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Ohio Construction Delay Claims: Blaming the Contractor for Plan Errors?

JAMESON K. GEORGE

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I. INTRODUCTION

During most of 2009 and 2010, the residents of Columbus, Ohio avoided the normally high-traveled State Route 315 despite the highway's excellent access to the Ohio State University campus.¹ The cause of the avoidance was a two-year, \$24 million bridge renovation and repaving

1. Bill Bush, *315 Nightmare*, THE COLUMBUS DISPATCH, Apr. 7, 2009, http://www.dispatch.com/content/stories/local/2009/04/07/315closures.ART_ART_04-07-09_A1_RLD_FQL8.html.

construction project facilitated by the Ohio Department of Transportation.² Timely completion is a crucial aspect of nearly every construction project, and it was no different with the work done on State Route 315. In order to minimize the impact on the traveling public, incentives were built into the construction contract which awarded the general contractor \$20,000 for each day ahead of schedule the project was completed, and the general contractor was awarded \$200,000 after the job was finished.³ Although this bonus payout was widely reported in Columbus, the local media outlets failed to disclose the details regarding the liquidated damages for late completion—roughly \$20,000 for each day behind schedule the project was completed.⁴ Although \$20,000 per day is a large penalty, some construction projects are much more time sensitive. In fact, some contracts have disincentives for late finishes as large as \$4,500 per *hour*—about \$108,000 per day.⁵

Naturally, construction delays are the source of much litigation. Construction projects are delayed when weather, design errors, design omissions, and even when the unavailability of materials inhibit the work of a contractor. Delays cause many time-related costs, such as forcing the acceleration of work which requires more manpower and equipment. Subsequently, the Ohio law stemming from delays caused by plan errors in the public construction sector is flawed in reasoning, and the process by which construction contracts are delivered only increases litigation. Part II of this paper analyzes the construction process, including a case illustration, in order to adequately demonstrate the problems. Part III addresses Ohio courts' preference of form over substance regarding delay claims resulting from plan errors, and Parts IV and V offer changes that would help improve delay claim law in Ohio—more specifically, shifting liability for plan errors to architects and owners and eliminating multiple prime contracting. Considering “[p]ublic construction in Ohio accounts for nearly \$3 billion a year in state [tax] spending[,]” these laws affect all Ohioans and not just contractors.⁶

2. *Id.*

3. Doug Caruso, *Bonuses Speed Up Road Construction*, THE COLUMBUS DISPATCH, Aug. 24, 2010, http://www.dispatch.com/live/content/local_news/stories/2010/08/24/bonuses-speed-up-roadwork.html.

4. Plans for FRA-315-2.40: Maintenance of Traffic General Notes 21 (on file with author).

5. Plans for PIC-23-3.21: Maintenance of Traffic General Notes 14 (on file with author).

6. Michael V. Passella, *Multi-Prime Contracting and Public Construction in Ohio: A Thing of the Past?*, DINSMORE (Dec. 28, 2009), http://www.dinslaw.com/multi_prime_contracting_and_public_construction/.

II. THE CONSTRUCTION PROCESS

The construction process that produces incredible structures like the Golden Gate Bridge and the Empire State Building can be quite complex and burdensome to those not associated with the construction industry. For clarity in addressing the issues surrounding construction delays, a brief overview of the construction process is required, including an outline of the parties and their relationships, contracts, and the law typically involved in construction delay claims.

A. *The Parties*

Relationships in the world of construction are normally contractual in nature; thus, it is vital to be familiarized with the parties entering these contractual relationships in order to understand the actual construction process. There are three primary parties in the construction process: the owner, the design professional, and the contractor.⁷ The owner is the party that desires to have something built on his property.⁸ In order to initiate construction, the owner is required to hire a design professional to create a blueprint of what is to be built and a contractor to build it.⁹ Generally, the owner is in charge of major decisions regarding control of the quality, timeliness and cost of the completed facility.¹⁰ However, the relationships are slightly more intricate.

The term “owner” refers to the party that provides the site, the money, and the general idea for the end goal of the construction.¹¹ Owners are usually divided into two categories: private owners and public owners.¹² The distinction can greatly influence the construction process, because private owners have much more freedom to contract as they are not bound by state statutes like public owners often are.¹³ Private owners are free to choose their design professional, sometimes referred to as the architect, by use of competitive bid or they can just negotiate with an entity they prefer because of reputation or familiarity.¹⁴ On the other hand, public owners

7. Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 472-78 (1998) (discussing the primary actors in commercial construction).

8. See CHRIS HENDRICKSON, *PROJECT MANAGEMENT FOR CONSTRUCTION: FUNDAMENTAL CONCEPTS FOR OWNERS, ENGINEERS, ARCHITECTS, AND BUILDERS* 1.2 (Prentice Hall 2nd ed. 2008).

9. *Id.*

10. *Id.*

11. JUSTIN SWEET & MARC M. SCHNEIER, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS* 85 (Hilda Gowans ed., Cengage Learning 8th ed. 2009).

12. *Id.*

13. *Id.*

14. *Id.*

usually have to hire designers principally on the basis of design skill and design reputation rather than fee.¹⁵ After the design professional is chosen, the owner typically shares his conceptual design or idea for the desired project, and then the design professional performs engineering analysis and creates the plans to be used for construction.¹⁶

Once the plans are created, a contractor must be chosen, and the distinction between public and private owners again plays a role in the process. Although private owners have much more freedom in choosing their contractor, virtually every Ohio state department, agency, and political subdivision must award its contracts through a competitive bidding process.¹⁷ The bidding process is initiated by a public owner through the use of a bid solicitation, usually on a website like that of Ohio's Department of Administrative Services.¹⁸ On the other hand, some public and private entities will also use other types of media to solicit bids, such as newspapers or magazines.¹⁹ The Ohio Revised Code requires that public owners prepare, adopt, and publish clear and unambiguous plans and specifications so that all participants are basing their bids on the same facts.²⁰ Typically, the participant with the lowest bid price to complete the work desired will be awarded the contract, but state agencies do use terms such as "lowest responsible bidder" in order to combat glaring mistakes made by the potential contractors when calculating their bids.²¹ As explained by the Supreme Court of Ohio, this competitive bidding scheme protects the tax payers by preventing corruption that would lead to excessive costs.²²

Though there are only three major parties involved in the construction process, there are several other parties that play important supporting roles. For example, the design professional may hire consultants that specialize in engineering analysis, such as geotechnical engineers to ensure that soil conditions are satisfactory for the construction of a skyscraper or bridge.²³

15. *Id.*

16. HENDRICKSON, *supra* note 8.

17. PETER D. WELIN, JEFFREY R. APPELBAUM & MICHAEL W. CURRIE, OHIO CONSTRUCTION LAW MANUAL § 3:2 (2009).

18. *State of Ohio Construction Bid Announcements*, OHIO.GOV, <http://apps.das.ohio.gov/ConstructionBids/construction.asp> (last visited Jan. 16, 2011).

19. *See, e.g., Legal Notices: Notice to Bidders Borough of Mt. Oliver Allegheny County, Pennsylvania*, SOUTH PITTSBURGH REPORTER, <http://sopghreporter.com/notice-to-bidders-p6924-93.htm> (last visited Dec. 30, 2011); *Dallas/Fort Worth Construction Bulletin: Construction News That's Easy to Use*, REED CONSTRUCTION DATA (July 6, 2009), available at <http://www.reedconstructiondata.com/pdf/SampleBulletin.pdf>.

20. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 3:3.

21. *Id.* at § 3:9.

22. *Cemtech, Inc. v. City of Fairlawn*, 849 N.E.2d 24, 27 (Ohio 2006) (citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 653 N.E.2d 646 (Ohio 1995)).

23. SWEET & SCHNEIER, *supra* note 11, at 90.

Similarly, the contractor may hire subcontractors to perform specific parts of a contract, and the subcontractors may hire sub-subcontractors to take care of even more specialized work.²⁴ Additionally, each of these subcontractors and the main contractor (also known as the prime or general contractor) will have material and equipment suppliers from whom they will purchase supplies and rent equipment needed to complete the construction.²⁵

B. Project Delivery and the Contract

This web of relationships is governed by contracts and the systems that deliver these projects to the parties. There are many project delivery systems, different from the system previously described, that help shape the various contractual relationships formed during the construction process. Adding to the complexity, most contracts include clauses that require contractors to keep a specific project schedule, which is then subject to change clauses that allow the owner to deviate from the original contracted work.

