Design Professional and Design-Build Litigation Lessons Learned 2018

Beazley Webinar

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Topics Covered

- Indemnification
- Limitation of Liability
- Climate Change: DP responsibility
- Contractor Claims against A/E
- Site Safety
- Ownership & Copyright of Plans
- Warranties
- Third Party Beneficiary Claims

Indemnification

Indemnitee for 3rd Party Claims Only

- Florida court holds indemnity clause in contract applies only to damages for claims brought by 3rd parties and not to 1st party damages and claims between the parties.
- To make indemnity apply to 1st party damages and claims the contract would have to expressly state that intent.
- The clause in question:
- Indemnification. To the fullest extent permitted by law, [Subcontractor] shall indemnify and hold harmless [Contractor], its officers, directors or employees and the Owner, from and against all claims, damage, losses and expenses (including, but not limited to attorney's fees) arising out of, in connection with or resulting from the performance of Work under this Subcontract Agreement ....
- *Int. Fidelity Ins. Co. v. Americaribe*, 906 F.3d 1329 (11th Cir. U.S., 2018)

Maryland Case
Indemnity Obligation Includes 1st Party Attorney's Fees Based on Language of the Clause

- Easement agreement between contractor and adjoining property owner to operate tower crane over the property.
- During excavation, certain damages occurred to the foundation and structure of neighboring buildings.
- Indemnity language in Easement obligated Contractor to "defend and indemnify the property owner from all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs expenses, fees, and liabilities … arising out of … breach of any terms of this Agreement."
- Court found the clause applied to 1st party claims for the property owner's own losses and damages, including right to recover attorneys fees.
- *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group, 454 Md. 475, 164 A. 3d 978, (Maryland 2017).*

Limitation of Liability

$50,000 LoL Clause Enforced for Designer under Design-Build Contract

- $50,000 limitation of liability (LoL) clause was only eight (8) percent of DP's $665,000 fee.
- LoL clause capped damages without exempting or exculpating the designer from **all** liability – so did not violate the state law.
- **Facts**: Contractor sued design professional (DP) claiming that designer's negligence caused contractor to incur $1,218,197.93 resolving problems caused by the designer's design plans.
- The court well explains the principal of freedom of contract and importance of honoring mutually agreed upon terms of contract even if terms turn out to be burdensome or one sided.
  - *Zirkelbach Construction, Inc. v. DOWL, LLC*, 389 Mont. 8 (Montana 2017).
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$50,000 LoL continued:
Affirming Freedom of Contract

With regard to the issue of freedom of contract the court quoted from a number of earlier court opinions as follows:

- "The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws." (citation omitted). "This tenet presumes that parties are in the best position to make decisions in their own interest." (citation omitted). "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contract, so far as the same is ascertainable and lawful."

- "To permit the avoidance of a written contract because the terms of the contract now appear burdensome or unreasonable would defeat the very purpose of placing a contract into writing."

Designing for Climate Change and Flooding

What is a Designer's Responsibility to Consider Climate Change When Designing Structures?

- If an area has been subject to repeated 100 year floods or even 500 year floods every 5 or 10 years, what happens if a DP designs a new structure in the 100 year flood plain without protections against a new flood occurring in just a few year? Ellicott City for example.
  - Elevate the structure higher than required by FEMA requirements?
  - Avoid putting HVAC and MEP equipment in basement?
  - Specify building materials that won't disintegrate, rot or mold?
  - See my paper at www.ConstructionRisk.com.

- See *Alexander v. Woodlands Land Development Co., 325 F.Supp.3d 786 (TX 2018)* holding engineers subject to liability for failing to design homes to withstand foreseeable flooding – and Federal Law and and 500 year flood plain doesn't pre-empt plaintiffs, homeowners, suit in state court.

