TRIAL Notes
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Contractor Compensation

The Tyranny of the Eichleay Formula

BY JOHN G. WITHERSPOON, JR.

MUNICIPALITIES, TOWNSHIPS, AND OTHER POLITICAL subdivisions are well aware that contractors are pursuing claims in the public sector with increased vigor and sophistication. Contractors are now taught to blanket the political subdivisions, as the owner, with letters describing any possible claim for additional time or expense from the first day of the project. Leaving aside legitimate change order requests, contractors seem to have forgotten they were awarded a contract to do the work for a certain price that is to be paid out of tax dollars. Instead of pursuing quality from the start, contractors pursue claims from the start with the goal of turning the project into a total cost project or time and materials project. Like an algebraic formula, political subdivisions, in a time of scarce money, are having to increase administration costs on their side of the equation to match the increased paperwork and administrative costs of contractors on the other side of the equation. Increased cost for everyone is the certain result.

The Eichleay F ormula is used to calculate unabsorbed home office overhead on a project when the contractor is entitled to compensation for delay. On January 16, 2002, the Ohio Supreme Court unleashed the Eichleay Formula on the political subdivisions of this state, which were ill-equipped to deal with a formula that arose out of the federal contracting system: *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.* (2002), 94 Ohio St.3d 34, 760 N.E.2d 364. Previous cases in Ohio had foreshadowed its coming: *Royal Electric Consts. Co. v. Ohio State Univ.* (December 21, 1993), Court of Appeals of Franklin County, Ohio, Case Nos. 93AP-399 and 93AP-424, reversed on other grounds (1995), 73 Ohio St.3d. 110, 652

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N.E.2d 687, and *Conti Corporation v. Ohio Dept. of Adm. Serv.* (1993), 90 Ohio App.3d 462, 629 N.E.2d 1073.

In its syllabus, the Ohio Supreme Court stated the Eichleay Formula was one way to determine unabsorbed home office overhead damages although the owner must be given the right to dispute the particular items in the contractor's claim. Although *Complete General* involved other issues (prejudgment interest, idle machinery costs, extended equipment costs), the Ohio Supreme Court was obviously fascinated with the Eichleay Formula because it spent seven pages discussing it and analyzing five different federal cases (none of which is an easy read) in addition to the original case from which the Eichleay Formula got its name–all of this in a case that was simply affirming the decision of the Court of Appeals on this issue.

The Ohio Supreme Court held in *Complete General* that the Eichleay Formula could only be used when the owner placed the contractor on "standby," and that while on "standby," the contractor could not do other work. This short article will not deal with the arcane definitions of "standby" or the differences between "additional work" or "other work." But, anyone working with the Eichleay Formula should be prepared to sacrifice many hours reading about twenty complicated cases (mostly federal and some state) to begin to get an idea of the circumstances in which the Eichleay Formula applies. Any jury instructions have to be drafted from scratch.There are generally three types of delays on a project from a contractor's point of view: non-compensable delay (the contractor's fault), excusable delay (time extensions allowed because no one is at fault, e.g., weather delays), or compensable delays (time extensions and cost increases allowed). This article assumes the contractor is entitled to claim compensable delay damages.

The Eichleay Formula is used to calculate unabsorbed home office overhead on a project that is caused by a compensable delay. When a project delay occurs, there may be additional direct equipment costs, additional direct labor costs, and additional direct field overhead costs such as a construction trailer. What about the additional overhead at the home office for the staff, rent, insurance, interest on loans, entertainment expenses, bad debts, contributions to charities and political parties, bid and proposal costs, and the like that are indirect costs? If a project is delayed, these indirect costs, hopefully covered in the contractor's bid, go beyond the amount covered in the bid because the delay caused the contract to go beyond the original completion date.

Public works contracts usually have a start date and a completion date. These indirect overhead costs are unabsorbed if the contractor cannot do the work and generate income while the contractor is on standby, holding his equipment and labor back from other jobs. Because most contractors have more than one project going at the same time, the Eichleay formula is supposed to help determine the amounts actually lost on the particular job because these indirect costs are properly allocated to more than one project.