“A project delivery system is the process by which a project is planned, designed, constructed, commissioned, maintained and, in some cases, decommissioned.”²⁶ The most traditional project delivery system is the design-bid-build system,²⁷ which was outlined in the previous section describing the relationships of the three main actors in construction.²⁸ However, the design-bid-build system is implemented in two different ways: general contracting and multiple prime contracting.²⁹ Multiple prime contracting involves dissecting a construction project into different components—such as electrical, plumbing, and HVAC—and requiring a separate bidder or contractor for each component.³⁰ On the other hand, a design-bid-build system implemented through general contracting means that the owner awards one lump sum contract to a general contractor who holds all the specific trade contracts required to complete the project.³¹

Although the Ohio Revised Code requires that all public authorities use multiple prime contracting when the total cost of a project will be greater

24. *Id.* at 86, 90.

25. *Id.* at 86, 87, 90.

26. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:2.

27. *Id.*

28. *See supra* section II.A.

29. *Report of the Ohio Construction Reform Panel*, 17-18, ADVANTAGE OHIO (Apr. 2009), available at <http://www.keglerbrown.com/File%20Library/Practice%20Areas/Construction%20Law/april-2009-ohio-construction-reform-panel.pdf>.

30. Passella, *supra* note 6.

31. *See Report of the Ohio Construction Reform Panel*, *supra* note 29, at 17.

than \$50,000, there are several other project delivery systems.³² For instance, an owner that chooses a construction manager at risk system utilizes a person or company with substantial discretion “and authority to plan, coordinate, manage, direct and construct all phases of a project”³³ The construction manager takes price risk by guaranteeing a maximum price to complete the project based on an incomplete design.³⁴ Similarly, the owner in a design-build system enters into a contract with a single entity that will assume the design, supervision, and construction of the project; thus, the bidding is performed without a completed design.³⁵ By overlapping the design process with the construction process, these types of delivery systems help accelerate the schedule and are often utilized in the private industry.³⁶

After the project delivery system is chosen, the parties must create rules and enforce them through contracts in order to govern the various relationships in the process. Because the interlocking web of contractual rights and obligations is so complex, it would be incredibly burdensome on the parties to invent new rules for each project; thus, various professional and trade organizations have stepped in and created contract forms that can be utilized in a wide variety of construction projects.³⁷ The forms prepared by the American Institute of Architects are the most commonly used construction contract form in Ohio.³⁸ The form contract typically sets forth the basic business terms of the construction agreement including: plans and specifications; delay claim resolution procedures; warranties; and the lump-sum price of the work.³⁹

Furthermore, these contracts include provisions relating to the schedule specifications, such as dates for substantial completion and final completion.⁴⁰ These specifications will also prescribe the form and detail of the project schedule, the methods for adjusting and updating it, and how it will be used for purposes of the contract.⁴¹ There are two main types of schedules utilized in construction: bar charts (also known as Gantt charts) and critical path method schedules (“CPM”).⁴² A bar chart presents the

32. OHIO REV. CODE ANN. § 153.52 (Page’s 2010); *see* Passella, *supra* note 6.

33. Passella, *supra* note 6.

34. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:8.

35. *See* ROBERT F. CUSHMAN & JAMES J. MYERS, CONSTRUCTION LAW HANDBOOK 341-42 (1999).

36. *See* WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:8.

37. CUSHMAN & MYERS, *supra* note 35, at 357-64.

38. *See* WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:15.

39. *Id.* at § 1:16.

40. *Id.*

41. PHILIP L. BRUNER ET AL., CONSTRUCTION LAW 323 (William Allensworth et al. eds., 2009).

42. *Id.* at 312-15.

schedule with a horizontal scale broken down into time increments that provides the time reference for the project and a vertical list of the project components or work items.⁴³ On the other hand, “CPM is a graphic presentation of the planned sequence of activities that shows the interrelationships and interdependencies of the elements composing a project.”⁴⁴ The key to CPM is identifying the critical path which represents “the chain of interrelated [project components] that take the longest time to complete from the beginning to the end.”⁴⁵ In Ohio, the CPM is the popular method of scheduling with many public projects.⁴⁶ While it is suggested that bar charts and CPM only be used as tools to aid in performance of the project, they are often front and center in delay claim litigation because of rigid scheduling requirements set forth in contracts.⁴⁷

The need for flexible standards in construction scheduling is due to the unpredictable nature of construction. The progress made on a construction project is dependent on weather, design errors, the changing mind of the owner, and even freak occurrences such as having ten different people drive through freshly-poured concrete.⁴⁸ Typically, construction contracts anticipate this need for flexibility with change clauses.⁴⁹ When owners and contractors mutually agree to change the work, price, or time of performance specified by the contract, a change order will be issued.⁵⁰ Many change order disputes arise from whether the parties had the proper authority to issue change orders, and whether proper notice was given to the owner.⁵¹ Additionally, constructive changes to the contract are “found where a contractor is proven right in asserting a dispute or a claim for a change order.”⁵² When delays occur, constructive changes are often claimed, but they are normally met with authority and notice defenses.⁵³

43. *Id.* at 313.

44. *Id.* at 315.

45. *Id.* at 316.

46. *See* WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 5:2.

47. *See id.*

48. John Pepitone & Dave Dunn, *10 Cars Plow Through Wet Concrete at Massive Construction Site*, FOX4KC (Dec. 6, 2010), <http://www.fox4kc.com/news/wdaf-10-cars-plow-through-wet-concrete-120510,0,284117.story>.

49. BRUNER, *supra* note 41, at 431.

50. *Id.*

51. *Id.* at 437-42.

52. *Id.* at 446.

53. *See id.* at 447-48.

C. Delay Law and the Dugan & Meyers Case

Delays in construction are inevitable because of the infinite number of issues that could inhibit progress. For the purposes of this article, it would be impracticable to analyze every type of delay and provide corresponding examples. However, *Dugan & Meyers Construction Co. v. Ohio Department of Administrative Services*,⁵⁴ a fairly recent decision by the Supreme Court of Ohio, provides an adequate illustration of delay law for the purposes of this article.

1. Facts

Dugan & Meyers was a case that originated out of a dispute regarding a \$20.9 million contract for the construction of buildings for the Ohio State University (“OSU”).⁵⁵ Construction contractor Dugan & Myers submitted a successful competitive bid to construct three buildings to be part of OSU’s Fisher College of Business.⁵⁶ The Ohio Department of Administrative Services, OSU’s authorized contracting agent, executed a contract with Dugan & Meyers in 1997 to complete construction work according to plans and specifications prepared by Karlsberger Companies, the associate architect.⁵⁷

Along with performing some construction, the contract specified that Dugan & Meyers was to perform as a construction manager that would coordinate the work of the multiple prime contractors.⁵⁸ The contract also specified that Dugan & Meyers was to create a critical path method schedule and update it on a monthly basis.⁵⁹ Like most construction projects, time was of the essence, and the contract specified a completion date within 660 days after a Notice to Proceed⁶⁰ with liquidated damages of \$3,000 per day for each day of construction after the completion date.⁶¹ Additionally, the contract specified milestone completion dates—dates by which certain parts of the project must be completed—because some of the newly-constructed buildings were to be used for the upcoming school

54. 864 N.E.2d 68 (Ohio 2007).

55. *Id.* at 69.

56. *Id.* at 70.

57. *Id.*

58. 2 JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS 699 (5th ed., 2009).

59. *Id.*

60. A Notice to Proceed is basically a formal letter from the owner notifying a contractor that work may begin in conformance with the contract upon receipt of the notice. See Daniel C. Barr, *The Supreme Court of Arizona: Its 2004-2005 Decisions*, 38 ARIZ. ST. L.J. 189, 219 (2006).

