

# PUTTING IT ALL TOGETHER: ANALYSIS AND EVALUATION OF A CONSTRUCTION LAWSUIT

P. Kohl Schneider, Esq.  
[pkschneider@gallaghersharp.com](mailto:pkschneider@gallaghersharp.com)

Mark D. Thompson, Esq.  
[mthompson@gallaghersharp.com](mailto:mthompson@gallaghersharp.com)

## I. CONSTRUCTION CLAIM OVERVIEW

**Introduction:** There are two types of construction projects each involving different circumstances and challenges.

*Complex:* schools, commercial buildings, public works

*Simple:* driveway, garage door, house addition

### A. The Parties

#### 1. *Complex Projects:*

- a. Owner: The entity or individual who wants the work performed.
- b. Construction Manager: The owner's representative and knowledgeable about overall construction.
- c. Design Professionals: Hired by the owner and designs the project.
  - i. Architects: Creates overall design and layout and provides blueprints.
  - ii. Engineers: May be hired by the Architect. Ensures design is structurally sound, designs complicated systems, among other things.
- d. Contractors:
  - i. General Contractor: Hired by the owner and oversees the overall project. Provides bid to the owner for cost, timeline of overall project completion and may self-perform some or all of the work.

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- ii. Subcontractors: Hired by general contractor. Provides bid to general contractor for completion of their trade and completes that portion of the project (roofing, flooring, foundation, electrical, plumbing, masonry, etc...).
  - iii. Material Suppliers: Hired by subcontractor. Contracts with and provides material to the subcontractor for completion of that trade. For example, a brick supplier will contract with the masonry subcontractor for provision of bricks and mortar.
  - iv. Surety: Contract may require the General Contractor be bonded. A surety will provide a performance bond that guarantees completion should a contractor fail to live up to its obligations.
- e. Insurers: Generally, all of the contractors (General and Subs) are insured.
- i. Contrasting with a Surety: A surety is a three-party relationship: the surety, the principal (usually the general contractor), and the obligee (usually the owner). Insurance is generally a two-party relationship. A surety guarantees the project will be completed. An insurer ensures payment for damages after the deductible is satisfied and the proof of liability and damages is resolved.

## 2. *Simple Projects*

“Simple” is a relative term as simple construction projects still present many challenges. Only the property owner, a general contractor, and one or two subcontractors are generally involved in a small scale project.

## **B. Case Characteristics**

### 1. *Complex Projects*

- a. Sophisticated Parties: Large scale projects use professional design and construction firms and generally involve a knowledgeable owner. Attorneys and consultants counsel the parties.

- b. Detailed Contracts:
  - i. Timelines: Deadline for completion and progress benchmarks.
  - ii. Dispute Resolution Provisions: Mediation and/or Arbitration
  - iii. Duties of Parties: Contractual and Legal. Contract outlines what is to be done and by whom.
  - iv. Notice Provisions: A contractor may be entitled to notice of noncompliance and an opportunity to address the claim or provide a cure before claim can arise.
  - v. Modification Procedures: Outlines the process for modification of the contract including the risk of loss, timelines, and additional payments.
  - vi. Expert Provisions: Whether deviation from a plan is a “defect” may require expert consultation. The contract may outline the process for consulting such experts, the experts’ qualifications, or may name an expert directly.
  
- c. Document Intensive:
  - i. Extensive Contract Documents: A complex project may involve dozens of contracts between the various parties. Moreover, the specifications for various parts of the project can be quite extensive.
  - ii. Requests for Information (“RFI”): Design specifications may be ambiguous or vague. A RFI seeks clarification from the designer.
  - iii. Change Orders: The conditions encountered on a project may be materially different than those contemplated in the contract, and require approval of an order that authorizes a deviation from the work to be performed. Also, the scope of a project may change necessitating the need to modify existing contract terms.
  - iv. Submittals: Submissions to the designer, engineer, or other entity requesting permission to substitute one form of material or work process for another. For instance, a contractor’s request to substitute one type of material for

one already specified will need approval from the designer or engineer.