There are many different variations of the Eichleay formula. It was first set forth in a 1960 case before the Armed Services Board of Contracting Appeals: *Eichleay Corp.* (1960), ASBCA No. 5183, 60-2 B.C.A. (CCH) 2688, 1960 Lexis 1207. This article will discuss the Original Eichleay Formula as set forth in *Eichleay Corp.*, and the Revised Eichleay Formula as set forth in *Complete General.* The basic difference between the two formulas is that the Original Eichleay Formula uses the period of performance (how long it actually took to do the job) while the Revised Eichleay Formula uses the original contract period (from the original notice to commence to the original contract completion date).

The Eichleay Formula purports to determine a per diem rate of overhead for each day of delay, like a per diem rate for travel expense for each day a sales person is on the road. It does this by taking the contact billings for the project at issue and dividing them by the billings for the total number of contracts of the company at the same time. The percentage reflects the size of the contract for the delayed project compared to all company contracts. This percentage is then multiplied by the total overhead for the company. This results in overhead allocated for the delayed project compared to all company contracts. The allocated overhead is then divided by the number of contract days for a per diem rate. This number is then multiplied by the number of delay days and–presto–we have reasonable and non-speculative damages, or at least we think so.

Let us use an example to understand both Eichleay Formulas. Assume a compensable delay. Assume the project was supposed to take 90 days, but was delayed on the 80th day and was not completed for a total 365 days, or an additional 275 days beyond the original completion date. Assume the original contact amount was $900,000 and the total billings for the contract were $800,000 within the 90 days. The estimated cost for the remaining work

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was $100,000. Assume the total company billings for all contracts during the 90 days was $2,500,000 and the total company billings for all contracts during the 365 days was $15,000,000. The contractor's business is cyclical. It does more business during certain times of the year than other times. Finally, assume the contractor claimed its home office overhead for the 90 days was $500,000 and for the 365 days was $1,400,000.

Here's the Revised Eichleay Formula in three steps:

(1)

The contract at issue / Total billings for all contracts during original contract period	X	Total overhead during the original contract period	=	Overhead allocable to the contract

(2)

Overhead allocable to the contract / Original planned length of the contract period	=	Daily contract overhead rate

(3)

Daily contract overhead rate	X	Compensable period in days	=	Amount claimed

Plug in the numbers:

(1)		(2)	(3)
$800,000 / $2,500,000	= 32% X $500,000 = $160,000	$160,000 / 90 days = $1778	$1778 X 275 days = $488,950

There you have it: a per diem rate of $1,778 for a total claimed $488,950 in damages for unabsorbed home office overhead on a contract that had 10 days of work left to perform estimated to cost only $100,000. Farfetched you might say. Not really in the rough and tumble world of contract claims–start high and all that.

Now let us use the Original Eichleay Formula:

Contract billing / Total billings for contract period of performance	X	Total overhead for contract period of performance	=	Overhead allocable to the contract

Overhead allocable to the contract / Days of performance	=	Daily contract overhead rate

Daily contract overhead rate	X	Compensable period in days	=	Amount claimed

Plug in the numbers:

$800,000 / $15,000,000	=	5% X $1,400,000 = $70,000	$70,000 / 275 days = $255	$255 x 275 days = $70,125

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FIRM news

The attorneys and staff at Freund, Freeze & Arnold are committed to providing the highest quality legal representation for businesses, physicians, municipalities and insurance companies. We are happy to report some recent examples of cases in which we vigorously defended the interests of our clients and obtained favorable results. We are also proud to share with our friends and clients news of our honors, community activities, growth and achievements.

TRIALS, DECISIONS & ARBITRATIONS

Robert W. Young secured a defense verdict in the Greene County Court of Common Pleas. The defendant, while driving a delivery truck through a construction zone, allegedly struck the plaintiff as she was operating a pavement roller. In nonbinding arbitration, the plaintiff was awarded $100,000. At trial, Plaintiff requested $400,000. The jury returned a verdict in favor of the defendant.

Susan Blasik-Miller obtained a unanimous defense verdict in the Montgomery County Court of Common Pleas. Plaintiff claimed hospital nurses were negligent in failing to use restraints and other safety measures to prevent a patient from falling out of bed. The 82-year-old patient fell and suffered a subdural hematoma. He died less than three weeks after the fall, and Plaintiff contended the fall was the cause of the death. The hospital alleged the death was the result of the medical conditions which took the decedent to the hospital. The jury concluded the nurses met the standard of care in the treatment they provided to the decedent.