61. *Dugan & Meyers*, 864 N.E.2d at 70.

years.⁶² The contract was also very detailed regarding delays in the construction and requests for time extensions.⁶³ The contract specified that the completion date would be extended for a reasonable amount of time to be determined by the architect if the contractor was delayed “due to suspension of the work for which the contractor is not responsible” and “any unforeseeable cause beyond the control and without fault or negligence of the Contractor.”⁶⁴ It was also stipulated that the contractor was required to make formal requests for time extensions in writing within ten days after the occurrence of a condition necessitating an extension of time.⁶⁵ If formal written requests were not made, it would be considered a waiver of any claim for extension or mitigation of liquidated damages.⁶⁶ The department sent the Notice to Proceed letter on August 15, 1997, and the official completion date was set for June of 1999.⁶⁷

After a delay-free first year of construction, Dugan & Meyers began to fall behind due to no fault of its own.⁶⁸ Inaccurate plans and specifications quickly became very evident, and the project’s completion was delayed by six months.⁶⁹ The plan errors were substantial. Framing conflicts in tiered classrooms resulted in floor heights that did not match.⁷⁰ The plans did not leave adequate space for plumbing, sometimes calling for PVC pipes to run directly through load supporting beams.⁷¹ Even the ceiling heights specified in the plans conflicted with air ducts, electrical wiring, and various other pipes.⁷² Before they could proceed with their work, these plan errors required Dugan & Meyers to seek determination by the architect as to what was intended or required.⁷³ In the end, 700 requests for information were made by Dugan & Meyers, and “Karlsberger had issued over 250 field work orders and 85 architectural supplemental instructions . . . to perform work

62. *Id.* at 70-71.

63. *See id.* at 70.

64. *Id.*

65. *Id.*

66. *Dugan & Meyers*, 864 N.E.2d at 70.

67. *Id.* However, subsequent agreements to modify the contract pushed the dates back to July of 1999. *Id.* at 70-71.

68. *See id.* at 71.

69. *Construction Update: A New Paradigm for Ohio’s Construction Industry?*, THOMPSON HINE (June 5, 2007), <http://www.thompsonhine.com/publications/publication1089.html>.

70. *See* Buckner Hinkle, Jr. & Michael I. Less, *Dealing with the Cumulative Effects of Requests for Information, Change Order Requests and Change Directives*, ABA FORUM ON THE CONSTRUCTION INDUSTRY 31 (Oct. 25-26, 2007) (transcript available at <http://www.legalist.com/newport2007/articles/Plenary4.pdf>).

71. *See id.*

72. *See id.*

73. *See Dugan & Meyers*, 864 N.E.2d at 71.

outside the contract”⁷⁴ These errors resulted in massive delays, “and OSU ultimately relieved Dugan & Meyers of its responsibilities as lead contractor”⁷⁵ Gilbane Building Company was brought in to finish the rest of the contract, and the project was completed six months after the deadline.⁷⁶

Obviously, the delays had repercussions. In its payments to Dugan & Meyers for the services rendered under the contract, OSU deducted the amount paid to Gilbane Building Company and liquidated damages of \$3,000 per day based on 188 days of delay in completion.⁷⁷ Because this was a multiple prime contract, OSU apportioned the liquidated damages amongst Dugan & Meyers and the three subcontractors based on each party’s contribution to the overall delay.⁷⁸ In response, Dugan & Meyers filed suit in the court of claims for the contract balance, and they also sought to have the liquidated damages claim reversed.⁷⁹ After a seventeen-day hearing, a referee found that the “specifications to be incomplete, inaccurate, and unbuildable[,]” and he recommended that the “contractor receive its contract balance, [and] that the liquidated damages be reversed”⁸⁰ The court of claims accepted these findings and “entered judgment for Dugan & Meyers in accord with the referee’s recommendations.”⁸¹ The court of appeals reversed the judgment of the court of claims, holding that “Dugan & Meyers was not excused from the contractual requirement that it request in writing an extension of the deadline or mitigation of liquidated damages”⁸² Dugan & Meyers appealed the court of appeals decision to the Supreme Court of Ohio.⁸³

2. Analysis

In its appeal, Dugan & Meyers urged the court to apply the *Spearin* Doctrine to this case as the referee did—basically “that the owner impliedly warrants the sufficiency of the plans and specifications and that it is liable

74. *Id.*

75. *Id.* (footnotes omitted).

76. *Id.*

77. *Id.* at 70-71.

78. *Dugan & Meyers*, 864 N.E.2d at 71.

79. SWEET, *supra* note 58, at 699.

80. *Id.*

81. *Dugan & Meyers*, 864 N.E.2d at 72.

82. *Id.* Of course, *Dugan & Meyers* addressed the issue of whether the contractor was entitled to damages, such as overhead, because of the numerous omissions, inaccuracies, and conflicts—generally known as cumulative impact damages. THOMPSON HINE, *supra* note 69. However, the purpose of this paper is better served by focusing on the application of the *Spearin* Doctrine and how it relates to the notice requirements and mitigation of liquidated damages.

83. *Dugan & Meyers*, 864 N.E.2d at 72.

for the consequences of defective designs.”⁸⁴ In *United States v. Spearin*,⁸⁵ “the United States Supreme Court recognized that when a contractor is ‘bound 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.’”⁸⁶ Ultimately, the Supreme Court of Ohio declined to apply the *Spearin* Doctrine for two main reasons: *Spearin* is distinguishable from *Dugan & Meyers* and the no-damage-for-delay clause in the contract precludes the application of the *Spearin* Doctrine.⁸⁷ The Court also ruled in favor of OSU because the contract provided a specific process to be followed in order to request time extensions, and this process was not followed by *Dugan & Meyers*.⁸⁸

The court held that the *Spearin* Doctrine did not apply in *Dugan & Meyers*.⁸⁹ *Spearin* specifically addressed “a site condition that precluded the completion of a construction project.”⁹⁰ Furthermore, Ohio courts have distinguished that in cases involving government contracts, the *Spearin* Doctrine creates an implied warranty of the accuracy of the government’s affirmative indications regarding job site conditions.⁹¹ The Court held that *Spearin* was distinguishable because *Dugan & Meyers* concerned the allocation of damages resulting from delay in completion of a construction project due to plan changes as opposed to job site conditions.⁹² Additionally, the contract in question included a no-damages-for-delay clause that provided: “‘extension of time granted pursuant to paragraph GC 6.2 shall be the sole remedy which may be provided by the Department’ and that the Contractor shall not ‘be entitled to additional compensation or mitigation of Liquidated Damages for any delay listed in paragraph GC 6.2.’”⁹³ Although no-damages-for-delay clauses were later ruled unenforceable by the Ohio General Assembly, they were enforceable at the time of the contract; thus, they were held to preclude any application of the *Spearin* Doctrine because it would offer a method by which to mitigate the liquidated damages.⁹⁴

84. THOMPSON HINE, *supra* note 69.

85. 248 U.S. 132 (1918).

86. *Dugan & Meyers*, 864 N.E.2d at 73 (quoting *Spearin*, 248 U.S. at 136).

87. THOMPSON HINE, *supra* note 69.

88. *Id.*

89. *Dugan & Meyers*, 864 N.E.2d at 73.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. THOMPSON HINE, *supra* note 69.

Moreover, the Court ruled in favor of OSU because Dugan & Meyers failed to comply with the strict contractual requirements covering requests for time extensions.⁹⁵ The contract stipulated that the contractor was required to make formal requests for time extensions in writing within ten days after the occurrence of a condition necessitating an extension of time, and it would be considered a waiver of any claim for extension or mitigation of liquidated damages if no written request was made.⁹⁶ Dugan & Meyers argued that it was excused from complying with the strict contract requirements because the owner had *actual notice* of the need for time extensions.⁹⁷ The court held that Dugan & Meyers failed to demonstrate that the owner gave affirmative or implied waiver of the change order procedures; thus, they were not entitled to disregard that obligation.⁹⁸ Dugan & Meyers lost their appeal, and the entire Ohio construction industry was on alert.⁹⁹

3. *Impact and the Future of Delay Law*

Dugan & Meyers had several effects on construction law, but some have claimed that it has raised more questions than it has answered.¹⁰⁰ One of those questions is where does the *Spearin* Doctrine stand in Ohio delay law?¹⁰¹ The court conveniently relied on the no-damages-for-delay clause in the contract to avoid analyzing how the *Spearin* Doctrine would apply to delays caused by plan errors.¹⁰² It is clear that this decision has greatly weakened the use of the *Spearin* Doctrine in Ohio. However, because Ohio Revised Code section 4113.62(C)(1) has rendered no-damages-for-delay clauses unenforceable, *Dugan & Meyers* now has no application to future cases.¹⁰³

The emphasis placed on the change clause in the contract has consequences as well. Project owners will use the decision to enforce the strict notice provisions for claims and time extensions; thus, contractors will have to comply with the contractual provisions, regardless of an owner's knowledge of the project status.¹⁰⁴ Contractors will have to be very mindful

95. *Id.*

96. *Dugan & Meyers*, 864 N.E.2d at 70.

