Design Professional Litigation Lessons Learned 2017

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Learning Objectives

- Gain a better understanding of contract language and field services to better manage site safety responsibility and liability;
- Learn about third party claims and how to manage them;
- Gain risk management ideas and strategies from recent court decisions; and
- Gain an understanding of new concerns and strategies regarding indemnification, limitation of liability, and other key risk allocation clauses.

Topics Covered

- Indemnification
- Limitation of Liability
- Procedural Issues –
  - notice of claim, time limit for filing suit
  - pay-if-paid clause
- Contractor Claims against A/E
- Site Safety
- Professional Liability Exclusion in CGL Policy
- Economic Loss Rule
- Mechanics Liens for A/E
- Ownership & Copyright of Plans; warranties

Indemnification

Indemnity Obligation Includes First Party Attorneys Fees Based on Language of the Clause

- Indemnity clause in easement agreement required indemnitor (contractor) to pay Indemnitee's (adjoining property owner) first party attorneys fees incurred in suing contractor for property damages.
- This was a "Crane Swing, Tie Back and Swing Scaffold Easement Agreement" granting the contractor an easement during construction for the property adjoining a high rise tower it was constructing.
- During excavation, certain damages occurred to the foundation and structure of the neighboring buildings.
- *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group*, 454 Md. 475, 164 A. 3d 978, (Maryland 2017).
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Indemnity of 1st Party Claim (continued)

- Contractor was obligated to defend and indemnify (including attorneys' fees) 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.”
- Although indemnity is generally for third party claims and the losses resulting from such third party claims, the court found the clause in this instance also applied to first party claims for the owner’s own losses and damages, and this included the right of the property owner to recover its attorneys fees.
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Indemnity of 1st Party Claim (continued)

- Court parsed the actual words and phrases and punctuation of the indemnification clause to find that although the words "defend and hold harmless" refer to third-party claims, this did not serve as a limitation on the breadth of what was covered by the "indemnification" obligation.
- With regard to the attorneys fees, it was not necessary for the indemnity provision to expressly state that it applied to "first party claims," in order for the court to find that it contained a first-party attorneys fee shifting to the contractor. Court looked at the overall "language and structure" of the article to conclude that the damages, losses and attorneys fees were not limited to those arising out of third party claims.

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Indemnity of 1st Party Claim (continued)

- "The inclusion of the words 'attorneys fees' together with a reference to damages 'arising out of … breach' constituted an express provision authorizing first-party fee shifting…." (Court of Special Appeals decision).
- The Court of Appeals affirmed this decision and further explained that the indemnification article
  - ties payment of attorneys fees to an action for "breach" of the contract; and
  - "it confirms the intent of the parties to cover first-party counsel fees by referring to 'rent loss,' a first party loss arising from a breach of the Agreement."
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Indemnification Drafting Tip

- **Clarify indemnity clauses so they apply only to damages from third party claims**.
- Revise indemnity articles to expressly state that obligations only apply to "third party tort claims."
- The typical clause mixes together terms like "claim," "action," and "proceedings" that require a defense with terms such as "damages," "losses," "judgments," and "expenses," that logically required only indemnification.
- Make clear that indemnity is not for first-party losses such as economic losses that the Indemnitte has in the absence of a third party claim against it.
- Consider revising the order of the words in the article by moving all words requiring a duty to defend to the beginning of the phrase, followed by words that require only indemnification. Then be sure to state that the only damages to be indemnified are those that arise out of third party claims.

Indemnification Clause that Included Voidable Provision Enforced to Extent Legally Permissible Instead of Throwing out Entire Clause

- Indemnification clause required contractor to defend and indemnify owner against all claims and damages even if caused by School Board/ owner.
- This violated the state's anti-indemnity statute that prohibits recovery under a contractual indemnity provision when damages sustained by third parties are caused the public owner's own negligence.
- Individual who was injured by debris from a tire blowout on a dump truck being operated by a general contractor on a construction site sued Board. When the Board sought to be indemnified, the trial court found the indemnity clause was void and unenforceable.
- *Johnson v. Hamp's Construction, LLC*, 221 So.3d 222, (2017).
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Voidable Indemnity Provisions (continued)

- This was reversed on appeal with the court finding that although the clause was void to the extent it required the contractor to indemnity the Board for the Board's own negligence, it was nevertheless enforceable in this case where the underlying claim alleged that damages were caused by the contractor's negligence.
- **Comment:** This is why it is wise to begin an indemnity clause with the introductory wording, "To the fullest extent permitted by law, the Contractor shall…." That language was included in the clause at issue. It permitted the court to strike out the offending language and enforce the balance of the clause to the maximum extent legally enforceable to accomplish the intent of the parties.
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Voidable Indemnity Provisions continued: Indemnification Clause Drafting Tip