- v. Daily/Weekly Reporting: The parties may be required to make daily and/or weekly reports concerning construction progress, material usage, change orders, RFIs, and benchmarks.

d. Indemnity Provisions

- i. Indemnity Spectrum: Indemnity provisions in construction contracts attempt to place the risk of loss on the negligent party. These provisions range from broad in language in an attempt to shift the risk to other parties, to narrow in which the risk is placed upon the negligent actor. Broad provisions often place the risk of loss on the party with the least bargaining power.

- ii. Anti-Indemnity Statute (R.C. 2305.31): Indemnity provisions in construction contracts are valid if it complies with R.C. 2305.31, Ohio's Anti-Indemnity Statute. In Ohio, a narrow, limited indemnification provision that calls for indemnification only to the extent of the party's own fault will pass muster.

- e. Additional Insured Provisions: Utilized as protection for contracting parties.

- f. Insurance Considerations: Most CGL policies do not provide coverage for defective work. They generally do, however, cover residual damage from that defect. For example, a roofing subcontractor's defective roof is excluded under the CGL but damage resulting from the defective work may be covered.

- g. Choice of Law: Ohio law applies if project is located in Ohio. R.C. 4113.62(D)(1)(2).

2. *Simple Projects*

- a. Unsophisticated Parties: New homeowner and the neighborhood handyman.

- b. Vague Contracts: Few pages; handwritten changes; separate versions; no timelines; sometimes unsigned; uncertainty as to who actually performed the work.

- c. Oral Agreements: Including oral modifications.

### C. Defining a “Defect”

A “defect” is a deviation, fault, or imperfection from what is expected. But a defect must be evaluated relative to something. How are defects identified?

1. *Contractual*: Specifications from the contract itself in complex matters. The contract for simple projects may not define duties, timelines, or project specifications.
2. *State/Local Laws and Building Codes*: These provide minimum standards that must be met and can vary from location to location.
3. *Local Standards*: A contractor must exhibit work and knowledge of what is reasonably expected of a competent tradesmen in the community.
4. *Workmanlike Performance: R.C. 4722.01*
  - a. The requirement that construction be of a “workmanlike performance” fills the gaps when other standards are vague or ambiguous as to the work required.
  - b. Duty to perform in a “workmanlike manner” is now a duty implied in construction work. *Jones v. Centex Homes*, 132 Ohio St.3d 1, 2012-Ohio-1001.

### D. Common Claims

1. *Construction Defects*: Contractors have a duty to perform in a workmanlike manner, which is generally defined as the work that is customary of other contractors in the community. *Salewsky v. Williams*, 5th Dist. No. CA-8131, 1990 Ohio App. LEXIS 4206 (Sept. 17, 1990).
2. *Warranties*
  - a. Express warranties written into the contract in addition to implied warranties.
  - b. Recently, the Supreme Court of Ohio in *Jones v. Centex Homes*, 132 Ohio St.3d 1, 2012-Ohio-1001, held that the duty to perform in a workmanlike manner is a duty of the contractor rather than an implied warranty.

3. *Liquidated Damages:* The contract can name the damages for certain acts of nonperformance for which the measure of damages would otherwise be difficult or speculative. These damages can be steep and are often written in for delay.
4. *Errors and Omissions:* Generally refers to incorrect plans or specifications that result in changes to the contract. Discovering and remedying an error and/or omission early in the project will prevent additional, more complex disputes further down the road.
5. *Delay in Performance*
  - a. Delays from an owner can lead to both common law contract damages and damages written into the contract itself. Money damages or even cancelation of the contract can result from an owners delay.
  - b. A no damages for delay clause is unenforceable if the delay is due to the claimant's own action or inaction. R.C. 4113.62(C).