97. THOMPSON HINE, *supra* note 69.

98. *Id.*

99. *See Dugan & Meyers*, 864 N.E.2d at 76.

100. THOMPSON HINE, *supra* note 69.

101. *See id.*

102. *See id.*

103. *See id.*; *see also* OHIO REV. CODE ANN. § 4113.62(C)(1) (LexisNexis 2011).

104. Michael Fortney, *Contractor's Reliance on Plans and Specifications*, FORTNEY & KLINGSHIRN (Dec. 31, 2009), <http://www.fklaborlaw.com/articles/Contractors-Reliance-on-Plans-and-Specifications.html>.

of the notice requirements in their contracts, and they will have to be prepared to “stop work on [their] projects to wait for an owner’s decision” regarding the issuance of a change order.¹⁰⁵

The impact of *Dugan & Meyers* is well documented, but it also serves as an illustration of several flaws in Ohio delay law, the worst being the preference of form over substance. The nature of construction calls for a new, more seamless system that places an emphasis on substance. A system that focuses on substance would allow contractors and owners to focus on the job at hand instead of drowning in potential paperwork. Additionally, *Dugan & Meyers* shows why the *Spearin* Doctrine should be applied to delays caused by plan errors—otherwise, a completely innocent party is punished for another party’s negligence.¹⁰⁶ Architects should be held accountable, and a shift in liability would achieve this end. Lastly, multiple prime contracting needs to be eliminated from Ohio construction. As *Dugan & Meyers* proved, when one construction manager is in charge of multiple prime contractors, the effects of delays can be greatly compounded and result in massive delay damages.¹⁰⁷ The elimination of multiple prime contracting would eradicate this compounding effect.

III. FORM OVER SUBSTANCE

Dugan & Meyers effectively established that Ohio delay law favors form over substance—that is, the party that fills out their paperwork the best will win in delay claim disputes. However, this system is counterproductive to the efficiency of the construction industry. Choosing form over substance also seems inequitable considering the nature of construction. Contractors are typically at the mercy of public owners, and recognizing a theory of actual notice would help level the playing field.

A. Form Over Substance Harms Construction Efficiency

Many construction contracts provide detailed processes to be followed in order effectuate changes, much like the contract at issue in *Dugan & Meyers*.¹⁰⁸ The most controversial element of these change order processes is the requirement of written notice. Of course notice requirements should be followed in nearly every situation if the contract calls for it. However, actual notice should be held to be sufficient in cases dealing with ongoing

105. THOMPSON HINE, *supra* note 69.

106. See *Dugan & Meyers*, 864 N.E.2d at 73.

107. See *id.*

108. *Id.* at 70.

delays caused by the cumulative impact of multiple design errors or unforeseeable problems.¹⁰⁹

The goal of the contractual notice requirements is to give the owner a reasonable amount of time to react and possibly remedy the problem delaying the project.¹¹⁰ “In the case of ongoing delays, occasioned by the cumulative impact of multiple design errors, the contractor needs to make sure that the owner is on notice of the delays and their cause.”¹¹¹ Providing written notice is a good principle considering not all delays are obvious, but the parties should not be expected to provide notice for every issue that may result in delay. This is the nature of construction: every party wants to complete the project as quickly as possible. The owner needs a structure to make money, and the contractor wants to avoid liquidated damages; thus, parties tend to streamline processes through various oral agreements.¹¹² Because of the nature of construction, actual notice should be recognized by the courts despite the contractual requirements.

Again, consider *Dugan & Meyers*, a case where 700 requests for information were made by the contractor, and the architect issued over 250 field work orders and 85 architectural supplemental instructions to perform work outside the contract.¹¹³ The issues regarding delays caused by plan error were brought up in project meetings and even memorialized in the meeting minutes.¹¹⁴ There is no doubt that the owner had notice of the delays in the case of *Dugan & Meyers*; therefore, the purpose of the contractual notice requirements had been served.¹¹⁵ However, the court chose not to recognize this actual notice theory and instead required strict compliance with the contractual notice requirements.¹¹⁶ This effectively ruins any attempt at streamlining a project, and it has undesirable effects on the construction industry:

109. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant Dugan & Meyers Constr. Co., Inc., *Dugan & Meyers*, 864 N.E.2d 68 (No. 2005-1698), 2006 WL 1021033 at *11.

110. George T. McLaughlin, *Contract Notice & Recognition*, PROJECT PROFESSIONALS (Feb. 16, 2011), <http://projectprofessionals.org/2011/02/16/contract-notice-and-recognition/>.

111. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *12.

112. Brief of Amicus Curiae Ass'd Builders & Contractors, Inc., et al., in Support of Appellant Dugan & Meyers Constr. Co., Inc., et al., *Dugan & Meyers*, 864 N.E.2d 68 (No. 2005-1698), 2006 WL 1021034 at *8.

113. *Dugan & Meyers*, 864 N.E.2d at 71.

114. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *11.

115. *Id.* at *11-12.

116. Patrick A. Devine, *Failure to Comply with Contract's Change Order Procedure may Result in Waiver of Claim*, LEXOLOGY, Mar. 7, 2011, <http://www.lexology.com/library/detail.aspx?g=9491c318-a809-457b-90c2-bcabe278232>.

The participants in any construction project, when confronted with doubt about the sufficiency of even actual notice, would have little or no alternative but to give repeated written notices of every problem. In the case of the numerous and ongoing design-related problems that can plague a project, this could lead to a virtual snowstorm of ongoing, redundant and pointless written notices, with resulting costs and inefficiencies for all concerned.¹¹⁷

In turn, this causes “contractors and owners to spend more energy and time on paperwork versus building a quality project.”¹¹⁸

In the wake of *Dugan & Meyers*, Ohio courts have acknowledged that it is possible to bypass the contractual requirement of written notice. In *Stanley Miller Construction Co. v. Ohio School Facilities Commission*,¹¹⁹ a prime contractor expressed concerns to the owner’s construction manager regarding what it perceived to be costly inefficiencies in the schedule of a construction project for a school—such as not allowing adequate allotted time for components of the construction and even missing certain components completely.¹²⁰ Stanley Miller Construction, the prime contractor in charge of masonry, had a contentious relationship with the construction manager, who made several threats regarding the imposition of liquidated damages.¹²¹ On the day the project was supposed to be substantially completed, Stanley Miller submitted a claim to the owner for \$1.1 million, representing unexpected costs incurred because of the inefficiencies in the schedule.¹²² Subsequently, the school project was substantially completed one month later.¹²³ Although both parties met to discuss the claim, Stanley Miller brought suit and won \$404,276 on the basis that the construction schedule was fundamentally flawed, and the case eventually found its way to the Tenth District Court of Appeals.¹²⁴ Not surprisingly, the appeals court applied *Dugan & Meyers* and ruled in favor of the owner because of the contractual requirement of written notice.¹²⁵

117. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *12.

118. Donald W. Gregory, *Dugan & Meyers: Ohio Supreme Court Rules for Public Owner*, OHIO ASPHALT 20 (Summer 2007), available at <http://www.keglerbrown.com/File%20Library/Practice%20Areas/Construction%20Law/summer07-duganmeyers.pdf>.

119. *Stanley Miller Constr. v. Ohio*, Nos. 10AP-298, 10AP-299, 10AP-432, 10AP-433, 2010 WL 5544013 at *1 (Ohio App. 10th Dist. Dec. 28, 2010).

120. Devine, *supra* note 116.

121. *Stanley Miller*, 2010 WL 5544013, at *1.

122. *Id.* at *2.

123. *Id.* at *1.

124. *Id.* at *2.

125. *Id.* at *6.

The appeals court held that “something more than actual notice on the part of the state is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts.”¹²⁶ While Stanley Miller did provide evidence that some changes were made to the contract without following the specific notice requirement procedure, the court held that this was not enough to excuse the failure to follow the contract in this case.¹²⁷ The case was remanded to the trial court to determine whether strict compliance with the written notice requirements was waived by the parties.¹²⁸

Most likely, future litigation regarding *Stanley Miller* will tell the construction world if courts are willing to ease up on contractors and make an exception to written notice requirements. However, it is still very clear that actual notice has been eliminated as a way to bypass contractual requirements of written notice.¹²⁹ Sadly, this will continue to strain relationships between contractors and owners, and paperwork will remain the focus of the parties instead of the project itself.