- **Comment:** When drafting indemnity clauses it is common to find a provision stating that the duty to defend and indemnify applies even if the damages were caused **in part** by the Indemnitees.
- So long as the clause states that the contractor's duty is limited to indemnifying for damages **to the extent caused** by its negligence, the logical way to read the clause is just as was done by the court in the *Johnson* case, i.e.,
  - (1) the contractor indemnifies for those damages caused by its negligence; (2) the owner remains responsible for the damages caused by its negligence and the contractor does not indemnify for those; and (3) the defense duty is triggered if there are allegations of negligence by the contractor even if there are also allegations of negligence against the Indemnitees (e.g. Owner).
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GMP Contractor Indemnification Claim against Engineer for Inaccurate Documents that Caused Extra Costs

- Hensel Phelps Construction Co. ("Contractor") was awarded a Guaranteed Maximum Price (GMP) contract for a Marriott Hotel in Washington, D.C.
- In preparing its GMP proposal, the contractor relied upon "Preliminary Design Documents" that had been prepared by an engineer working under contract directly to the project owner.
- After receiving the GMP contract award, the engineering firm entered into contract with the contractor to provide the balance of design services for the project.

- *Hensel Phelps Construction v. Cooper Carry, Inc.*, 2016 WL 5415621 (U. S. District Ct., District of Columbia, 2016). (*Continued on next slide)*

Contractor Indemnity against Engineer (continued)

- After completing certain construction phases, contractor states it determined designs it was using were flawed, and it had to make midstream corrections to comply with various code requirements, and thereby incurred unexpected costs.
- Trial court granted Engineer summary because
  - A suit based on the indemnification clause of the contract could only seek damages if they resulted from third party claims against the contractor.
  - The indemnity clause could not be used to make first party claims by the contractor to recover its financial losses.
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Contractor Indemnity against Engineer (continued)

- **Comment**: Even though the indemnity clause did not expressly limit indemnification to damages caused by third party claims, the court explained that

  - that is the only basis to find liability under an indemnity clause, and
  - that for first party claims, a contractor is expected to just make a normal breach of contract claim against the other party.

- The court says, "if the Court were to read the indemnification clause in the way [contractor] urges – to cover [contractor's] damages, including [contractor's] own liabilities for costs it incurred in fixing [engineer's mistakes] – then it would be redundant."

ADA Penalties against Project Owner can be Recovered from AECOM & Contractor through Indemnification and Contribution Claims

- Disabled individuals sued Los Angeles for alleged failure of the city's bus facility to meet the accessibility standards of the Americans with Disabilities Act (ADA) and of the Rehabilitation Act
- City filed third party complaint against its Engineer and Contractor for indemnification of the damages -- or contribution.
- City contract with Engineer required Engineer "to defend, indemnify and hold harmless the City against all suits, claims, losses…to the extent that any such claim results from negligent and/or intentional wrongful acts or omissions…."
- *City of Los Angeles v. AECOM Services, Inc.*, 2017 WL 1431084 (9th Cir., 2017).

ADA Indemnification continued

- U.S. 9th Cir. Court of Appeals held federal law does not preempt state law or otherwise prohibit the City from being indemnified.
- Court distinguishes facts in this case from those in two other federal court decisions where indemnity obligations of the designers and contractors were found unenforceable.
- The difference, according to the court, is that City did not attempt to allocate full risk of loss to the firms and completely insulate itself from the penalties of ADA non-compliance. Rather, the liability was passed along to the firms only to the extent that they caused the non-compliance due to their own negligence or willful misconduct.

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).

$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."

$9.5 Million Jury Verdict Knocked Down to $550,00 due to LoL

Housing developer won jury verdict for $9.5 million against a geotechnical engineer.

LoL clause limited liability to $550,000.

Developer attempted to avoid the LoL by arguing geotech's conduct was willful and wanton misconduct.

Trial court allowed evidence in that regard, but the jury found the conduct was not willful and wanton.

Therefore, the LoL clause withstood the challenge.

Taylor Morrison of Colorado, Inc. v. Terracon Consultants, Inc., 2017 WL 2180518, 2017 COA 64 (2017).

