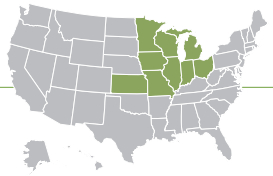

Rulemakers

Wisconsin Sprinkler Rule All Wet

Wisconsin's attorney general, Brad Schimel, issued a formal legal opinion Dec. 8 stating that state regulators cannot enforce a Department of Safety and Professional Standards (DSPS) rule from 2008 requiring sprinklers in apartment buildings built after Jan. 1, 2011, with more than four units. The Wisconsin Builders Association challenged the requirement in court when it was issued, but the state Circuit Court of Appeals found that the agency had the authority to set such a rule. The legislature responded in May 2011 by adopting a law—Act 21—that prohibits state agencies from writing rules that are more restrictive than state law. The builders association noted the DSPS rule is stricter than state law, which requires sprinklers in apartment buildings of more than 20 units. The DSPS had waffled over the course of 2017 in its commitment to the rule, concluding in the second half of the year that the rule wasn't enforceable under Wisconsin law. The agency sought an official opinion from the attorney general, who determined that Act 21 prevents enforcement of the DSPS sprinkler rule because it is stricter than the standing statute.

According to Schimel's opinion: "As a result, Act 21, where it invalidates rules as it does here, may create gaps of unregulated conduct, and these gaps will remain unfilled until the Legislature chooses to act, or by its silence, decides that particular conduct should remain unregulated."

Milwaukee Fire Chief Mark Rohlfing has called upon state legislators to take the sprinkler law up for revision.

Get Your Money Back

When can you recover attorneys fees in the realm of construction law?

By Andrew Smith

Andrew Smith

If you have not noticed, construction litigation is expensive! Attorneys fees comprise a large portion of the overall cost. Construction cases can take years to resolve complex issues involving multiple parties, insurance issues, delay and acceleration issues, and the like. Litigation costs can easily reach into the six figures in most construction cases. The importance of being able to recover these costs if successful at trial cannot be stressed enough. From the very beginning of a project, it is essential to consider these issues when drafting and negotiating the construction contract and project agreements.

Be careful not to overlook recovery of attorneys fees from the inception of any project. All too often, the parties are more concerned with project deadlines and costs than focusing on this important detail. Many people also do not realize that American Institute of Architects construction contracts do not provide for recovery of attorneys fees under any circumstances. Indeed, if you are relying on the standard AIA A101 or A201, you have no ability to recover attorneys fees in the event of litigation or arbitration under the contract.

Ohio Law and the "American Rule"

In general, a prevailing party in a civil action may not recover attorneys fees as part of the costs of litigation in Ohio. This is known as the "American Rule." That is, each party must pay

Regulators, Court Crack Down on Safety

Ohio contractors are taking it in the wallet over poor safety cultures. OSHA, in the first week of the year, slapped an Ohio roofing contractor with almost $100,000 in proposed penalties for failing to protect workers from falls and other safety hazards. Inadequate fall protection at heights greater than eight feet, no use of eye protection, failure to train workers on fall hazards, and a lack of an accident prevention program top the list of violations. Contractors in Ohio also got a wake-up call on the costs of safety non-compliance from the state Supreme Court in early January. The court upheld a ruling that a family of a worker killed in a trench collapse is entitled to additional death benefits—beyond the workers comp death claim—based on the company's numerous safety violations. The contractor, Sunesis Construction, was found to have cut corners on trench engineering and design, among other safety failures. In another blow, effective Jan. 2, OSHA civil penalties for safety violations rose nationwide to adjust for inflation. Willful and repeat violations are now fined at $129,336 (up from $126,749). Other-than-serious, serious and failure-to-abate violations are now $12,934 per violation (up from $12,615). ■

its own fees, regardless of who actually prevails in the case. Nearly every state in the United States follows this philosophy when it comes to awarding costs and fees.

There are limited exceptions to the American Rule in Ohio.

1. Attorneys fees may be awarded when an enforceable contract specifically provides for the losing party to pay the prevailing party's attorneys fees, as decided in *Nottingdale Homeowners' Assn., Inc. v. Darby*.
2. Fees may be awarded when a statute specifically provides for the losing party to pay the prevailing party's attorneys fees, also stipulated in *Nottingdale*.
3. Fees are available when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant or evidence to justify punitive damages, as decided in *Pegan v. Crawer*.

Common Law Award to "Prevailing Party"

When the right to recover attorneys fees arises from a stipulation in a contract, the rationale permitting recovery is the "fundamental right to contract freely with the expectation that the terms of the contract will be enforced," according to *Nottingdale* at 36. Courts reason the presence of equal bargaining power and the lack of indicia of compulsion or duress are characteristics of agreements that are entered into freely. In these instances, agreements to pay another's attorneys fees are generally "enforceable and not void as against public policy as long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case," according to *Nottingdale* at the syllabus. See also *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 513 N.E.2d 253 (1987), which says an indemnity agreement requiring the payment of qualified legal expenses arising from free and understanding negotiation is enforceable and not contrary to Ohio's public policy.

On the other hand, agreements to pay attorneys fees in a contract of adhesion, where the party with little or no bargaining power has no realistic choice as to terms, are unenforceable, as determined in *Nottingdale* at 37.

An additional issue concerns the definition of a "prevailing party" since fees can be contractually awarded only to the prevailing party under this exception. Black's Law Dictionary 1232 (9th Ed. 2009) defines prevailing party as "a party in whose favor a judgment is rendered." Ohio courts have held a prevailing party generally is the party in whose favor the verdict or decision is rendered and judgment entered. According to *Hikmet v. Turkoglu*:

> Prevailing party has been also defined as the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who had made a claim against the other has successfully maintained it.

The concept of prevailing party is important because a voluntary dismissal without prejudice in Ohio means there has been no adjudication on the merits. Without an adjudication on the merits, no formal prevailing party exists, according to *Miami Valley Hosp. v. Payson*. Thus, a prevailing party does not exist when a claim is voluntarily dismissed, as seen in *Hansel v. Creative Concrete & Masonry Constr. Co*.

Statutory Right to Recovery of Fees

As an example of a statutory right under Ohio law to attorney-fee recovery, the case of *Somerset Synfuel No. 1, L.L.C. v. Resource Recovery International Corp.* is illustrative. That case involved the defendant's failure to pay attorneys fees to the successful party in a promissory note. The 11th District Court of Appeals stated, in pertinent part:

> R.C. 1301.21(B) authorizes the award of attorney fees regarding contracts of indebtedness. It states: "[i]f a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment."

Ultimately, the court awarded attorneys fees for enforcing the promissory note under R.C. 1301.21 based on the explicit terms of the note in dispute. Thus, R.C. 1301.21(B) authorizes the award of attorneys fees regarding contracts of indebtedness if: (1) the contract includes the commitment to pay attorneys fees; and (2) the contract is enforced through judicial proceedings.

When Writing Contracts

The general rule in Ohio is that a prevailing party in a civil action may not recover attorneys fees as part of the costs of litigation. However there are limited exceptions. Attorneys fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees. Fees are also available when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant.

Be mindful of these issues from day one whenever drafting a construction contract or agreement to perform design work or construction services. In the absence of a contractual provision, recovery of attorneys fees is likely unavailable in the event your client is forced to bring a lawsuit based on breach of contract or a project failure. A well-drafted contract clause should provide for recovery of attorneys fees by the prevailing party in any arbitration or lawsuit arising out of the contract. ■

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