#### **E. Common Defenses**

1. *Acts of God:* An act of God is defined as any irresistible disaster, the result of natural causes such as earthquakes, violent storms, lightning, and unprecedented floods; it is such a disaster arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. *Triplett v. Cowan Lake State Park*, 2003-Ohio-7132, 2003 Ohio Misc. LEXIS 91.
2. *Differing Site Conditions ("DSC")*
  - a. A DSC is a condition encountered at the job-site that is materially different than those contemplated by the contract. A contractor is not expected to work into its bid for time and materials every possible material contingency, and an owner cannot be expected to be bear the full risk of loss when a condition would only be discovered by unreasonable investigation during contract formation. Construction contracts must strike a balance between a contractor's ability to accurately estimate the cost of labor and materials given the expected conditions and the owner's expectation for a project to come in on time and at the bid price.
  - b. A common solution is to write into the construction contract a method for resolving differing site condition claims made by the contractor.

3. *Cardinal Changes:* This is a change to the project that cannot be remedied by an equitable adjustment to the contract price, and the changes are so dramatic that contract change clauses do not apply to provide a remedy.

**F. Approach to Defending the Claim and Practical Considerations**

1. *Who are you defending?*
  - a. The Owner?
  - b. The General Contractor?
  - c. A Sub?
  - d. Different defenses may apply.
2. *Discovery*
  - a. For complex projects, there can be numerous parties necessary to the claim. Further, the number of contract and other relevant discovery documents can be extraordinary, numbering in the hundreds of thousands or even millions. With this amount of discovery, it can take months to even bring in all the relevant people and longer still just to compile and exchange all of the relevant documents.
  - b. Simple projects present separate challenges. The small-scale nature of the project that may have been completed several years ago means witnesses or contractors may simply be unidentified or unavailable.
3. *Scope of the project:* Determine the entire scope of the project, the contracts, and the obligations of the parties.
4. *Defining the Defects:* Simply discovering what the actual defect is can become a protracted dispute.
5. *Insurance*
  - a. Will there be a coverage dispute?
  - b. Who has coverage and for what?
  - c. Additional insureds provisions are often not executed properly and can lead to additional litigation.

6. *Contract Provisions*
  - a. Who do they apply to?
  - b. What duties do they impose?
  - c. Are there indemnity provisions?
  - d. Additional insured provisions?
    - i. Are they enforceable?
    - ii. Do they conflict with other contracts and how to resolve those conflicts?
7. *Timing for Resolution:* The number of parties and documents makes decisions concerning dispute resolution difficult as many have differing positions concerning liability and damages.
8. *Analyzing Liability*
  - a. Contractors and Subcontractors: Must fulfill the contract duties, building codes, local standards and the implied duty of workmanlike manner pursuant to the Ohio Home Construction Service Suppliers Act, R.C. 4722.01, et seq.
  - b. Spearin Doctrine: A contractor will not be liable to an owner for defects resulting solely from plans and specifications provided to the contractor by the owner. *United States v. Spearin*, 248 U.S. 132 (1918).
  - c. Design Professionals: Design professionals such as an architect or engineer have a duty to exercise that degree of care, skill, and diligence as those in his profession ordinarily exercise under similar circumstances.
    - i. Absent privity of contract, there is no tort-based right of recovery against a design professional concerning the drawing up of plans and specifications for a project. *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Association*, 54 Ohio St.3d 1 (1990).
  - d. Privity and the Economic Loss Rule: Generally prevents recovery in tort for purely economic loss. *Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005-Ohio-5409. 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. This rule attempts to strike a balance between compensating for damages arising from tort (a breach of duty) and compensating for damages arising from contract (breach of contract terms).

The economic loss rule originated as part of product liability jurisprudence in an effort to prevent recovery for a product that only caused harm to itself. Courts have expanded the doctrine over the years to include numerous types of claims, including construction claims in Ohio. As a result, privity of contract plays a significant role in construction claim liability.