LoL Drafting Tips

- The LoL clause should be comprehensive. Consider one I like to use:

- **Sample LoL Clause**
- To the fullest extent permitted by law, the total liability, in the aggregate, of Consultant and its officers, directors, partners, employees, agents, and subconsultants, to Client, and anyone claiming through or under Client, for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way relating to this Project or Contract, from any cause or causes, including but not limited to tort (including negligence and professional errors and omissions), strict liability, breach of contract, or breach of warranty, shall not exceed the total compensation received by Consultant or $100,000, whichever is greater. The Client may negotiate a higher limitation of liability for an additional fee, which is necessary to compensate for the greater risk assumed by Consultant.

Include Waiver of Consequential Damages Clause – separate from LoL

- **Sample Mutual Waiver of Consequential Damages**:

"Consultant and Client waive all consequential or special damages, including, but not limited to, loss of use, profits, revenue, business opportunity, or production, for claims, disputes, or other matters arising out of or relating to the Contract or the services provided by Consultant, regardless of whether such claim or dispute is based upon breach of contract, willful misconduct or negligent act or omission of either of them or their employees, agents, subconsultants, or other legal theory, even if the affected party has knowledge of the possibility of such damages. This mutual waiver shall survive termination or completion of this Contract."

Procedural Issues

These are not design professional cases, but the principles learned apply equally to design professionals

Contractual Agreement can shorten statutory Time Limit for Bringing Suit

- Homeowner contract with a professional furnace maintenance company shortened the three year statutory time period for bringing claim to just one year.

  Court held parties have freedom of contract to shorten time period for filing suits and contractually shortened limitation period will be valid if:
  - (1) there is no statute prohibiting shortening the time period;
  - (2) the provision is not the result of fraud, duress, misrepresentation; and
  - (3) the provision is reasonable in light of all the pertinent circumstances.
- *Ceccone v. Carroll Home Services, LLC*, 454 Md. 680 (Maryland 2017).

Notice of Claim Requirement Flows Down from Prime Contract to Subcontract

- Elevator sub filed breach of contract claim against GC for damages resulting from delay to the performance of the work.
- GC moved for summary judgment based on sub's failure to comply with notice provision that flowed down from the prime agreement and required any delay claims to be submitted within 45 days of incurring the delay.
- Trial court denied summary judgment because GC had actual notice of the delay, even though it was not formally notified by the sub.
- Jury awarded sub $209,000.
- Reversed on appeal.
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Notice of Claim (continued)

- Strict compliance with notice provision was condition precedent, and this specifically included the requirement that "verified statements" that detailed the amount of damages incurred must be submitted.
  - *Schindler El. Corp., v. Tully Construction Co., Inc.*, 139 A.D. 3d 930, 30 N.Y.S.3d 707 (2016) .

- ***Comment**: Although some courts have been somewhat lenient in what constitutes adequate notice, and some courts have held that unless prejudice resulted from the lack of notice, the requirement will not be strictly enforced, this decision is an excellent reminder of how important it is for contractors and subcontractors to know the detailed notice requirements of their contracts and follow those requirements precisely.*

"Pay-when-paid" treated as a "Pay-IF-paid"
due to Condition Precedent Language (Virginia law)

- Project was allegedly delayed by the project owner and caused delay and impact costs to a subcontractor.
- "Pay-when-clause," in combination with a separate clause addressing payments arising from owner-initiated changes, set a condition precedent such that the subcontractor was not entitled to payment since the owner failed to pay the prime contractor for the changes.
- Despite concluding that payment was due to the subcontractor only IF the owner paid the prime, the court never referred to the clause as a "pay-*if*-paid" clause but instead called it a "pay-*when*-paid" clause with a clear **"condition precedent"** to the payment obligation.
- *Young Electrical Contractors, Inc. v. Dustin Construction, Inc.*, 231 Md. App. (2016), applying Virginia law.

Contractor Claims against A/E Firms

Engineer Liable for Rainwater Tank Collapse Where it Failed to Provide Appropriate RFI Responses to Contractor

- Engineering firm designed site plans for a rain tank system to be buried under a parking lot for a new church sanctuary.
- As contractor began constructing the project, it inquired via (RFI) about concerns about the suitability of the tank for the location, given the high water table, and included questions about installation and performance.
- Without addressing the performance issues or reevaluating the choice of the tank system in light of the contractor's concerns, the engineer referred to information in the manufacturer's drawings to assure the contractor that their ground water concerns would not impact the functionality of the tank.
- *William H. Gordon Associates, Inc. v. Heritage Fellowship*, 291 Va. 122 (2016).

RFI case continued

- Only a few months after it was installed, the tank collapsed under the parking lot.

- In litigation that followed, trial court found engineer breached its professional standard of care by:
  - (1) failing to conduct due diligence regarding the suitability of the tank;
  - (2) incorporating a manufacturer's specifications into its own plan without verifying them; and
  - (3) failing to respond to appropriate questions during construction.