Christopher F. Johnson and Jesse R. Lipcius won a defense verdict in the Clinton County Court of Common Pleas. During a road construction project, the plaintiff claimed that the defendant's truck suddenly began backing up after the decedent had called for it to stop while he walked behind the vehicle to adjust an attached gravel spreader. Chris and Jesse argued that at the time of the accident, the truck was continuously moving, and the decedent put himself in a dangerous position by walking behind the moving vehicle. The defense also established that the driver of the truck was under the direction and control of the decedent as the supervisor of the job, making him a loaned servant and immune from liability under the workers' compensation act. After a five-day trial, the jury determined that the defendant truck driver was under the direction and control of the decedent, making him a loaned servant. A verdict was returned for the defendants.

Susan Blasik-Miller won a defense verdict in the Montgomery County Court of Common Pleas. The plaintiff claimed that Susan's client should not have performed an exploratory laparotomy, lysis of adhesions, and revision of Roux-en-Y gastrojejunostomy because of significant risks to the patient. The patient died three days after discharge. The plaintiff further criticized the surgeon's post operative care. The jury unanimously concluded that Susan's client acted appropriately and within the standard of care.

Judd R. Uhl obtained an excellent result in the Hamilton County Court of Common Pleas in an automobile accident case. A plaintiff claimed approximately $20,000 in medical bills from an accident involving Judd's client. Liability was not disputed. The jury returned a verdict in the total amount of $2,478.

James M. Cawood won a defense verdict in the Knox Circuit Court in Kentucky. Plaintiff alleged permanent injury to neck and back following a rear end collision. The plaintiff sought medicals in excess of $10,000 and past and future pain and suffering. The jury returned a verdict in favor of the defendant on liability.

Mark L. Schumacher won a defense verdict in the Montgomery County Court of Common Pleas in a medical malpractice trial. The plaintiff lost a kidney due to urethral damage during pelvic operation. The jury found that Mark's client was not negligent.

Kevin C. Connell received a defense verdict in the Montgomery County Court of Common Pleas in an automobile accident case. The plaintiff had pre-existing back complaints, and she did not seek treatment immediately after the accident. Within five months of the accident, a surgeon recommended back surgery. She claimed approximately $26,000 in medical expenses, plus lost wages. The jury came back with a verdict of $182.72, one day of lost wages.

Mark L. Schumacher secured a defense verdict in the Darke County Court of Common Pleas. The plaintiff claimed mild brain damage due to a seizure, allegedly caused by failure to administer an anti-epileptic drug the patient had been on for 30 years. The jury returned a defense verdict.

AWARDS & HONORS

Neil F. Freund, Stephen V. Freeze, Gordon D. Arnold, Susan Blasik-Miller and **Dee Sheriff-MacDonald** were recently named Ohio Super Lawyers for 2006. Each year, Law & Politics issues ballots to active lawyers in the state who have practiced law for five or more years. The ballots ask lawyers to nominate the best lawyers he/she has seen in action. After a thorough and extensive review and verification process, the top lawyers from each practice area are named Super Lawyers.

Stephen V. Freeze became President of the Ohio Association of Civil Trial Attorneys (OACTA) on December 2, 2005 at the Winter Conference in Columbus, Ohio. OACTA is an organization of attorneys, corporate executives and managers who devote a substantial portion of their time to the defense of civil lawsuits. Steve spent the last year as Vice President of OACTA.

Neil F. Freund was presented with the Michael F. Colley Award from the Ohio Chapter of the American Board of Trial Advocates. He was honored for his service to the trial bar, leadership to his colleagues, an extraordinary standard of professional conduct, total dedication to the ideals of mutual respect for all, and the preservation of the right to a jury trial.

Susan Blasik-Miller was elected at the annual meeting to serve as Treasurer of the Ohio Chapter of the American Board of Trial Advocates. She is the first female to serve in an official capacity in the Ohio Chapter.

Sandra R. McIntosh was accepted into the Columbus Bar Association Barrister Leader Program. The Barrister Leader Program is designed to assist lawyers in becoming confident, competent leaders in the legal field and the community at large.