Protection against economic losses caused by another's failure to properly perform is but one provision the contractor may require in striking his bargain. Any duty in this regard is purely a creature of contract and can only be enforced by a party to that contract

- i. Includes: 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).
- ii. Example: As to negligence claims against design professionals, in the absence of privity of contract, no cause of action exists in tort to 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).
- iii. Trend: The Florida Supreme Court recently abolished the economic loss rule in all matters, including construction cases, except for those grounded in product liability. *Tiara Condominium Ass'n., et al. v. Marsh & McLennan Companies, Inc., et al.*, 38 Fla. L. Weekly S 151, 2013 Fla. LEXIS 343 (Mar. 7, 2013). In *Tiara*, a condo association sued its broker due to the condominium's belief that it had less insurance than originally expected. The Eleventh

Circuit certified the following question to the court, restated by the Florida Court: Does the economic loss rule bar an insured's suit against a broker where the parties are in contractual privity and the damages sought are solely economic losses?

The Court answered "the question in the negative and held that the application of the economic loss rule is limited to product liability cases." Florida determined that the economic loss rule was developed for product liability matters and has been impermissibly extended throughout the years to other areas of law. This step may set a trend for other states to follow suit and is something of which to be aware.

- e. Liability to Employees of Subcontractors: 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). As a result, a general contractor who hires a subcontractor generally owes no duty to the subcontractor's employees. He can be responsible if he or she *actively participates* in the subcontractor's work.

9. *Real World Complications: Examples*

- a. Delay From Other's Non-Performance: The general contractor brings a claim against the HVAC subcontractor for delay in performance. The HVAC installer was late to perform because the roofer was late installing the roof. The roofer, in turn, was late because the material supplier was late in shipping the steel. The supplier was late because a shipping strike prevented the steel from getting to port on time.
- b. Differing Tracks for Dispute Resolution: Owner sues architect and general contractor for design and construction defects. Architect invokes arbitration option, but general contractor prefers dispute to be in court. There are now separate actions involving the same project in different venues.
- c. Employees vs. Subcontractors: The line between these definitions can be muddled so determination must be made for whom does the person performing the trade actually work? Determination of this issue alone could be the subject of its own litigation before the issue of damages is even reached.

- d. Inability to Settle: A third-party defendant wants to settle but the third-party plaintiff does not want to settle with the plaintiff. The third-party plaintiff then refuses to settle with the third-party defendant for fear he or she may be liable to the plaintiff for a substantial sum more than the settlement with the third-party defendant.

## II. OHIO CONSTRUCTION LAW UPDATE

- A. ***Jones v. Centex Homes*, 132 Ohio St.3d 1, 2012-Ohio-1001.** Decided March 14, 2012.

In *Jones*, the Supreme Court of Ohio addressed the question of whether a home buyer can waive his right to enforce a home builder's legal duty to construct a house in a workmanlike manner. During the building process, the home's metal joists became magnetized and caused problems with computers, telephones, and televisions. The builder argued that the buyers waived all express or implied warranties except for the specific limited sales warranty noted in the sales agreement.

The *Jones* Court held that the home buyer *cannot* waive this right and now implied within every construction contract is a duty to perform in a workmanlike manner. The Court found that performance in a workmanlike manner is a duty that cannot be waived rather than an implied warranty subject to waiver.

- B. ***Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712.** Decided October 16, 2012.

In *Westfield*, the Sixth Circuit certified to the Supreme Court of Ohio the question of whether claims of defective workmanship/construction brought by a property owner were claims for property damage caused by an occurrence under a CGL policy.

The Court, at the syllabus, held that "claims of defective construction or workmanship brought by a property owner *are not claims for 'property damage' caused by an 'occurrence'* under a commercial general liability policy." (Emphasis added.)

- C. **Ohio Home Construction Services Supplier Act (R.C. 4722.01 et seq.)**

The Ohio legislature recently passed R.C. 4722.01(G), which governs home construction and defines "workmanlike manner" to mean "the home construction service supplier has engaged in construction that meets or exceeds the minimum quantifiable standards promulgated by the Ohio Home Builders Association."