Contractor Claims against A/E Firms

Contractor may Sue Design Firm for Defective Plans & Specs on which it Relied

- Contractor sued project engineer for negligence – asserting DP provided Owner with deficient plans on which contractor relied.
- DP argued it had no duty to the contractor.
- Court held DP duty could arise where a "foreseeable zone of risk arises from the acts of the defendant."
- In absence of privity of contract between the contractor and DP, the DP must have some control over the contractor or project for a duty to be imposed.
  - *Suffolk Construction Co., Inc. v. Rodriquez Quiroga Architects, et al.*, 2018 WL 1335185 (FL 2018).
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DP Duty to Contractor (*Suffolk continued)*

- *Suffolk* court stated:

  "Control may be established … where the architect or engineer acts with knowledge that the plaintiff will rely on its designs or plans."

- Court held the case must proceed to trial to determine if DP had such control over the process to make it foreseeable that the contractor would be injured by the DP's reports, plans and designs.

Contractor May Sue CM for Losses Caused by Poor Project Oversight and Interference

- Contractor sued its client(Owner) and the CM alleging CM failed to oversee and administer the project according to industry standards thereby impeding the contractor's performance and adding extra costs and delay to its work.

- Trial court granted CM summary judgment – finding CM owed no independent duty of care to the contractor.

- Reversed on appeal, with court holding CM who had no contract privity with contractor can still owe a duty of care to Contractor if it has high degree of control and power and knows its services will benefit the contractor as well as the project owner.
- *Lathan Company v. State of Louisiana*, 237 So 3d 1 (Louisiana App. 2017).
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CM Liability to Contractor for Interference (*continued*)

- Court concluded evidence established that although engineer wasn't responsible for signing change orders or construction change directives (CCDs), and was not required to respond to RFIs, it was responsible for coordinating the management of invoices, contracts, and change orders.

- "Thus, if [Engineer] improperly delayed the processing of invoices and RFIs, as alleged herein, it is foreseeable and to a degree certain that the project would be delayed, and thereby, adversely affect the work and profits of the general contractor…."

- Court found, "[Engineer] must be deemed and held to know that is services were not only for the protection or interests of the owner but also for third parties, including, specifically [construction contractor]."

- Court reversed the summary judgment and held contractor claim against the CM may go forward to trial.

Contractor Can't Sue Engineer for Damages Caused by Construction Administration

- Contractor was prohibited by contract from suing the project engineer for damages it claimed were sustained due to engineer's negligent interpretation and application of the project plans and specs.
- A clause in general conditions expressly stated that no decision made by the engineer in "good faith" would create any duty owed by the engineer to the contractor.
- The court found that contract clause didn't violate public policy, and even though there was testimony that the engineer made mistakes, there was no evidence that the standard of care was violated.
- Moreover, testimony established good faith was exercised.
- *Domson, Inc. v. Kadrmas Lee & Jackson, Inc.*, 918 N.W. 2d 396 (South Dakota 2018).

Engineer Can't Sue Contractor for Contribution Where Losses Not Caused by 3rd Party Tort Claims

- Town sued its:
  - contractor for failure of equipment to perform successfully.
  - engineer for defective specifications.

- Engineer made contribution claim against contractor to recover any damages Engineer might owe Town.

- Contribution statute, like most around the country, states contribution is only for "damages in tort," e.g. negligence.

  - *Penta Corp. v. Town of Newport v. [Engineer] v. WesTech* (New Hampshire Super., 2018)

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Contribution (Penta Continued)

- Court states:
  - Each party may defend itself against the town's complaint on the ground that it did not breach its contract but that damages resulted from the breach by a different party of that party's contract.
  - "Each party's exposure is limited by the contract it made."

Site Safety

Safety Consultant May be Liable for Death of Client's Employee

- Because consultant only had oral (handshake) contract and couldn't show limits of its scope of service with regard to role with respect to safety training, meetings, and inspections, a jury would have to decide the question of liability based on their consideration of how much responsibility consultant assumed when it agreed to assist its client in carrying out workplace safety.

- Consultant performed a site safety inspection and an employee training meeting. It was not necessary to show it fully assumed safety obligations for it to be found liable.

- Decision demonstrates the importance of having a written contract with a well defined scope of service.

- *Peredia v. HR Mobile Services, Inc.*, 25 Cal. App. 5th 680 (2018).

Single Employer Site Safety Liability: GC Responsible for Acts of its Sub

- OSHA fined GC for violations by its sub related to accident at construction site where two roofers fell twenty feet, sustaining serious injuries.