B. Form Over Substance is Inequitable

Requiring form over substance not only results in a “snowstorm” of written notices, but it also creates an inequitable result. Since the 1800s, courts in the United States have tried to resolve contract disputes in the fairest way possible.¹³⁰ In *Willard v. Tayloe*,¹³¹ the Supreme Court of the United States held that specific performance “is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case.”¹³² The Court specifically indicated that it would not order a remedy of specific performance if the circumstances of the case did not call for it, despite written contractual obligations of both parties.¹³³ Though the specific performance remedy is not at issue in the case of delay claims resulting from the cumulative impact of multiple design errors, the principle can be carried over.¹³⁴ Despite this, Ohio courts have declined to “rewrite” contracts to achieve a more equitable result when the contract has an

126. *Stanley Miller*, 2010 WL 5544013, at *6.

127. *Id.* See also Devine, *supra* note 116.

128. Devine, *supra* note 116.

129. See *Dugan & Meyers*, 864 N.E.2d at 76; see also *Stanley Miller*, 2010 WL 5544013, at *6.

130. See *Willard v. Tayloe*, 75 U.S. 557 (1870).

131. 75 U.S. 557.

132. *Id.* at 565.

133. See *id.*

134. See *id.*

express provision governing the dispute.¹³⁵ When examining *Dugan & Meyers*, it is quite clear that courts should strive for a more equitable solution when faced with delay claims resulting from plan errors, and recognizing actual notice would help rectify this problem.

In *Dugan & Meyers*, the issue of schedule slippage due to the frequent need for clarification, modification, and completion of design documents were discussed at weekly progress meetings, and special meetings between the design team and the contractors were eventually held as well.¹³⁶ The owner's design team actually began a series of regular meetings for the purpose of "damage control" against potential delay claims.¹³⁷ This was direct evidence that the owner knew of the inability to maintain the desired construction schedule.¹³⁸ The cumulative impact of the design errors had made it impossible to finish the contract on time.¹³⁹ Nevertheless, OSU insisted on completion by a fixed date while continually denying any responsibility for the delay.¹⁴⁰ *Dugan & Meyers* knew it would be a waste to even request a time extension in writing as required by the contract.¹⁴¹ This thought later proved conclusive. The owner invited the contractors to file their claims just before contract completion, and OSU denied them in their entirety, it should be noted, *without bringing up anything regarding the notice requirements*.¹⁴² This shows the imbalance of bargaining power between the two parties. *Dugan & Meyers* was officially between a rock and a hard place in this case. The court had a chance to level the playing field by recognizing an actual notice theory, but it declined.¹⁴³ Now owners have even more power to wield, as contractors are now required to focus on paperwork almost as much as the actual construction they were hired to do.

Choosing form over substance also allows the owner to take advantage of contractual loopholes created by events not anticipated or foreseen by the parties at the time of contracting. OSU made it very clear that they were not going to extend the completion date.¹⁴⁴ But OSU also insisted that the contractor continue to work, and it did while sustaining significant losses

135. *Dugan & Meyers*, 864 N.E.2d at 75.

136. Referee Report at 7, *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Serv's.*, 2003-Ohio-3709 (No. 2001-07084), available at <http://www.sconet.state.oh.us/rod/docs/pdf/13/2003/2003-Ohio-3709.pdf> (last visited Dec. 31, 2011).

137. *Id.* at 35.

138. *See id.*

139. *Id.* at 6-7.

140. *Id.* at 39.

141. Referee Report, *supra* note 136, at 39.

142. *Id.* at 35.

143. *Dugan & Meyers*, 864 N.E.2d at 75.

144. Referee Report, *supra* note 136, at 35, 39.

through no fault of its own.¹⁴⁵ This situation almost appeared as though OSU was leading Dugan & Meyers on by letting them assume that they would be able to recoup their losses by filing a claim after the work had been completed. Dugan & Meyers was surely under this impression considering it had nothing at all to do with the plans provided by the owner.¹⁴⁶ In addition, the contract provision requiring notice within ten days of the occurrence of a claim-worthy event was nearly impossible to follow in this case, as hundreds of notices would have been required.¹⁴⁷ After all, neither party could have foreseen the number of plan errors that would require future attention.¹⁴⁸ Also, there was no way of telling when the errors would cease in becoming known to the parties.¹⁴⁹ OSU took advantage of Dugan & Meyers by using a contract loophole created by an event unforeseeable to the parties at the time of contracting.¹⁵⁰ If actual notice was used by the court in this situation, or similar future situations, inequitable results like that of *Dugan & Meyers* would not occur. The contract would be honored as it was intended by the parties when it was made.

IV. SHIFTING LIABILITY

The troubling nature of choosing form over substance is only the first of many problems associated with the Court's decision in *Dugan & Meyers*. The main concern is that the wrong party is being punished. The design-bid-build system, which was used in *Dugan & Meyers*, creates relationships between the parties that give the contractor very constricted rights in regards to examining the plans before a contract is formed.¹⁵¹ Regardless, the majority in *Dugan & Meyers* held that the contractor was responsible for correcting the faulty plans provided by the owner.¹⁵² This line of reasoning is flawed, and liability for faulty plans must be shifted away from contractors and towards owners and architects. Liability can be shifted to the owner by strengthening the application of the *Spearin* Doctrine so that the parties are on a more equal plain. Additionally, liability can be shifted to the architect by addressing these potential issues during the forming of the contract.

145. *Id.* at 13-22.

146. *See id.* at 13.

147. *See id.* at 13, 37.

148. *Id.* at 39.

149. *See* Referee Report, *supra* note 136, at 39.

150. *See id.*

151. *See supra* Part II.B; *Dugan & Meyers*, 864 N.E.2d at 70.

152. *Dugan & Meyers*, 864 N.E.2d at 77 (Pfeifer, J., dissenting).

A. The Court Punishes the Wrong Party

It is quite obvious that Dugan & Meyers was not at fault in its case against OSU other than the fact that it failed to fill out the proper paperwork. Nevertheless, the Court placed the burden on the contractor.¹⁵³ Justice Pfeifer summed up the *Dugan & Meyers* majority decision:

The majority seems to suggest that an owner need not be concerned with preparing accurate plans, since any deficiencies must be corrected by the contractor. As it turns out, the state could have saved a lot of money on blueprints and just submitted some sketches on the backs of a few cocktail napkins.¹⁵⁴

The court's decision to not apply the *Spearin* Doctrine exhibits a flawed line of reasoning. The nature of the bidding process makes it inequitable for the court to impose liability on the contractor for defective plans.¹⁵⁵ Also, the responsibility for the accuracy of the information used in a construction project should naturally fall on the party that provides the information, and if the liability is placed on the contractor, unacceptable incentives and disincentives will be created.¹⁵⁶ Lastly, *Dugan & Meyers* leaves the contractor with no effective remedy against the party that actually caused it harm.¹⁵⁷

Imposing liability on the contractor for defective plans is inequitable considering the nature of construction bidding.¹⁵⁸ After the owner has hired an architect to design a project, the owner typically approves the design and the blueprints are made available to contractors throughout the bidding process.¹⁵⁹ Contractors intending to bid on the project must then analyze the plans and potential work site to determine how much the work will cost so that they can submit what they perceive to be the lowest feasible bid.¹⁶⁰ The plans are usually only made available to contractors for thirty days.¹⁶¹ On the other hand, architects take months or even years to develop a schematic design of the potential project.¹⁶² In *Dugan & Meyers*, as a

153. *Id.* at 75 (majority opinion).

154. *Id.* at 77 (Pfeifer, J., dissenting).

155. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *3.

156. *Id.* at *5.

157. *Id.* at *7.

158. *Id.* at *3-5.

159. *Id.* at *3.

160. See CUSHMAN & MYERS, *supra* note 35, at 220-21.

161. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *3.

