldg. Co.,* 66 Ohio St.3d 594 (1993). Accordingly, the primary responsibility for protecting the employees of a subcontractor lies with the subcontractor, not a general contractor or owner. *Eicher v. U.S. Steel Corp.,* 32 Ohio St.3d 248 (1987). For these reasons, where a subcontractor undertakes to do work for a general contractor, the very doing of which involves elements of potential danger, no liability ordinarily attaches to the general contractor or owner for injuries to the employee of the subcontractor. *Wellman v. East Ohio Gas Co.,* 160 Ohio St. 103 (1953). Accordingly, a general contractor who engages a subcontractor to do work for him, ordinarily owes no duty to employees of the subcontractor in connection with execution of the work. *Id.*

However, when a general contractor engages the services of an independent subcontractor, and actively participates in the job operation performed by the subcontractor and fails to eliminate a hazard which the general contractor, in the exercise of ordinary care, could have eliminated, the general contractor can be held responsible for the injury or death of an employee of the independent subcontractor.

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[1]Economic loss is defined to include, among other things, (1) all wages, salary, or other compensation lost as a result of an injury, death, or loss to person or property and future expected lost earnings, (2) all expenditures for medical care or treatment including future medical expenses, (3) all expenditures paid by, or on behalf of, a person whose property was injured or destroyed in order to repair or replace the property, and (4) any other expenditures incurred as a result of an injury, death, or loss to person or property, except those incurred in relation to actual preparation or presentation of the claim. R.C. §2307.011(C).

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Hirschbach v. Cincinnati Gas & Elec. Co., 6 Ohio St.3d 206 (1983). As a general rule, a general contractor who has not actively participated in the subcontractor's work does not, merely by virtue of its supervisory capacity, owe a duty of care to employees of the subcontractor who are injured while engaged in inherently dangerous work. *Cafferkey v. Turner Constr. Co.,* 21 Ohio St.3d 110 (1986).

What constitutes "active participation" has changed over the years. In *Bond v. Howard,* 72 Ohio St.3d 332 (1995), the Ohio Supreme Court defined active participation to mean that the "general contractor directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to an employee's injury…" The general contractor's job in coordinating the work and directing subcontractors to perform tasks in accordance with the contract specifications does not constitute active participation.

Over the years, courts have applied the same active participation task to suits brought against owners for injuries to employees of independent contractors. In *Sopkovich v. Ohio Edison Co.,* 81 Ohio St.3d 638 (1998), the Ohio Supreme Court refined the active participation test in deciding a claim against the owner, Ohio Edison. In *Sopkovich*, the plaintiff was an employee of an independent painting contractor hired to perform painting work at an Ohio Edison Electric substation. Although Ohio Edison did not direct or participate in the contractor's painting work, it was responsible for shutting off the flow of electricity to portions of the substation being painted. Sopkovich was injured when he allegedly came into contact with an energized portion of the substation. In its decision, the Ohio Supreme Court held that active participation on the part of an owner giving rise to a duty of care may be found to exist, (1) through the direction or control of the performance of the work activities, or (2) through the exertion or retention of control over a critical variable in the workplace, including the environment.

Since *Sopkovich*, some courts have used this expanded definition of "active participation" to claims involving the liability of general contractors. See, e.g., *Cefaratti v. Mason Structural Steel Co.,* 136 Ohio App.3d 363 (1999). In *Cefaratti*, the court held that a general contractor can be liable to an independent contractor's employee if, (1) the general contractor exercised control over the work activity, or (2) the general contractor retained control over a critical variable in the workplace, including the work environment.

For tort claims involving damage to real or personal property, a construction contractor who merely follows the project plans and specifications cannot be held liable for negligence, unless the plans and specifications were "so obviously defective" that no reasonable person would follow them. *Jackson v. City of Franklin,* 51 Ohio App.3d 51 (1988); *Farr v. Safe-Way Barricades, Inc.,* No. L-97-1258, 1998 Ohio App. LEXIS 2618.

QUESTION 9

Is there special legislation addressing residential construction defects?

ANSWER:

No.

QUESTION 10

Does assumption of risk exist as a defense?

ANSWER:

In Ohio, contributory negligence, other contributory tortious conduct, or implied assumption of the risk of the plaintiff may be asserted as an affirmative defense to a negligence claim or other tort claim. R.C. §2315.19. Assumption of risk can be asserted as a defense to a product liability claim as well, but not to an intentional tort claim. R.C. §2315.42(A). Moreover, the contributory fault of a plaintiff may not be asserted as an affirmative defense to an intentional tort claim. R.C. §2315.32.

QUESTION 11

Are "no damage for delay" claims enforceable?