Site Safety

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 established CM did not assume responsibility for manner in which work was conducted.

- 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, according to the court, "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."

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CM Site Safety Continued

- The court also stated that CM,
  - "was authorized only to review and monitor safety programs and requirements and make recommendations, provide direction to contractors regarding corrective action to be taken if any unsafe condition was detect, and stop work only in the event of any emergency."

- For these reasons, the court found the CM had not assumed by contract or by action in the field any responsibility for the construction contractor's site safety responsibilities.

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 intend to assume a duty of care for **everyone** at the site.

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Comment on DBIA Contract Issue

- **Comment**: I wonder if the design-builder might have avoided this result by inserting language in the prime agreement expressly stating that it could assign the safety duties to its subcontractors instead of itself assuming all the duties stated in the quoted sections.
- That might have been enough to satisfy the court by demonstrating the intent that was subsequently expressed by the subcontracts.
- I don't know whether this would work, but it can't hurt to insert such language in the prime agreement as a precaution against a court rendering a decision like the one here.

Professional Liability Exclusion in CGL Policy

Professional Liability Exclusion in CGL Policy Bars A/E from GCL Additional Insured Coverage for Laborer's Injuries

- Sparks from cutting torch ignited a methane gas explosion that killed an employee of a construction subcontractor and injured an employee of another subcontractor.
- Both subcontractors were required by their contracts to name the project design professional (DP) as an additional insured on their commercial general liability (CGL) polices.
- When claims were brought on behalf of the subcontractor employees against the DP, the DP tendered the claims to the subcontractor CGL carriers for defense.
- *Orchard, Hiltz & McCliment (OHM) v. Phoenix Insurance Co*., 2017 WL 244787 (U.S. Court of Appeals, 6thCir., 2017).
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Professional Liability exclusion continued

- Carriers refused to defend. Professional liability exclusion in their policies applied to the claims.
- Held: "The substance of the underlying claims is that [DP] is liable for failing to properly plan for, and take preventative measures to ensure, the safe removal of the digester tank lids...."

  "The underlying plaintiffs allege that [DP] had a duty as the project's consulting engineering firm to do so. Even if some of the underlying factual allegations implicate tasks that do not, in and of themselves, involve a specialize skill, such acts and omissions are reasonably related to [DP's] overall provision of professional services."

  DP's own professional liability carrier defended it in the two actions and the court concluded that the CGL policies were "never intended to cover professional negligence claims."

CGL Policy Precludes Coverage for Damages from Subcontracted Land Surveyor's Error

- GC constructed two condo buildings too close to the adjoining property.
- Mistake was due to error made by the land surveyor who was working under subcontract to the GC.
- GC paid the neighboring landowner for a strip of land along the property line and that resolved the set-back distance problem.
- GC sought the property purchase costs as damages under its CGL policy.
- Carrier denied coverage due to the professional services exclusion.
- Court agreed. Explained why land surveyor is "professional" why it is not relevant whether the land surveyor as a subcontractor to the GC.
- *Western National Mutual Ins. Co. v. TSP, Inc.,* 904 N.W. 2d 52 (2017).

Professional Liability Exclusion in CGL Policy bars coverage fro Massive Pipe Explosion

- Construction excavator struck unmarked petroleum pipeline causing massive explosion and rupture.
- CGL carrier of the pipeline owner, Kinder Morgan, settled claims against owner and then made equitable subrogation claim demanding recovery of defense costs and settlement amounts from CGL carrier of staffing agency company that provided pipeline personnel.
- Court held CGL carrier could refuse that demand because personnel in question were hired as construction "inspectors" and provided a professional service in "marking" or failing to mark the pipeline, and the claim against them was a "professional liability" claim subject to the professional liability exclusion of the CGL policy.
- *Energy Insurance Mutual Limited v. ACE American Insurance Company, 221 Cal. Rptr. 711 (2017).*

Economic Loss Doctrine

Economic Loss Doctrine Bars Claim by a Third Party Seeking Purely Economic Losses

- The Maryland Court of Appeals applied the economic loss doctrine to bar a claim against an engineer by a general contractor seeking to recover economic losses based upon reliance on allegedly defective designs.
- In the absence of contractual privity, physical injury, or risk of physical injury, the court held that design professionals in government construction projects do not owe a tort duty to those who bid and contract with the government.
- *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600 (2017).