David W. Zahniser has recently been commissioned as a Kentucky Colonel. This is the highest honor awarded by the Commonwealth of Kentucky. Colonels are Kentucky's ambassadors of good will and fellowship around the world. Commissions as Kentucky Colonels are presented for contributions to the community, state, or nation, and for all types of special achievements. The Honorable Order of Kentucky Colonels, founded in 1932, has been incorporated as a charitable organization.

Susan Blasik-Miller has been elected to serve on the Board of the Society of Ohio Healthcare Attorneys as a Southwest Ohio District Representative.

John J. Garvey was selected to the Class X of Cincinnati Academy of Leadership for Lawyers by the Cincinnati Bar Association.

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A per diem rate for unabsorbed home office overhead of $255 seems more sensible for a project of this size, but $70,125 still seems a bit much for just home office overhead, which is not idle equipment or labor at the job site or the job site trailer.

Take a look at the overhead number the contractor provided: $500,000 for 90 days and $1,400,000 for 365 days. The Ohio Supreme Court stated in *Complete General* that the overhead number was not an accounting number, but could only comprise the overhead amounts allowed by the Federal Acquisition Regulations, 48 C.F.R. § 31.205-1 et seq. ("FAR"). For example, interest on borrowing, certain entertainment expenses, bad debts, contributions, bid and proposal costs, and donations were not allowed.

Assume adjusting for FAR reduces the $500,000 for 90 days to $300,000 and the $1,400,000 for 365 days to $840,000. Then do the math. Under the Revised Eichleay Formula, the claim for unabsorbed home office overhead drops to $293,425 from $488,950, but this is still too high for overhead when the only work remaining was estimated at $100,000. Under the Original Eichleay Formula, the claim for unabsorbed home office overhead drops to $42,075 from $70,175.

What is the damage—$488,950—$293,333—$70,125—$42,075—or some other number? You might also ask why the Eichleay Formula is even used, with only 11% of the contract left to complete. Sometimes this is a good argument, and sometimes it is not: compare *Satellite Elec. Co. v. Dalton* (Fed. Cir. 1997), 105 F.3d 1418, with *Melka Marine, Inc. v. U.S.* (Fed. Cir. 1999), 187 F.3d 1370, with one panel of the Federal Circuit Court of Appeals accepting the argument and the other rejecting it.

It is not at all clear from where the Ohio Supreme Court obtained the Revised Eichleay Formula set forth in *Complete General*. In seven pages, which require reading and rereading, the Ohio Supreme Court cited and discussed five cases from the federal courts in addition to *Eichleay Corp*. itself. All of these cases, however, use the Original Eichleay Formula. The Court of Appeals in *Complete Gen. Constr. Co. v. Dept. of Transp.* (May 25, 2000), Court of Appeals of Franklin County, Ohio, Appeal No. 98AP-1619, used the Revised Eichleay Formula, but cited *West v. All State Boiler, Inc.* (Fed. Cir. 1998), 146 F.3d 1368. *All State* was also cited by the Ohio Supreme Court, but *All State* specifically sets forth the Original Eichleay Formula in Footnote 4 and cites *Eichleay Corp*. The Court of Appeals in *Complete General* also cited *Royal Electric Consts. Co. v. Ohio State Univ.* , supra, but this case also used the Original Eichleay Formula.

Study the Revised Eichleay Formula. It is economically unsound. It does not measure overhead during the period of delay, although it is the period of delay that is the basis for the claim. It only determines the overhead during the original contracting period.

It appears the Ohio Supreme Court may have used the Revised Eichleay Formula because the Court of Appeals used it. Which formula to use was not an issue in *Complete General*. A reading of the Court of Claims decision in *Complete General* suggests that the Original Eichleay Formula was used at the trial court level. *Complete Gen. Constr. Co. v. Dept. of Transp.* (November 18, 1998), Court of Claims of Ohio, Case No. 97-01180. One of the law review articles cited by the Ohio Supreme Court in *Complete General*, Linda L. Shapiro and Margaret M. Worthington, *Use of the Eichleay Formula to Calculate Unabsorbed Overhead for Government-Caused Delay Under Manufacturing Contracts* (1996), 25 Pub. Contr. L.J. 513, specifically noted in Footnote 21 that the federal contract system had been rejecting the Revised Eichleay Formula

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Title IX

The Retaliation Cause of Action After *Jackson v. Birmingham Board of Education*

MARK A. MACDONALD

If schools were permitted to retaliate freely, then any individual who witnessed discrimination would be hesitant to report it, and as a result Title IX violations may go unremedied.