162. *Id.*

matter of fact, several different design firms started developing the plans and specifications for OSU in June of 1995, and the plans were made available to the contractors for four weeks starting on May 16, 1997; thus, the design team had about two years to review the plans and the contractors had about one month.¹⁶³ Under the *Dugan & Meyers* decision, contractors with a limited opportunity to review the plans are held to be liable for errors in plans as opposed to the design professionals.¹⁶⁴ In light of the time disparity, common sense dictates that contractors should not be saddled with the burden of fixing inaccurate plans and specifications.¹⁶⁵

Placing the liability for faulty plans on the contractors also creates unacceptable incentives and disincentives.¹⁶⁶ Contractors participating in the public works bidding process are now compelled to try to avoid the risk of inaccuracies in plans.¹⁶⁷ This may entail including a contingency factor into their bid prices or even by avoiding bidding on public projects which would dilute competition—both of which would raise the costs of all public improvements.¹⁶⁸ Additionally, contractors are incentivized to ignore plan defects.¹⁶⁹ If courts are going to make contractors completely liable, they will be more likely to keep the defects quiet, “especially when the defect is arguable or marginal, or when the resulting cost of the ‘fix’ could mean that the contractor itself would face bankruptcy or ruin.”¹⁷⁰

Dugan & Meyers has also left the contractor, who has suffered harm, with no remedy against the party who caused it.¹⁷¹ In *Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Ass’n*,¹⁷² a flooring installation contractor sued an architectural firm for negligently specifying flooring and sealant products that were incompatible with construction methods used on the project.¹⁷³ After the contractor installed the flooring in a manner prescribed by the owner’s installation instructions—which were provided by the architect—“bubbles of varying size began to appear” on the floor and additional costs were incurred in determining the cause and

163. *Id.* at *4.

164. *See generally Dugan & Meyers*, 864 N.E.2d 68.

165. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *4.

166. *Id.* at *5.

167. *Id.*

168. *See id.*

169. *See id.* at *5-6.

170. *See* Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *6.

171. *See id.* at *7.

172. 560 N.E.2d 206 (1990).

173. *Id.* at 206.

correcting the problem.¹⁷⁴ The court held that a contractor cannot sue an architect for economic injury due to allegedly defective plans and specifications if there is no direct contractual relationship or privity between the two parties.¹⁷⁵

When combined with the decision in *Floor Craft*, the court in *Dugan & Meyers* gave the contractor no remedy against the party who caused the actual harm, because now the architect and owner are protected.¹⁷⁶ An innocent party was left picking up the costs of two negligent parties,¹⁷⁷ and this should never be the case. In situations involving defective plans, the liability must either be shifted to the party who provides the plans, the owner, or the party that creates the plans (the architect).

B. Shift Liability to the Owner

While the architect who provides faulty plans seems to be the natural party to shift liability upon, the Ohio Revised Code and the *Spearin* Doctrine generally direct liability to the owner in cases involving defective plans.¹⁷⁸ Additionally, *Spearin* should have been applied in *Dugan & Meyers*, as it does apply to cases where there are numerous errors, omissions, and changes to the plans and specifications.¹⁷⁹ Placing liability for plan defects on the owner rather than the contractor would be good for construction in Ohio, and it would also be good public policy.

An argument should not have to be made to establish that liability for plan errors should be shifted over to the owner, because the Ohio Revised Code already does.¹⁸⁰ The section of the Ohio Revised Code that applies to the Department of Administrative Services requires that when any building is to be erected or constructed, the owner shall have “full and accurate plans” made by an architect or engineer.¹⁸¹ The statute also requires that the architect or engineer create “[d]efinite and complete specifications of the work to be performed, together with such instructions” that will enable a competent contractor to carry them out.¹⁸² This statute appears to give rise to a reasonable presumption on the part of contractors bidding on public

174. *Id.*

175. *Id.* at 212.

176. *See Dugan & Meyers*, 864 N.E.2d at 75-76; *see also Floor Craft Floor Covering, Inc.*, 560 N.E.2d at 206.

177. *See Dugan & Meyers*, 864 N.E.2d at 75.

178. *See OHIO REV. CODE ANN. § 153.01* (LexisNexis 2011); *Spearin*, 248 U.S. at 136-37.

179. Brief of Amicus Curiae Ass'd Builders & Contractors, Inc., et al., in Support of Appellant, *supra* note 112, at *6-8.

180. *See OHIO REV. CODE ANN. § 153.01*.

181. *Id.* § 153.01(A), (B).

182. *Id.* § 153.01 (D).

works contracts.¹⁸³ Regardless, *Dugan & Meyers* has made this statute appear to be nothing more than a goal as opposed to a requirement.¹⁸⁴

Dugan & Meyers also ignored a construction law history that has placed the liability for faulty plans on the owner since 1871.¹⁸⁵ In *Boren & Guckes v. Darke County*,¹⁸⁶ the court addressed a legislative enactment that “authoriz[ed] county commissioners to erect court houses and other county buildings” in 1869.¹⁸⁷ Section 7 of 66 Ohio Laws, 52 specified that when county commissioners were required to erect a courthouse, they were required to “make, or procure some competent architect to make a full, complete and accurate plan or plans for such court house[.]”¹⁸⁸

The premise of owner liability for faulty plans was later upheld by the Supreme Court of the United States in 1918. In *Spearin*, the contractor was hired to build a dry dock at the Brooklyn Navy Yard.¹⁸⁹ Bound by the plans and specifications prepared by the government, the contractor was required to relocate a section of six-foot diameter brick sewer.¹⁹⁰ Despite the contractor’s full compliance with the prescribed requirements of the plans, the excavation of the dry dock was flooded about a year after the relocation of the sewer.¹⁹¹ As it turned out, the existing sewer system caused a large amount of storm water to be diverted into the sewer section that was to be replaced, and the relocated sewer line proved inadequate and burst in several places after heavy rainfall.¹⁹² Despite general contract clauses requiring the contractor to examine the site and plans, the Court ruled in favor of the contractor.¹⁹³ The Court reasoned that the obligation to examine the site did not entail inquiry into the history of the area to determine “whether the sewer *specifically prescribed by the Government* would prove adequate.”¹⁹⁴ Additionally, the duty to check the plans was held to not impose an obligation to analyze their adequacy in regards to accomplishing the purpose sought by the owner.¹⁹⁵ Justice Brandeis further held:

183. Brief of Amicus Curiae Ass’d Builders & Contractors, Inc., et al., in Support of Appellant, *supra* note 112, at *4-5.

184. *See generally Dugan & Meyers*, 864 N.E.2d 68.

185. *See Boren & Guckes v. Darke Cnty.*, 21 Ohio St. 311 (Ohio 1871); *see also Spearin*, 248 U.S. at 136-37; *see generally* *Mason Tire & Rubber Co. v. Cumminsblair Co.*, 157 N.E. 367 (1927).

186. 21 Ohio St. 311.

187. *Id.* at 317.

188. *Id.*

189. *Spearin*, 248 U.S. at 133.

190. *Id.*

191. *Id.* at 134.

192. *Id.* at 134-35.

193. *Id.* at 136-37.

194. *Spearin*, 248 U.S. at 137 (emphasis added).

195. *Id.*

The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the dry-dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate.¹⁹⁶

This implied warranty is the basis of the *Spearin* Doctrine, and a profoundly common sense rule. “[I]f the contractor is bound 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.”¹⁹⁷

The common sense applied in *Spearin* should be brought back to Ohio construction law. In fact, the *Spearin* principles should have been applied in *Dugan & Meyers*.¹⁹⁸ There had never been a ruling in Ohio that specifically limited the *Spearin* Doctrine to one single identifiable error or omission until *Dugan & Meyers*, but a federal Board of Contract Appeals decision did set a precedent that the Supreme Court of Ohio should have followed.¹⁹⁹ In *David J. Tierney Jr., Inc.*,²⁰⁰ damages were sought by a contractor because of forty-four change orders, and the Board held for the contractor reasoning that the numerous changes made by the owner to the contract impeded the contractor from completing the job.²⁰¹ Despite the fact that the contractor could not pinpoint, day by day, the effect of each change order on each item of work, the Board held that the changes had a cumulative impact on job progress as a whole.²⁰² This decision was made before *Dugan & Meyers* and its proposition—that the more changes one is forced to make to a project, the more difficult, expensive, and time consuming it becomes—is a proposition the Ohio courts should adopt.

Not only would a liability shift to the owner fall into line with established legal history, but the shift would be good public policy considering the incentives that would result.²⁰³ If liability for delays resulting from the cumulative impact of numerous design errors is with the

196. *Id.*

197. *Id.* at 136.

198. Brief of Amicus Curiae Ass’d Builders & Contractors, Inc., et al., in Support of Appellant, *supra* note 112, at *2.

199. *Id.* at *6-7.

200. *David J. Tierney Jr., Inc.*, GSBCA No. 7107, 88–2 BCA ¶ 20,806.

