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**THINK THAT LIQUIDATED DAMAGES PROVISION YOU JUST AGREED TO IS UNENFORCEABLE? THINK AGAIN.**

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In the construction industry, owners and developers often rely upon per diem (“per day”) liquidated damages provisions to ensure that projects are completed on time. These provisions typically require the contractor to pay “x” dollars per day for each day that the contractor fails to complete the project. Contractors and their lawyers have often argued, and believed, that at some point the per day assessments can become so high that the damages ultimately assessed are a penalty. The amount is “unreasonable or disproportionate.” As such, the liquidated damages provision no longer expresses the parties’ true intention. On February 24, 2016, in *Boone Coleman Constr., Inc. v. Piketon*,<sup>1</sup> the Supreme Court of Ohio rejected this argument. The Supreme Court of Ohio held that the proper analysis is not on the aggregate amount ultimately assessed but rather whether the agreed upon per day amount was reasonable at the time the contract was entered into.

In *Boone v. Piketon*, the Village of Piketon contracted with Boone Coleman Construction, Inc. for the construction of a public road. The original contract amount was \$683,300. The contract expressly provided that time for completing the project was “of the essence,” and that the project must be substantially completed within 120 days of the date of commencement of the project. The contract contained a liquidated damages provision wherein Boone agreed to pay Piketon \$700 per day if the contract was not substantially complete after the projected date of completion. Boone did not complete the project until 397 days after the projected date of completion.

Boone sued Piketon for failure to pay \$147,477 of the contract price for its completion of the project. Piketon countersued for \$277,900 in liquidated damages pursuant to the parties’ contract. The trial court ordered Boone to pay damages in accordance with the liquidated damages provision set forth in the contract. On appeal, the Fourth District Court of Appeals held that, viewing the contract as a whole, “in its application,” the amount of liquidated damages assessed constituted an unenforceable penalty that was “manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable.” The court stated that reasonable compensation for actual damages is the legitimate objective of a liquidated damages provision, and the damages assessed have to bear a reasonable relationship to the actual damage.

The Supreme Court of Ohio reversed. The Supreme Court noted that the Fourth District properly determined that (1) the damages incurred as a result of Boone’s delay were uncertain at the time the parties entered the contract and (2) the plain and unambiguous language of the contract was evidence that the parties intended that damages in the amount of \$700 per day would result from Boone’s failure to complete the project on time. However, the Supreme Court found that the Fourth District inappropriately focused its decision on whether the aggregate amount of the penalty ultimately assessed to Boone was unconscionable. The appellate court’s myopic focus on the reasonableness of the *total amount* of liquidated damages in application, rather than on the reasonableness of the *per diem* amount in the contract terms, was not proper. The correct analysis looks at whether it was conscionable to assess \$700 *per day* in liquidated damages for each day that the contract was not completed rather than looking at the aggregate amount of the damages awarded.

The lesson to be learned here is that liquidated damages provisions are no longer viewed with disfavor and will be analyzed and enforced *as written*. Courts will not review a per day assessment in hindsight. The contract and its provisions must be viewed from the standpoint of the parties at the time of contract. Provided the agreed upon amount of per day damages reflects

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<sup>1</sup>*Boone Coleman Constr., Inc. v. Piketon*, February 24, 2016, Slip Opinion No. 2016-Ohio-628.

a genuine agreed upon pre-estimate of damages, a per day liquidated damages provision will be enforced.

**ADDITIONAL INFORMATION**

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