Economic Loss Doctrine did not bar Negligent Misrepresentation Claim against A/E Seeking Indemnity against Subcontractor Delay Claim

- Subcontractor sued prime contractor for delay claims.
- The prime filed 3rd party complaint against the project owner and the architect seeking indemnity.
- Court held architect owed a duty of care to the contractor, and the economic loss did not apply.
- The key holding of the court was that the economic loss rule does not apply to a claim of negligent misrepresentation where there is no privity of contract." *D.W. Wilburn, Inc. v. K. Norman Berry Associates*, 2016 WL 745774 (Kentucky 2017).
- ***NOTE**: Subcontractor Claim against the Architect was not waived by Prime Contractor Having Executed Change Orders with the Owner and Accepting Final Payment.*

Economic Loss Doctrine Does Not Bar Negligent Misrepresentation Claim

- Negligent misrepresentation filed against a environmental/geotechnical firm by its client, the project developer.
- Suit sought to recover economic losses the developer incurred when it discovered that an abandoned landfill encroached on part of the land it had purchased in reliance upon a Phase I environmental site assessment (ESA) performed by the consultant.
- Held: Because this case concerns an alleged negligent misrepresentation, it falls under Section 552 Restatement (Second) of Torts negligent misrepresentation exception to the economic loss doctrine rule, which would have otherwise barred the developer from seeking purely economic losses in a tort action instead of a breach of contract action.
  - *Atlantic Geoscience, Inc. v. Phoenix Development and Land Investment, LLC*, 341 Ga. App. 81 (2017).
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Comment on Economic Loss Doctrine cases

- More cases are holding that allegation of negligent misrepresentation gets the plaintiff out from under LoL clause of contract and the bar of the economic loss doctrine.
- Because this is a Phase 1 ESA, the consultant's fees was probably only a few thousand dollars.
- The risk of facing suits seeking millions of dollars for the loss of a real estate development deal are so significant that most firms providing ESAs routinely request and obtain, limitation of liability (LoL) clauses in their contracts to limit their liability to the amount of their fee or some specified dollar amount, whichever is higher.
- The profit earned on an ESA simply would not justify performing the services without some reasonable LoL.
- Owner/Client effectively avoids LoL clause of contract by suing for negligent misrepresentation.

Liens for the A/E

Architect Cannot Enforce Mechanic's Lien for Design Services Performed Offsite

- Architect provided millions of dollars worth of design services for condominium project and was not paid by the developer with whom it was under contract.
- Developer didn't own the property, but it had a contract to purchase it from the owner.
- Financing for the project fell through, and the purchase was never closed.
- Architect filed a mechanic's lien on the property.
- Property owner successfully had the lien removed and all rights of the Architect extinguished because the Architect had failed to file a notice with the landowner when first beginning its off-site design services.
- *Iliescu v. Steppan*, 394 P. 3d 930 (Nevada 2017).

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?

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

Implied Warranty of Specifications – Spearin Doctrine Applies to Design-Build Contracts allowing Trade Subcontractor to Rely on Designs Provided by Engineer/Subcontractor

- On a design-build project, a sub filed suit against Balfour Beatty Construction ("BBC") the design-build contractor, alleging breach of implied warranty of specifications (Spearin Doctrine claim).
- Sub filed motion for partial summary judgment asking the court to find that the design-builder could not shift legal responsibility for defective plans and specs onto its subcontractor/engineer.
- Sub argued it could seek relief under the Spearin Doctrine line of cases for extra work necessitated by defects in plans and specs that were provided to the contractor for bidding its work.

Design-Build Implied Warranty of Specs (continued)

- Design-builder argued that Spearin doctrine does not apply here due to the design-build process where plans and specifications provided to subcontractors are expressly incomplete when the initial agreements are signed.
- In response, Sub argued that although it assumed the risk that the plans and specs would be "refined," it did not assume the risk that they would be "defective."
- Court concluded that (1) The Spearin doctrine may apply to design-build projects, but (2) the record in the case was not sufficiently developed to determine whether the doctrine applies to the facts in this case.
- *U.S. for benefit of Bonita Pipeline, Inc. v. Balfour Beatty Construction LLC,* et. al., 2017 WL 2869721 (U.S. District Ct., S.D. California).

Implied Warranty of Habitability does not Apply to Design Professionals that didn't Perform Construction Work on Condominium

- Court held implied warranty of habitability claims cannot be made against design professionals that do not engage in the actual construction of the allegedly defective structure.
- Quoting from an earlier case precedent, the court stated,
  - "Engineers and design professionals… provide a service and do not warrant the accuracy of their plans and specifications." This is so even where the project developer is bankrupt and the condo association has no recourse for recovery due to that insolvency."
- *Sienna Court Condominium Association v. Champion Aluminum Corporation, et. al.*, 75 N.E. 3d 260 (Illinois 2017).

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