201. *Id.*

202. *Id.*

203. See Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *1.

contractor, many contractors will be inclined to build according to the plans without raising concerns for fear they will be saddled with massive liquidated damages penalties.²⁰⁴ But if the liability is shifted to the owner, the contractor has an incentive to point out any problems in the plans because the owner will reimburse the contractor for the additional time and costs which will result.²⁰⁵ This is the most logical situation considering there should be some incentive to identify problems in the plans that could lead to defective or unsafe construction, as opposed to an incentive to remain quiet and build as the plans require.²⁰⁶

Yet Ohio courts have chosen to go in a different direction. As a result, the Ohio construction industry is incurring increased costs and inefficiency because of potential liability for cumulative impact delays.²⁰⁷ The increased costs and inefficiencies resulting from the potential of liability have two main effects. First, local construction companies will be a step behind regional and nationwide construction companies because the increased costs are passed along as part of the bidding process.²⁰⁸ Companies in other jurisdictions will not be saddled with these costs and inefficiencies, and they will be a step ahead of Ohio construction companies and in a better position to bid lower on construction contracts.²⁰⁹ Second, the increased costs resulting from potential liability will tend to squeeze smaller contractors out of the local market.²¹⁰ Not every contractor can afford to take on the multi-million dollar costs of these delay claims, as smaller contractors would “be crushed by the exposure on a single job and go out of business.”²¹¹ Even the larger local contractors will be greatly burdened if a delay resulting from cumulative impact of design errors occurs because they will be forced to take smaller jobs with less risk.²¹² The best way to combat these effects is to give more deference to the *Spearin* Doctrine and shift liability onto the owner.

C. Shift Liability to the Architect

If Ohio courts are unwilling to shift liability to the owner, the alternative which makes the most sense is that the liability be shifted to the

204. *See id.* at *5.

205. *Id.* at *5-6.

206. *See id.*

207. *Id.* at *9-10.

208. Merit Brief of Amicus Curiae Allied Constr. Indus. in Support of Plaintiff-Appellant, *supra* note 109, at *9.

209. *Id.* at *5-9.

210. *Id.* at *6.

211. *Id.*

212. *Id.*

architect. Unfortunately, the only way architects will be burdened with this liability is if the courts are willing to ignore a wealth of legal precedent regarding privity.²¹³ However, there are steps that can be taken before a construction contract is formed that could help contractors avoid paying for the mistakes of architects. In order to shift liability to the entity that is actually responsible for the damages, parties can change the project delivery system, bargain for more favorable contractual provisions, and seek legislative solutions.²¹⁴

Contractors and owners can solve the privity problem established in *Floor Craft* by changing the project delivery system used. As mentioned earlier, the project delivery system of choice by public entities is the design-bid-build system—where the architect designs the blue prints, and the lowest-bidding contractor gets to build the project.²¹⁵ This system prevents the contractor and architect from ever being in privity, thus insulating the architect from liability. Alternatively, the parties could implement a design-build system.²¹⁶ “Under the design-build project delivery method, the owner engages a single entity to provide both design and construction services.”²¹⁷ Basically, “the architect and the contractor are on the same team” when a design-build project delivery system is implemented; thus, the contractor and architect are in privity.²¹⁸

However, the design-build system does have flaws that would affect their use in the public sector.²¹⁹ Contractors need complete design drawings and a well-defined scope of work in order to produce an accurate bid, but Ohio requires publically-financed construction projects to be competitively bid rather than negotiated.²²⁰ The design-build system does not allow contractors to produce hard bids with performance objectives; thus, contracts would have to be awarded based on criteria other than competitive bidding.²²¹ Of course, questions would surely arise because the competitive

213. See generally *Floor Craft Floor Covering, Inc.*, 560 N.E.2d at 206 (much of the decision discusses the law regarding contractual privity).

214. See Jason Shoemaker, Construction Drawings that Work—or Maybe Not?: Architects get a Free Pass in Ohio, 3 LIBERTY U. L. REV. 183, 199-200 (2009).

215. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:2.

216. Shoemaker, *supra* note 214, at 199-200.

217. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:10.

218. See Shoemaker, *supra* note 214, at 199-200.

219. See *id.* at 200.

220. See WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:10; see also Shoemaker, *supra* note 214, at 200.

221. See Shoemaker, *supra* note 214, at 200; see also WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:2.

bidding process is the key method in preventing corruption.²²² Yet, with the wealth of technology at the hands of government entities, a record system could be implemented which would help estimate the costs of certain types of contracts so prices could be kept in check. If the legislature would then impose a system that required good faith bargaining on the government and the bidding design-builders, negotiated construction contracts would be successful. Alternatively, a separate policing organization could even be created to help prevent corruption. The implementation of additional procedural safeguards would further ensure efficient expenditure of tax dollars.²²³ For example, contractors could be required to “compete on a profit percentage and design fee basis rather than total project costs.”²²⁴

In order to implement these ideas, the state legislature is the route to be taken. Ohio currently requires the design-bid-build system for public projects, but the Ohio Legislature passed a bill in 2010 that requires three pilot projects to utilize alternate project delivery methods.²²⁵ Coincidentally, one of the designated alternate delivery methods is the design-build system.²²⁶ This is a step in the right direction, but more needs to be done. The legislature needs to keep exploring new and better methods than the system currently in place. Otherwise, the architect will continually be given a free pass to do inferior work.

In lieu of seeking a legislative solution, the contractors could just focus on the contracts they sign with owners. Contractors should be wary of clauses pertaining to delays, and request provisions that prevent them from paying for the mistakes of another party. However, the sophistication of the parties plays a large role in making the contracts.²²⁷ Sophisticated parties may choose to have the assistance of counsel when they negotiate contracts, and this ensures that their contract will allocate the risk and responsibility in a commercially reasonable way.²²⁸ On the other hand, small contractors will often just use industry form contracts.²²⁹ Contractors should be encouraged to seek the assistance of counsel when entering into contracts with government owners. But it should be noted that owners typically will still have all the bargaining power. Regardless whether the liability should

222. See *Bd. of County Comm’r, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 691-93 (1996) (noting that “all 50 states have enacted legislation imposing competitive bidding requirements on various types of contracts with the government” to help prevent corruption).

223. See Shoemaker, *supra* note 214, at 199-202.

224. *Id.* at 200.

225. Passella, *supra* note 6.

226. *Id.*

227. See Shoemaker, *supra* note 214, at 200-01.

228. *Id.* at 200-01.

229. *Id.*

rest with the architect or the owner, the best solution to allocating liability for delays resulting from multiple plan errors is to be proactive during the contracting process. Both parties should anticipate worst-case scenarios and plan accordingly so that the wrong party is not punished.

V. MULTIPLE PRIME CONTRACTING

In light of common sense, it appears that shifting liability to the owner or architect is the most glaring problem with construction delays resulting from the cumulative impact of multiple design errors. Nevertheless, this cumulative impact could be minimized if multiple prime contracting was eliminated entirely. Although Ohio is taking steps to eradicate this horrid method of project delivery, more needs to be done.²³⁰ There are several alternative systems that would make the entire construction industry much more streamlined and efficient.

A. Eliminate Multiple Prime Contracting

Multiple prime contracting, as previously mentioned, is a method of dissecting the components of construction contracts and having separate entities bid on each component independently.²³¹ Because large public contracts have different contractors for general trades, plumbing, electrical, and mechanical work, one plan error can lead to a domino effect. Consider *Dugan & Meyers*, where multiple prime contracting was implemented.²³² The plans had numerous conflicts in ceiling heights, plumbing system dimensions, electrical system dimensions, and HVAC dimensions.²³³ The plan errors resulted in a slowdown of framing and drywall work, and “[t]his led to cascading delays into plumbing, electrical, and HVAC contractors”²³⁴ This domino effect is common in most construction projects dealing with delays, but the errors were more pronounced for *Dugan & Meyers*.²³⁵ As a construction manager, *Dugan & Meyers* was responsible for coordinating all of the co-prime contractors on the project.²³⁶ “[T]he multiple changes to the design documents resulted in an increase in *Dugan & Meyers*’ cost to coordinate the work of co-prime contractors,

230. See Passella, *supra* note 6.

231. *Id.*

232. Timothy R. Hughes, *Defective Plans*, HUGHESNASSOCIATES.COM, <http://www.hughesnassociates.com/articles/TH/EC/defective.htm> (last visited Apr. 14, 2011).