Roderick Jackson was a girls' high school basketball coach in Birmingham, Alabama. Mr. Jackson, who was also a physical education teacher for ten years in the Birmingham school district, began coaching for the Ensley High School girls basketball team in 1999. Mr. Jackson quickly recognized the girls' team did not receive the same funding as the boys' team. In 2000, Mr. Jackson began complaining to his supervisors about this unequal treatment of the girls' basketball team. He pointed out his girls' team had to do fundraising to pay for equipment while the boys' team was fully funded by the school district. The girls' team also played on a basketball court smaller than regulation size and had bent basketball rims. The girls on the team even wore mismatched uniforms and shoes.

Despite ongoing complaints, the school board made no changes in the girls basketball program. Instead, the school board gave Mr. Jackson negative work evaluations. Ultimately, Mr. Jackson was terminated as the girls coach, but retained as a teacher. Once Mr. Jackson's coaching duties ended, he filed suit in the United States District Court of the Northern District of Alabama.

He alleged the Alabama Board of Education violated Title IX by retaliating against him for protesting about discrimination of the girls basketball team. The Board of Education moved to dismiss the claim on the grounds Title IX does not provide a private cause of action for claims of retaliation. The District Court granted the motion to dismiss.

The Court of Appeals for the Eleventh Circuit affirmed the District Court's decision. The Court of Appeals specifically held "nothing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations." The Eleventh Circuit also held Mr. Jackson was not in the class of persons protected by the statute.

The Supreme Court, in a five to four decision, held Mr. Jackson could bring a Title IX cause of action against the school board which retaliated against him because he complained of sex discrimination. *Jackson v. Birmingham Board of Education*, *554 U.S.* (March 29, 2005). The Supreme Court based its decision on its previous holdings which recognized a private right of action under Title IX for any intentional sex discrimination. The Court further reasoned retaliation against a

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FIRM*news*

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CALL is a prestigious bar association program in its tenth year, sponsored by the Cincinnati Bar Association. CALL is designed to foster leadership skills and community action by members of the legal profession.

FIRM GROWTH

Freund, Freeze & Arnold welcomes the following new associate attorneys to its Dayton and Cincinnati offices:

Joining our Dayton office:

Adam C. Armstrong. Adam was born in Raleigh, North Carolina, but has spent most of his life in Ohio. He attended Miami University, receiving his Bachelor's Degree in Speech Communications/ Public Relations. Adam received his law degree from the University of Dayton School of Law and served as Executive Editor of Notes and Comments for the University of Dayton Law Review. Adam enjoys spending time with family and friends, likes playing golf and attending sporting events, and is a fan of University of Kentucky Basketball and Pittsburgh Steelers Football.

Justin A. Dillmore. Justin was born in Newark, Ohio, and now lives in the Dayton area. He attended Miami University and received a Bachelor's Degree in Political Science and Psychology. Justin obtained his law degree, with Distinction, from Ohio Northern University Pettit College of Law. He is a member of the Phi Beta Delta Honor Society, the Order of Barristers, served on the Phi Alpha Delta Executive Board (2003-04), and was a member of the 2004 Philip C. Jessup International Law Moot Court Team. Justin was also the Lead Articles/Symposium Editor for the Ohio Northern University Law Review and is published in *State v. Brown*, 30 Ohio N.U. L. Rev.1 (2004), and the soon-to-be-published "Leap Before You Look: The SEC's Approach to Hedge Fund Regulation," 31 Ohio N.U. L. Rev. __ (2005). Justin enjoys spending time with his fiancee, family and friends and likes to read, golf and cook.