The Ohio Home Builders Association minimum standards states:

(A) Compliance with the Residential Code of Ohio (“RCO”);

(B) If the RCO is silent, then in accordance with the manufacturer’s specifications;

(C) If (A) or (B) do not apply, then direct reference to the OHBA standards is required.

**D. Statute of Limitations for Written Contracts (R.C. 2305.06) – *infra*.**

**III. LIMITATIONS FOR ACTIONS**

**A. Written Contract – R.C. 2305.06**

Significant to construction claims is the Ohio General Assembly’s recent amendment to the statute of limitations concerning commencement of actions based on a written contract. Previously, a contracting party had up to fifteen years to bring an action for breach of a written contract. Effective on September 28, 2012, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within *eight years* after the cause of action accrued.

1. *Implications:* Prior to the statute’s revision, a party to a construction contract could have been liable for a breach of that contract for up to fifteen years or more after a project was completed. Defending a matter arising out of a project more than a decade old leads to obvious difficulties. Witnesses are unreachable, evidence is gone. Now, a cause of action on a construction claim based on a written agreement must be brought within eight years after the cause of action accrued so long as the accrual occurred after September 28, 2012.
2. *Accrual:* In Ohio, a cause of action for breach of written contract does not accrue when the contract is executed. Rather, the cause of action accrues when 1) the breach of contract occurs, or 2) when the complaining party sustains actual damages.
3. *Retroactive:* For a cause of action that accrued before September 28, 2012, the statute of limitations runs as of the **earlier** of: (i) eight years from September 28, 2012, or (ii) the expiration of the limitations period in effect prior to the amendment (15 years from the date of breach).
  - a. Example: A cause of action for breach of a written contract accrued on January 1, 2007. Under the previous statute, the plaintiff can bring suit for fifteen years, until January 1, 2022.

That's a long time to wait. Now, the eight year limitations period kicks in on September 28, 2012, so the expiration will occur on September 28, 2020, cutting off more than a year.

- B. Oral Contract:** Six years after accrual pursuant to R.C. 2305.07.
- C. Tort Based Claims for Construction Defects:** Four years after accrual pursuant to R.C. 2305.09.
- D. Statute of Repose (R.C. 2305.131)**

Differs from the statute of limitations because it begins running upon completion of the construction rather than upon breach of contract or when actual damages are sustained. Ohio's applicable statute of repose limits tort claims in this instance to a period of ten years.

#### **IV. ALTERNATIVE DISPUTE RESOLUTION**

##### **A. Arbitration**

1. *Defined:* Arbitration is a dispute resolution method by which the parties submit their differences to an impartial arbitrator. The Federal Arbitration Act of 1925, 9 USC § 1, et seq. establishes a public policy in favor of arbitration, and is supported by Ohio state law as codified in R.C. 2711.01, 2711.02. The process is less formal than a courtroom hearing or trial but more formal than mediation or a negotiation. Most arbitrations arise out of an arbitration clause in a contract, in which the parties agreed to resolve any disputes through arbitration.
  - a. Mandatory or Voluntary: In mandatory arbitration, the parties give up their right to sue in court, participate in a class action lawsuit, or appeal the arbitration decision.
  - b. Binding or Non-Binding: In a binding arbitration, the arbitrator's decision is final and there is no recourse for the "loser" except in limited circumstances such as fraud or abuse of power. Non-binding arbitrations are often used as an independent assessment of the strengths and weaknesses of a potential lawsuit with the aim of fostering a settlement.
2. *Public policy:* Strongly favors arbitration as a way to resolve disputes without utilizing court resources. As one example of this support, it is written in statute that a court order denying a stay pending arbitration is

appealable. The American Arbitration Association alone estimates that it handles more than two million arbitrations each year.