233. *Id.*

234. *Id.*

235. Brief of Amicus Curiae Ass’d Builders & Contractors, Inc., et al., in Support of Appellant, *supra* note 112, at *7.

236. *Id.*

supervise the project, maintain and update the schedule, update the working drawings and process related paperwork.”²³⁷ Some projects can have up to twenty-five different prime contractors, and delays can result in excessive costs for everyone; thus, the system is incredibly inefficient.²³⁸ The required use of multiple prime contracting slows construction progress, decreases efficiency, and increases the risk of litigation because so many different contractual relationships are involved.²³⁹

It should be noted that multiple prime contracting is not bad for every project. When multiple prime bids are solicited, many contractors “eliminat[e] a layer of mark-up for profit and overhead,” and this lowers the prices of multiple prime construction contracts overall.²⁴⁰ Additionally, multiple prime contracting allows small businesses to bid on larger contracts, and it protects against favoritism and corruption by not allowing contractors to bid shop.²⁴¹ For optimal performance, however, public owners should be allowed to select the project delivery system that best suits their specific project.²⁴²

Ohio is moving towards project delivery system diversity in public works projects.²⁴³ When the “state lawmakers and [ex-]Governor Strickland finally reached an agreement on the state budget for fiscal year 2010[,] [a] key component of the Bill [was] the overhaul of Ohio’s 132 year-old [multiple prime] bidding requirements for public construction projects”²⁴⁴ The program is experimental, and it requires “the Chancellor of the Ohio Board of Regents, in consultation with representatives of state institutions of higher education and with Controlling Board approval . . . to designate 1 construction project at . . . 3 different

237. *Id.*

238. *See, e.g.,* William D. Clifford, *Private Sector: State Needs to Change Outdated ‘Multiprime’ Approach to Public Building Projects*, PITT. POST-GAZETTE, Oct. 9, 2007, at A8.

239. Richard Hobbs, Executive Director, AIA OHIO, *Pro and Con Testimony on Eliminating Multiple Prime Contracting*, http://aiaohio.org/index.php?option=com_content&view=article&id=372:pro-and-con-testimony-on-eliminating-multiple-prime-contracting&catid=38:legislative-issues&Itemid=50 (last visited Dec. 31, 2011).

240. Valerie Dahlberg, Executive Director, AIA OHIO, *Pro and Con Testimony on Eliminating Multiple Prime Contracting*, http://aiaohio.org/index.php?option=com_content&view=article&id=372:pro-and-con-testimony-on-eliminating-multiple-prime-contracting&catid=38:legislative-issues&Itemid=50 (last visited Dec. 31, 2011).

241. *See id.* Bid shopping is an unethical practice used by contractors where the general contractor squeezes the subcontractors into lowering their original quotes after winning the contract through the bidding process. Clifford, *supra* note 238.

242. *See* Hobbs, *supra* note 239. Not only will the freedom to choose the project delivery system that best suits a particular project help streamline the construction, but it will also provide the opportunity to save an estimated ten to thirty percent of the construction costs. *See id.*

243. *See* Passella, *supra* note 6.

244. *See id.*

institutions” that will utilize alternative methods of project delivery.²⁴⁵ The program requires the projects to utilize one or more of the following project delivery systems: construction manager at risk, design-build, general contracting, and/or design-assist.²⁴⁶

B. The Alternatives

Though four project delivery models are identified by the program, the reform panel that suggested the change focused on two: construction manager at risk and design build.²⁴⁷ Each model has strengths and weaknesses pertinent to the overall efficiency of construction projects, and the following will dissect them. The models are all strong in certain aspects, but each has specific disadvantages. The key to efficiency is to stay away from rigid statutory specifications such as the requirement of multiple prime contracting on public projects. Instead, Ohio should implement a system that allows for flexibility. This will result in an efficient system that reduces costs and risk of litigation for all parties involved.

1. Construction Manager at Risk

In the construction manager at risk project delivery model, the owner hires a construction manager, much like the role Dugan & Meyers played in the illustration case.²⁴⁸ However, the difference is the scope of the services and the role provided by the construction manager. The construction manager “provides preconstruction services during the design phase . . . and, at an agreed upon design completion point, the construction manager takes price risk by providing the owner [with] a guaranteed maximum price.”²⁴⁹ After the maximum price has been guaranteed, the construction manager can commence construction as a general contractor with the power to award and hold all subcontracts.²⁵⁰ The construction manager at risk model also allows for an “overlap of the design and construction” which helps accelerate the overall schedule.²⁵¹ Because the contractor takes a more active role in the design process, the inequities addressed in *Dugan & Meyers* would be eliminated.²⁵²

245. See Passella, *supra* note 6.

246. See *id.*

247. See *Report of the Ohio Construction Reform Panel*, *supra* note 29, at 17-18.

248. Passella, *supra* note 6; see *Report of the Ohio Construction Reform Panel*, *supra* note 29, at 12; see generally *Dugan & Meyers*, 864 N.E.2d 68.

249. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:8.

250. *Id.*

251. *Id.*

252. See generally *Dugan & Meyers*, 864 N.E.2d 68.

There are some disadvantages to the construction manager at risk model, primarily the tension between the owner and the contractor. Because the construction manager assumes the role of general contractor, issues regarding project quality, budget, and schedule are sure to arise, but nearly every construction project deals with these issues.²⁵³ Additionally, the guaranteed maximum price method could possibly lead to disputes over “completeness of the design and what constitutes a change to the contract.”²⁵⁴ Regardless, the construction manager at risk model helps overcome the apparent invincibility possessed by architects in the traditional design-bid-build multiple prime system.

2. Design-Build

On the other hand, the design-bid build model completely eliminates the third-party architect. As previously mentioned, the design-build is an integrated delivery system where one entity “is responsible for both the design and the construction[.]”²⁵⁵ This method of project delivery offers the same advantage of the construction manager at risk in that the actual construction can overlap with the design process.²⁵⁶ Additionally, it can reduce the possibility of litigation with just a single point of responsibility for design and construction.²⁵⁷ Ohio’s licensing requirements regarding architectural services tend to necessitate that “design-build services are . . . provided by a joint venture consisting of an architect and a contractor[;]” thus, the architect would not be shielded from liability because of a lack of privity like he would be in the traditional model.²⁵⁸

The design-build model is the preferred method of project delivery in the private sector, but it has several limitations. “[T]he owner relinquishes a significant amount of control over the design to the design-builder[.]” and this places a potential negative impact on the quality of the project.²⁵⁹ Also, the design services must be provided by a licensed architect; therefore, several of the smaller construction firms are squeezed out of the process because they cannot afford to keep an architect on staff, nor are they able to attract architect firms to form a joint venture.²⁶⁰ In addition, much more risk is placed on the contractors because they are now responsible for design

253. See WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:8.

254. *Id.*

255. Passella, *supra* note 6.

256. See WELIN, APPELBAUM & CURRIE, *supra* note 17, at §§ 1:8, 1:10.

257. *See id.* at § 1:10.

258. *See id.*

259. *Id.*

260. *See id.*

as well as construction, and this will tend to squeeze the smaller players out of the game.²⁶¹ Because smaller construction firms will be unable to compete, higher initial costs will result.²⁶² However, if owners can get past the fact that they will have less control during the design process, the design-build project delivery model may be the best alternative.

VI. CONCLUSION

It is obvious that Ohio law regarding delay claims resulting from plan errors is in need of reform. Ohio courts' insistence on form over substance is out of touch with common sense, and it produces inequitable results.²⁶³ Without some type of reform, negligent architects will remain insulated from liability, while non-negligent contractors will be forced to pay for other party's mistakes. If the courts were willing to recognize actual notice in delay claims, these ridiculous results would be negated. The liability for delay damages resulting from the cumulative impact of plan errors and omissions must be shifted back onto the architect or the owner.²⁶⁴ At the very least, multiple prime contracting must be eliminated in order to decrease the impact of these delays.²⁶⁵ If these issues are ignored, Ohio taxpayers will continue to see much lower quality construction projects, despite an increase in the current \$3 billion annual bill already paid for public construction.²⁶⁶

261. WELIN, APPELBAUM & CURRIE, *supra* note 17, at § 1:10.

262. *Id.*

263. *See supra* Part III.

264. *See supra* Part IV.

265. *See supra* Part V.

266. Passella *supra*, note 6.