ANSWER:

Pursuant to R.C. §4113.62(C), any provision made part of a construction contract that waives or precludes liability for delays caused by the owner's act or failure to act, or that waives any other remedy for delays caused by the owner, is void and unenforceable as against public policy. Similarly, any provision made part of a construction subcontract that waives or precludes liability for delay caused by the owner's or

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contractor's act or failure to act, or that waives any other remedy for delays caused by the owner or contractor, is void and enforceable as against public policy.

QUESTION 12
How is the economic loss rule applied?

ANSWER:
In Ohio, the economic loss rule generally prevents recovery in tort of damages for purely economic loss. *Chemtrol Adhesives, Inc. v. Am. Mfgr.'s Mut. Ins. Co.,* 42 Ohio St.3d 40 (1989); *Floor Craft Floor Covering, Inc. v. Parma Comm. Gen. Hosp. Assn.,* 54 Ohio St.3d 1 (1990). The well established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable. *Chemtrol*, 42 Ohio St.3d at 44. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that party to a commercial transaction should remain free to govern their own affairs. *Chemtrol*, 42 Ohio St.3d at 42, *Floor Craft,* 54 Ohio St.3d at 7. See, also, *Corporex Development & Constr. Mgmt., Inc. v. Shook, Inc.,* 106 Ohio St.3d 412 (2005). The only exception, as indicated in the previous discussion of the *Floor Craft* case (Question 2), is in situations where a "sufficient nexus" exists to substitute for privity.

QUESTION 13
What are the lien notice requirements?

ANSWER:
Ohio's Mechanic's Lien Statute (R.C. Chapter 1311) has separate provisions for residential projects, commercial projects, and public improvements, all of which impact the procedures and time periods for providing various notices and preparing and filing an affidavit for mechanic's lien.

On commercial projects, prior to the commencement of work, the owner is required to prepare and file a Notice of Commencement in the County Recorder's Office. The Notice of Commencement shall contain, in affidavit form, among other things, (1) the legal description of the property, (2) a brief description of the improvement to be performed, (3) the name and address of the owner, (4) the name and address of the owner's designee, (5) the name and address of all original (general) contractors, (6) the name and address of all sureties. If the owner fails to record the Notice of Commencement, the time within which a subcontractor or material man may serve a Notice of Furnishing is extended until 21 days after the Notice of Commencement has been recorded.

On public projects, the public authority, as the owner, is also required to prepare a Notice of Commencement and is required to make it readily available to the public upon request. The Notice of Commencement shall contain, in affidavit form, among other things, (1) the name, location, and number, if any, used by the public authority to identify the public improvement, (2) the name and address of the public authority, (3) the name and address of all principal (general) contractors, (4) the name and address of all sureties, and (5) the name and address of the public authority representative upon whom service shall be made for purposes of serving an affidavit for a mechanic's lien.

On private projects, if a Notice of Commencement has been recorded, a subcontractor or material supplier that wishes to preserve lien rights is required to prepare and service a Notice of Furnishing upon the owner's designee named in the Notice of Commencement and the original contractor named in the Notice of Commencement. The Notice of Furnishing can be served any time after the Notice of Commencement is recorded, but within 21 days after first performing work or providing materials. Any party in privy of contract with the owner does not have to serve a Notice of Furnishing. Similarly, any subcontractor or material supplier in direct privy of contract with the original contractor does not have to serve the Notice of Furnishing upon the original contractor in order to preserve his lien rights.

A Notice of Furnishing served more than 21 days after the subcontractor or material supplier first performed work or provided materials preserves lien rights for the 21-day period immediately preceding service of the Notice of Furnishing and thereafter, but does not revive lien rights for work or materials furnished prior to the 21 days immediately preceding service of the Notice of Furnishing. There is no requirement to serve a Notice of Furnishing for a project involving a home construction contract. R.C. §1311.05.

For projects involving public improvements, a subcontractor or material supplier wishing to exercise lien rights is required to serve the Notice of Furnishing on the principal contractor within 21 days after first performing work or providing materials to the project, except that

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a subcontractor or material supplier in direct privity with the principal contractor is not required to provide the notice. A subcontractor or material supplier may serve the principal contractor with a Notice of Furnishing more than 21 days after first performing work or providing materials. In this situation, however, the subcontractor or material supplier has lien rights only with regard to amounts owed during and after the 21 days immediately preceding service of the Notice of Furnishing. R.C. §1311.261.

For home construction contracts, any party wishing to assert its lien rights must file an Affidavit for Mechanic's Lien within 60 days from the date on which the last labor was performed or materials were furnished. For commercial projects, the time frame for serving an Affidavit for Mechanic's Lien is 75 days. R.C. §1311.06. For public improvement projects, an Affidavit for Mechanic's Lien must be filed within 120 days after it last performed work or provided materials. R.C. §1311.26.