3. *Partial Preemption of State Law:* In addition, the policy supporting arbitration extends to the FAA's partial preemption of state law. Section 2 of the FAA states that arbitration provisions are subject to invalidation only on the same grounds generally applicable to contractual provisions, such as unconscionability or duress. Once more, Ohio law echoes this sentiment in R.C. 2711.01(A): "A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract . . . shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."
4. *Stay to Allow Arbitration is Mandatory:* Pursuant to R.C. 2711.02(B): "if any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending. . . shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement. . . ."
5. *Arbitration Process*
  - a. Initiation: The clause can require the use of one of the large arbitration associations, like the American Arbitration Association ("AAA"), which will help select the arbitrator or a three member panel for complex cases. The organizations usually keep their own procedural rules and oversee details such as notifying the parties of when and where to meet.
  - b. Pre-Hearing Conferences: Conferences may be held prior to the arbitration to sketch out details such as the need for confidentiality or to iron out highly contested issues, such as the scope of pre-hearing discovery and whether the arbitrator can also decide related claims.
  - c. Hearing: The parties can agree to have the arbitration in any convenient setting. A courtroom is not required. A neutral office or conference center is usually preferred. Cost, formality, and location also weigh into the decision.
    - i. Each side presents his or her version of the conflict, usually with an opening statement bolstered by evidence such as contracts and other paperwork and tangible items such as the building material that is being claimed as defective or not up to specs. Witnesses may also be called to testify and be cross-examined.

- ii. A closing argument from both sides summarizing the evidence, explaining how it relates to individual theories of the case, and setting out why the arbitrator should rule in his or her favor. Sometimes written summaries of evidence and theories are used in place of closing arguments.
- d. *Decision*
- i. Arbitrators are free to base their decisions on their own ideas of what is fair and just. Unlike judges, they are not required to follow the law or the reasoning of earlier case decisions.
  - ii. Decision deadlines vary from a few days to several months. Decisions may contain an explanation of the decision or the award or they may not. It depends on the terms set during the initial hearing, the terms in the contract, the complexity of the matter, and the propensity of the particular arbitrator or panel.
- e. *Appeal:* Most arbitration decisions are final and getting a court to review or vacate is very difficult. An appeal is usually only permissible upon proof of: corruption, fraud, or undue influence in securing the award; bias in the arbitrator or panel; refusal by the arbitrator to postpone the hearing despite sufficient cause to delay it; or the arbitrator exceeded his or her power.

6. *Pros*

- a. Flexibility: While matters in a court must be fit into the court's tight litigation schedule, arbitrations can often more be worked into more convenient times for those involved.
- b. Privacy: Unlike litigation, which is a matter of public record, arbitrations usual convene in private and the parties can agree to keep the subject matter of the arbitration confidential. Both of these safeguards are useful if the subject matter may cause some embarrassment or reveal private information.
- c. Simplified Rules of Evidence: The rules of evidence are typically modified in an arbitration proceeding.
- d. Efficiency and Cost: Arbitration is becoming more costly and more entrenched, and more experienced attorneys take up the cause. It is not unusual for a well-known arbitrator to charge

\$3,000 to \$4,000 per day for his or her services. And most parties in arbitration will also hire lawyers to help them through the process, adding to their costs. Still, resolution through arbitration is usually far less costly than proceeding through litigation because the process is quicker and generally less complicated than litigation. A recent study by the Federal Mediation and Conciliation Services noted that the average to decision in arbitration is about 475 days, while a similar case in litigation took from 18 months to three years to resolve.

- e. Appeals: Oftentimes there is no method for appealing the result of arbitration; more so in the case of binding arbitration in which the participants must accept the decision of the arbiter or the arbitration panel.