- OSHA found owner of sub was a "supervisory employee" of the GC for purposes of supervising the sub's injured employee. That makes the GC liable for actions of its "supervisory employee." Court found GC "exercised an unusual amount of control over [sub's] actions, atypical of a traditional contractor/subcontractor relationship."

- Based on findings of "common worksite, interrelated and integrated operations, and common management or supervision," the court also found firms acted as a "single employer" – making GC responsible.

- *A.C. Castle Construction Co., Inc. v. Acosta*, 882 F.3d 34 (1st Cir. Ct. of Appeals, 2018).

CM not Responsible for Injuries to a Contractor's Employee

- Agreement between Construction Manager (CM) and the Metropolitan Transportation Authority (MTA) provided CM was responsible for coordinating work relating to the subway extension project.
- This included "liaising with contractors to ensure that the project was completed in accordance with cost time, safety, and quality control requirements and reporting to the MTA."
- Agreement **did not confer authority** on the CM, however, to control the methods used by the contractors to complete their work.
- *Willie Lamar v. Hill International, Inc., et al*., 153 A.D.3d 685, 59 N.Y.S.3d 756 (2017).
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CM Site Safety (*continued*)

- Deposition testimony showed CM didn't assume responsibility for contractor's manner of conducting work.

- Appellate court held that summary judgment was correctly granted the CM. Court explained:

  – "A CM of a work site is generally not responsible for the injuries under the Labor Law"… "unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the injury."

DBIA Contract Form Makes A/E Who was Design-Builder Responsible for Subcontractor's Site Safety

- On a design-build project where an architect held the prime contract under DBIA forms 530 and 535, it was liable for overall site safety – including that which it had by subcontract expressly delegated to its construction subcontractor.

- Because the language of the prime agreement imposed safety duties on the prime design-builder, the court held that those duties could not be avoided or delegated down to a subcontractor.

  - *Ryan v. TCI Architects/Engineers/Contractors, Inc*., 72 N.E. 3d 908 (Indiana 2017)

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Site Safety – DBIA Contract (*continued*)

- Question was whether architect as GC assumed a non-delegable duty of care to keep a worksite safe when it executed the DBIA form contract.

- Trial court granted summary judgment for the design-builder on basis that agreement between prime and sub stated all site safety responsibility was delegated to the subcontractor.

- Appellate Court held the contract demonstrated design-builder's intent to assume a duty of care for **everyone** at the site.

Ownership and Copyright – Instruments of Service

Project Owner May Lose Right to A/E's Documents Due to Failure to Pay Invoices

- When a project owner failed to pay its architect, the architect terminated its contract for default and terminated the owner's nonexclusive license to use the architect's documents.
- The owner and its new architect and contractors continued to use the documents over the protest of the architect.
- In response to the architect's suit, the defendants moved to dismiss the complaint based on the argument that the payment requirement of the contract was a mere "covenant" upon which the architect could sue for damages, but was not a "condition precedent to the existence of the nonexclusive license."
- The court concluded that this was indeed the law of the state, but it was the wrong argument to raise in this case. WHY?
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Ownership & Copyright (*continued*)

- It is the wrong argument because, although the nonexclusive license came into existence "upon execution" of the Agreement before payment was due, the contract expressly provided for "termination" of the license for subsequent non-payment.
- The more important point was that the architect had been prudent enough to include language in its contract stating that even if a license was granted at the outset of a project, the license would automatically terminate upon failure of the client to pay the architect's invoices.
- *Eberhard Architect's v. Bogart Architecture, Inc. et al.,* 314 F.R.D. 567 (U.S. District Court, N.D Ohio)

Warranties

Construction Manager Not Guarantor of Contractor's Work

- CM contractually agreed to "make sure the construction work is performed properly;"
- Trial judge found CM liable for roof repair or replacement costs because even though not a guarantor of contractor's work, it failed of satisfy its CM obligations;
  - "The lack of thorough, timely inspection by [CM] allowed [contractor's] substandard work to escape detection when, had work been checked, correction of deficient work would have been much easier and less costly."
- *Manley Architecture Group, LLC v. Santanello*, 2018 WL 2749344, 2018 Ohio 2200.
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CM not Guarantor (*continued*)

- Appellate court said CM role "only loosely defined" and ambiguous as to the scope.