Amy M. Phillips. Amy was born in Columbus, Ohio and now resides in Springboro, Ohio. She obtained a Bachelor of Science degree in Psychology, Cum Laude, from Northeastern University. Amy attended law school on a merit scholarship and obtained her law degree, Cum Laude, from the University of Toledo College of Law. She was an Associate Member of the Law Review, and a member of the Moot Court on the Civil Rights Team. She placed as runner-up for Best Oral Advocate at Howard University Moot Court Competition in Washington, D.C. Amy received an additional scholarship as the highest ranking student in Family Law. She enjoys horseback riding, shopping, and scrapbooking. Amy also enjoys ballroom dancing and has competed Internationally in ballroom and Latin dancing.

Joining our Cincinnati office:

Sharif A. Abdrabbo. Sharif was born in Elizabeth, New Jersey, and now lives in northern Kentucky. He attended the United States Coast Guard Academy and obtained his Bachelor of Science degree in Marine Science. Sharif obtained his law degree, Cum Laude, from the Salmon P. Chase College of Law, Northern Kentucky University (Dean's List, Fall 2003/Spring 2004). He was an Associate Member of the Salmon P. Chase Inn of Court. Sharif received Second Place Team and Best Attorney awards at the Thurgood Marshall Mock Trial Competition in Fort Lauderdale, Florida in 2004, the Judge Robert S. Kraft Memorial Award for Excellence in Legal Ethics, the Henry L. Stephens, Jr. Environmental Law Book Award, the CALI Excellence for the Future Award for the highest grade in Remedies, and the Lawrence Firm Award for Outstanding Trial Advocate in 2005. He also received the Coast Guard Achievement Medal for outstanding performance of duties as Investigating Officer, Security Officer, and Intelligence Officer. Sharif actively serves as Lieutenant Commander with the U.S. Coast Guard Reserve. He enjoys spending time with family and friends and keeping in contact with friends made while on active duty in the military. Sharif likes jazz music, cooking, and traveling to locations around the world.

Jason E. Abeln. Jason was born in Ft. Mitchell, Kentucky and continues to live in the northern Kentucky area today. He received a Bachelor's degree in History, Summa Cum Laude, from Thomas More College and was a member of the James Graham Brown Honors Society. Jason obtained his law degree from the University of Cincinnati College of Law and served as an Associate Member of the Law Review. He enjoys spending time with friends and family, playing softball, basketball, and keeping up on current political news.

COMMUNITY

Dee Sheriff-MacDonald presented a seminar titled "Anatomy of a Medical Malpractice Lawsuit: Dos & Don'ts" to a hospital medical staff in Georgetown, Ohio. The seminar provided an overview of medical malpractice litigation.

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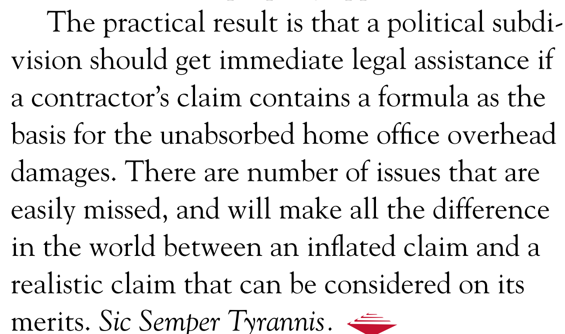
since 1984, citing the case of *Capital Electric Co. v. United States* (Fed. Cir. 1984), 729 F.2d 743. Shapiro and Worthington perceptively noted:

> Much litigation has centered on the Eichleay Formula, considering whether it should apply, as well as how to apply its particular elements. In addition, case law reflects frequent attempts to modify the formula. Although these attempts met with some early success, the formula, as above stated [Original Eichleay Formula], has withstood the test of time and the ingenuity of legal and accounting experts offering variations to suit the particular circumstances of their clients.

Id. at 515-516.

Study the Revised Eichleay Formula. It is economically unsound. It does not measure overhead during the period of delay, although it is the period of delay that is the basis for the claim. It only determines the overhead during the original contracting period. The Original Eichleay Formula, on the other hand, makes economic sense if properly applied.



The practical result is that a political subdivision should get immediate legal assistance if a contractor's claim contains a formula as the basis for the unabsorbed home office overhead damages. There are number of issues that are easily missed, and will make all the difference in the world between an inflated claim and a realistic claim that can be considered on its merits. *Sic Semper Tyrannis*.