Before or after suit has been commenced upon a lien, a bond, cash, or other form of security may be provided as substitute collateral for the lien. For claims less than $5,000, the amount of the bond or cash deposit is required to be 2 times the amount of the lien claim. For lien claims in excess of $5,000, the bond or cash deposit is required to be 1-1/2 times the amount of the lien claim. An application is then made to the Court of Common Pleas for approval of the bond or cash deposit, following which the court will hold a hearing on the sufficiency of the substitute collateral. Once the court approves the application, the lien is discharged and the bond or cash deposit is filed with the court and substituted as security for the lien. R.C. §1311.11(C).

The owner with an interest in the property or any original contractor or subcontractor who has provided a bond or cash deposit may notify the lienholder to commence suit on the lien. The Notice to Commence Suit is then to be served on the lienholder and the party issuing the notice is required, within 30 days after service, to prepare and file an Affidavit with the County Recorder's Office identifying the manner in which service was accomplished. If the lienholder fails to commence suit within 60 days following service of the Notice to Commence Suit, the lien is void and the property wholly discharged from the lien.

On public projects, the public authority is required to detain funds from the principal contractor and deposit those funds in escrow. The public authority must detain those funds unless, (1) ordered by a court of competent jurisdiction to release the funds, (2) there is an agreement between the principal contractor and subcontractor or material supplier who prepared and filed the lien affidavit, or (3) the lienholder fails to commence suit as provided in R.C. §1311.311. R.C. §1311.28.

QUESTION 14

Are "pay if paid" or "pay when paid" clauses enforceable and what standard exists?

ANSWER:

Ohio courts have noted the distinction between "pay when paid" and "pay if paid" clauses, both of which are generally enforceable. Pursuant to a "pay if paid" provision, the general contractor is required to pay a subcontractor only if the owner pays the general contractor and the risk of owner non-payment falls upon the subcontractor. *Kalkreuth Roofing & Sheet Metal v. Bogner Constr. Co.,* No. 97 CA 59, 1998 WL 666765 (Ohio App. 5 Dist.). A "pay if paid" provision is binding and enforceable as long as such provision is undeniably clear and ambiguous as to the true intent and meaning of the clause. Kalkreuth, supra; *Power & Pollution Serv., Inc. v. Suburban Power Piping Corp.,* 74 Ohio App.3d 89 (1991).

Pursuant to a "pay when paid" clause, however, a general contractor agrees to pay a subcontractor within a period of time after the general contractor is paid by the owner, and the risk of non-payment falls upon the general contractor. P*ower, supra; Chapman Excavating Co., Inc. v. Fortney & Weygandt, Inc.,* 2004 WL 1631118 (Ohio App. 8 Dist.). In *Power, supra,* the court held that a "pay when paid" clause does not set a condition precedent to the general contractor's duty to pay the subcontractor, but rather constitutes an absolute promise to pay, fixing payment by the owner as a reasonable time for when payment to the subcontractor is to be made. In determining what constitutes a "reasonable time" for payment, courts have, (1) looked to other provisions within the contract at issue which sets forth the time periods for performance of analogous acts, and (2) determined, as a matter of law, when a reasonable time for payment has elapsed. Chapman Excavating, supra. One final point worthy of note is that pursuant to R.C. §4113.62(E), a clause in a construction contract making payment from a, (1) contractor to a subcontractor or material supplier, or (2) from a subcontractor to a material supplier, lower tier subcontractor, or lower tier material supplier, conditioned or contingent upon receipt of payment shall not prohibit a person from filing a claim on a bond or a mechanic's lien during the pendency of receipt of payment.

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QUESTION 15
Can interest be charged?

ANSWER:
R.C. §1343.03 governs the recovery of interest on contracts and judgments. Pursuant to R.C. §1343.03(A), when money becomes due and payable on, among other things, (1) a contract, (2) a settlement between parties, and (3) upon all judgments, decrees, and orders of a judicial tribunal for payment of money arising out of tortious conduct, the creditor is entitled to receive interest at a variable rate determined pursuant to R.C. §5703.47, unless a written contract provides for a different rate of interest. Moreover, pursuant to R.C. §1343.03(C), if, upon motion of a party to a civil action based on tortious conduct where the court has rendered a judgment, decree, or order for the payment of money, the court determines that the party required to pay the money failed to make a good faith effort to settle the case, and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, the prevailing party is entitled to pre-judgment interest from the time he first gave notice of the claim to the time of judgment, or from the time the complaint was filed to the time of judgment, whichever period is longer.

QUESTION 16
Are attorney's fees recoverable?

ANSWER:
As a general rule in Ohio, attorney's fees are not recoverable unless, (1) provided for by statute, (2) there is a contract clause providing for an award of attorney's fees, or (3) the non-prevailing party acted in bad faith.

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