- Court found CM didn't breach its contractual obligations by failing to monitor roof installation. Project Owner testified he knew about the leaking roof soon after completion and CM then "worked hard at trying to figure out what the problem was" and "tried an attempt at once" to have the contractor fix it.

- Owner testified CM then got another contractor to look at the roof and make repairs. This testimony, says the court, demonstrates CM performed the "construction management" responsibilities as the parties intended under the agreement.

Third Party Beneficiary Claims against Design Professionals

Owner on Design-Build Project Can't Sue the Subcontracted DP

- Owner on design-build project sued design-builder as well as subcontracted DP firm and two of its employees.
- Summary Judgment for engineers because lack of privity of contract with the owner.
- Affirmed on appeal because no contract between engineers and Owner, and no "functional equivalent to privity" of contract.
  - because no evidence of "linking conduct" by DP – such as "words or actions that link the professional the professional to the non-client."
- *Stapleton v. Barrett Crane Design & Engineering. United States Court of Appeals, Second Circuit (2018)*

3rd Party Beneficiary of DP Contract?

- New York City claimed it was intended 3rd party beneficiary of engineer's contract with NY Dormitory Authority.

- Court held summary judgment must be granted to DP because City failed to demonstrate it could be found to be 3rd beneficiary.

  - "We have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party 'to enforce [a promisee's] contract with another.'"
  - "In the absence of express language, '[s]uch third parties are generally considered mere incidental beneficiaries'.

- *Dormitory Auth. of the State of N.Y. v Samson Constr. Co. 2018 NY Slip Op 01115 Decided on February 15, 2018*

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3rd Party Beneficiary case (continued)

- "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts"

- "We have previously sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was "an intent to permit enforcement by the third party".

Owner Sues Sub/DP for Approving Design-Builder's Payment Applications

- Design-Builder completed project behind schedule.
  - Subcontracted DP approved pay applications and contractor received "final payment."
- Project owner sued the DP for negligently approving pay applications that failed to account for liquidated damages and unpaid subcontractor claims.
- Court reviewed the DP contract and found no duty to approve pay applications – but even if there was, no duty owed for benefit of owner.
- *Tax Increment Finance Authority v. Haussman Construction Company,* Court of Appeals of Michigan (2018)

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Pay Application case (*continued*)

- To find a duty to owner, the DP's duty to its client, the design-builder, would have needed to be supplemented by duty to owner arising from some additional source: a special relationship, a voluntary undertaking of a task, an obligation to the public, or some similar circumstance.

- Court said DP was not in position to carry out tasks for Owner because as a sub to the contractor, the DP couldn't reasonably pass judgment on contractor's payment applications to the owner.

- Those functions should have been conducted by the owner itself, or by a construction manager or advisor working directly for the owner.

Miscellaneous Issues

Filing a Mediation Demand does not Toll Statute of Limitations for Filing Suit

- Owner's Negligence suit against DP barred by 3 year statute of limitations that accrued on date building permit was issued.
- Owner's filing of mediation demand didn't toll the clock.
- AIA B101 - Section 8.2.1 provided
  - "Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution."
- Section 8.1.1 provided
  - the parties "shall commence *all claims and causes of action* ... in accordance with the method of binding dispute resolution selected in this Agreement *within the period specified by applicable law*."
- *Washington Tennis & Education Foundation, Inc. v. Clark Nexsen, Inc.*, 324 F.Supp.3d 128 (U.S. Dist. Ct., District of Columbia 2018).
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Statute of Limitations (*Wash. Tennis* continued)

- The requirement to file with the applicable statute of limitations is absolute.

- The court found that "The Architect Agreement expressly contemplates the filing of a protective action [litigation] during the pendency of mediation precisely to avoid issues with the statute of limitations."

More detailed articles and case notes on the cases presented in this program are available at:

www.Construction*Risk*.com

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