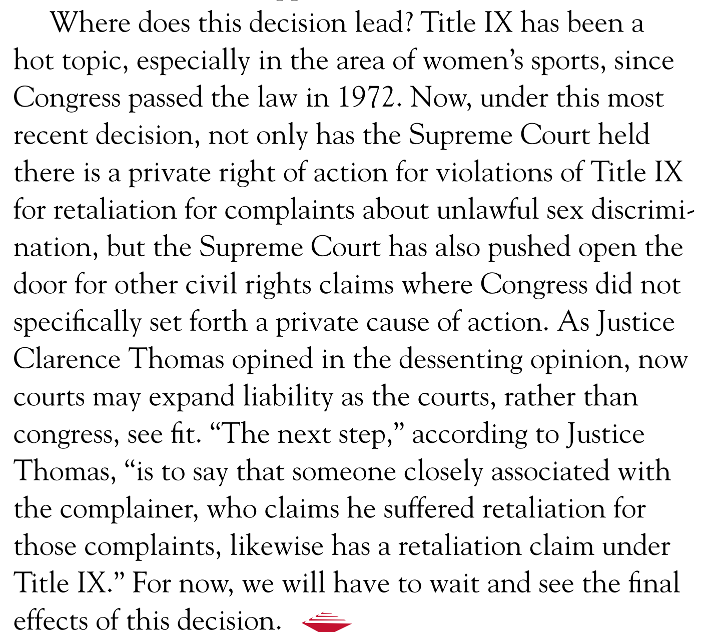
RETALIATION *Continued from page 6*

person because the person complained sex discrimination is another form of intentional sex discrimination. "Retaliation," as held by the Court, "is by definition an intentional act."

While the Court admitted Congress certainly could have set forth retaliation in Title IX expressly, as Congress has done in other civil rights statutes, it was not necessary. Title IX is broadly written and a cause of action is implied in order to encompass exactly the type of retaliation claim presented now.

The Court also addressed the issue of Mr. Jackson not being able to invoke his claim because he was an "indirect victim" of sex discrimination and not within the class protected. The Supreme Court, again referring to the broadly worded statute of Title IX, held it does not require the victim of the retaliation to be the actual victim of the discrimination which is the subject of the original complaint. Title IX provides "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(A). If the statute instead stated "no person shall be subject to discrimination on the basis of such individual's sex," then this would be a different issue. However, Title IX contains no limitation on the discrimination being based on the individual who was subject of the original complaint.

Lastly, the Court held adult employees are sometimes "the only effective advisaries of discrimination in schools." If schools were permitted to retaliate freely, then any individual who witnessed discrimination would



be hesitant to report it, and as a result Title IX violations may go unremedied. Reporting incidents of discrimination is an integral function of Title IX enforcement and if retaliation against the individuals reporting went unpunished then "Title IX's enforcement scheme would unravel."

The Supreme Court reversed the judgment of the Court of Appeals for Eleventh Circuit and remanded the case for further proceedings. Mr. Jackson will now have to prove the Board of Education retaliated against him because he complained of sex discrimination. The Supreme Court stated the issue is not whether Mr. Jackson will now prevail but instead, Mr. Jackson is now entitled to offer evidence in support of his claim.

Where does this decision lead? Title IX has been a hot topic, especially in the area of women's sports, since Congress passed the law in 1972. Now, under this most recent decision, not only has the Supreme Court held there is a private right of action for violations of Title IX for retaliation for complaints about unlawful sex discrimination, but the Supreme Court has also pushed open the door for other civil rights claims where Congress did not specifically set forth a private cause of action. As Justice Clarence Thomas opined in the dessenting opinion, now courts may expand liability as the courts, rather than congress, see fit. "The next step," according to Justice Thomas, "is to say that someone closely associated with the complainer, who claims he suffered retaliation for those complaints, likewise has a retaliation claim under Title IX." For now, we will have to wait and see the final effects of this decision.

Thanks for visiting
Government Law

Notes **on-line**

Look for our next issue: Summer 2006

This newsletter is intended for general information. Many states require that law firms add the statement, *"This Is An Advertisement"* on publications of this nature.