## 7. *Cons*

- a. Limited Recourse: The binding nature of arbitration can be a double-edge sword. Your opponent's inability to appeal a result favorable to you is a pro of this method of dispute resolution. However, that same inability to appeal an unfavorable decision will apply to all parties and must be accounted for in the analysis of whether arbitration is recommended for your particular dispute. Even if the award is unfair or illogical, a claimant is likely stuck with the result.
- b. Rising Costs: Although arbitration is still generally believed to be a cheaper form of resolution, its costs are rising. According to a recent study by Public Citizen, a consumer watchdog group, the cost of initiating arbitration is significantly higher than the cost of filing a lawsuit. It costs \$6,650 to \$11,625 to initiate a claim to arbitrate a consumer claim worth \$80,000 versus \$221 to file that action in a county court. Add in arbitrator's fees, which are tripled if a panel is involved, in addition to administrative fees – suddenly the process is less of a bargain.
- c. Limited Discovery: Opportunities to depose certain witnesses or obtain enough information to key in on knowledgeable witnesses may be limited due to the truncated discovery schedules and absence of the rules of civil procedure granting the right to discovery.
- d. Even Playing Field: The “take it or leave it” nature of arbitrations lead some to believe that the clauses work in favor of larger entities rather than providing an even playing field for smaller subcontractors and suppliers. Often times these arbitration clauses

are one-sided and not subject to negotiation by a sub who derives a substantial amount of his or her revenue from only a small number of clients.

- e. Questionable Objectivity: Another concern is that the process of choosing an arbitrator is not an objective one, particularly when a decision-maker is picked by an agency from a pool list, where those who become favorites may get assigned cases more often.
- f. Lack of Transparency: As mentioned, that arbitration hearings are generally held in private rather than in an open courtroom, and decisions are usually not publicly accessible, is considered a benefit by some people in some situations. Others, however, lament that this lack of transparency lends the process to taint or bias, which is especially troublesome due to the finality of the award or decision.

#### 8. *Common Challenges to Arbitration Clauses*

- a. Contract Revocation in Law or Equity: Per R.C. 2711.01(A), *supra*.
- b. Unconscionability: The absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party. Procedural and substantive unconscionability must be proven to invalidate an arbitration clause.
  - i. Procedural: Individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible. Factors bearing on the relative bargaining positions of the parties include: age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, who drafted the contract, and availability of an alternate supply. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, ¶ 31, 809 N.E.2d 1161. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, ¶ 44, 884 N.E.2d 12. Representation by counsel during negotiation of the contract is also considered.
  - ii. Substantive Unconscionability: Occurs when the arbitration clause is so one-sided as to oppress or unfairly surprise a party. Circumstances in which courts have invalidated arbitration clauses based on substantive unconscionability

are: where one party has more rights under the agreement than the other, such as the ability to waive or forego arbitration, or where the arbitration costs are exorbitant in comparison to the claimed damages or the contract price. *Myers v. Terminix Int'l Co.*, 91 Ohio Misc. 2d 41, 697 N.E.2d 277 (1998).

- c. Contracts of Adhesion: A standardized form contract prepared by one party, and offered to the weaker party who has no realistic choice as to the contract terms. Arbitration clauses in adhesion contracts are more susceptible to a challenge than in other agreements (such as a collective bargaining agreement), but are still not unconscionable per se. *William v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-294, 700 N.E.2d 859.
- d. Fraudulent Inducement: A party must demonstrate the arbitration provision itself, and not merely the contract within which it is contained, was fraudulently induced. The challenger must show that the other party made a knowing, material misrepresentation with the intent of inducing the other's reliance, and that representation was relied upon. *Haller v. Borrer Corp.*, 50 Ohio St. 3d 10, 552 N.E.2d 207 (1990).

## **B. Mediation**

Mediation is also a form of alternative dispute resolution by which a neutral third party attempts to resolve the issues among the parties. Mediation may also offer cost benefits and lead to a quicker resolution of the dispute and may be a cheaper alternative to litigation or to arbitration.

Unlike arbitration, however, a mediator only attempts to assist the parties in resolving the dispute; a mediator does not actually render a decision or make an award in most instances. Further, the process is voluntary because any resolution is usually based upon an agreement by all of the parties involved.