Design Professional Litigation

2015 Year in Review

Arch Insurance

Professional Underwriters Agency

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Course Description

This course will be a review of recent court decisions and how they affect a design professional's practice. Topics that will be addressed and reviewed include:

Incorporation by Reference & Flow Down

CM at Risk

Code Compliance

Copyright infringement

Site Safety

Indemnification

Third Party Claims

Economic Loss Doctrine

Piercing Corporate Veil

Warranties

Defamation claims

Dispute Resolution

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;
- Be given risk management ideas and strategies from recent court decisions; and
- Gain an understanding of new concerns and strategies regarding indemnification and other key risk allocation clauses.

CM at Risk:

Owner's Implied Warranty of Specifications – Spearin Doctrine

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CM at Risk Entitled to Reasonably Rely on Design Provided by Owner

- Public Owner who furnishes plans and specs to a Construction Manager at Risk (CMAR) is deemed to have given implied warranty of their sufficiency for purpose intended.
- To recover for defective specs the CMAR will have to prove it reasonably relied to its detriment on them.
- Language in contract requiring the CMAR to consult with Owner and designer during design development, and other duties to take field measurements and verify field conditions did not bar CMAR's claim
- CMAR not required to indemnify and defend Owner against subcontractor claim based on defective specs.

Coghlin Electrical Contractors v. Gilbane Buidling Co., (SJC-1178, Supreme Judicial Court, Massachusetts, March 2015).

Site Safety:
Responsibility and Liability

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Scaffolding Collapse:
Engineer, Architect, Project Owner Not Liable for Injuries

- Summary judgment in favor of an architect and an engineer, against employees of a contractor that were injured when scaffolding failed under the weight of a concrete slab that was being poured.

- The firms that designed and observed the project were dismissed because they were not involved in actual supervision and control of the contractors work.

- Citing the AIA B141 agreement, the court found the engineer "was not obligated to inspect the scaffolding to ensure that it was in compliance" with the plans and specifications.

*McKean v. Yates Engineering Co*rp., 2015 WL 5118062 (Mississippi 2015).

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- Engineer of scaffolding created a design impossible to build.
- Rather than seeking clarification of design, contractor used its own design to “splice” supporting posts without the knowledge of the engineer.
  - Result: even if the engineer’s design was inadequate, it was not the cause of the collapse. Plaintiff’s expert witness (an engineer) submitted an affidavit stating “defects in the scaffolding caused the collapse.”
  - An inadmissible aspect of the expert affidavit opined that the architect had duty to inspect and supervise the construction of the scaffolding.

Testimony was excluded because engineer was not a “like professional” and was not qualified to offer opinion on what was required of architect.

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- Court stated only limited circumstances where engineer has duty to warn employees of the contractor or subcontractor of hazardous conditions.

- Engineer had one initial site visit and then a visit after the collapse.

- Court considered factors to determine if supervisory powers went beyond provisions of contract:

- (1) actual supervision and control of the work; (2) retention of the right to supervise and control; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) assumption of responsibilities for safety practices; (6) authority to issue change orders; and (7) the right to stop the work.

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- **The importance of the contract language**

  Plaintiffs asserted architect had contractual duty to inspect the formwork and scaffolding before the subcontractor poured the concrete for the second-floor slab.

- Also asserted architect's conduct created a duty "to ensure the integrity of the concrete formwork."

- In rejecting these arguments the court quoted from the AIA B141 contract and said unambiguous contract language states architect not responsible for construction methods or safety precautions in connection with the work.

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- Court said: “the scaffolding was a means to build the project's second-story floor”, and “nothing in the contract made the architect responsible for ensuring that the engineer’s scaffolding design was adequate.”

- Court found architect had no contractual duty to inspect the scaffolding before the concrete was poured. Quoted the contract that stated the architect “shall visit the site at intervals appropriate … to determine that the Work when completed will be in accordance with the Contract Documents.”

- General authority to “reject” non-conforming work did not create a special duty, because the architect “had no authority to stop the work. Only [the owner] had the authority to *stop* work on the project.”

- Since Architect did not supervise work it had no duty to warn plaintiffs that scaffolding was inadequate.

Condo Claims

Design Professional Owes Duty to Third Party Condominium Unit Purchasers

- Condo association alleged negligent design resulted in several defects, including extensive water infiltration, inadequate fire separations, excessive solar heat gain, structural cracks, and other safety hazards.
- Alleged that designers provided their services "knowing that the finished construction would be sold as condominiums."
- Alleged designers played an active role throughout the construction process, including coordinating efforts of the design and construction teams, conducting weekly site visits and inspections, recommending design revisions as needed, and monitoring compliance with design plans.
- California Supreme Court held architects designing condos owe duty of care to future homeowners even though they do not actually build the projects themselves or exercise ultimate control over their construction.

Beacon v. Skidmore, Owings & Merrill (211 Cal.App.4th 1301 (2014)

Condo Claim:

Warranties
Don’t Apply to Professionals

Designer not Liable for Implied Warranty of Habitability on Condo

- Condo association filed suit against a number of the parties involved in the design and construction of the condo complex, alleging breach of implied warranty of habitability.

- Association attributed air and water infiltration to latent defects in the design that were not discovered until 2007.

- Trial court dismissed suit against designer, and appellate court affirmed dismissal.

Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC, 2015 IL App (1st) 123452

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- Court cited the principle that an architect does not warrant or guarantee perfection in his or her plans and specifications is long standing

- Association argued that work of architects is similar to the work of general contractors, noting architect can create latent defects in a completed building and that the public policy underlying the implied warranty of habitability is to protect new homeowners from latent defects by holding the responsible party liable.

- Court disagreed. Found implied warranty should be limited to subcontractors who were involved with the physical construction or the construction-sale of the property.

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- Court emphasized that implied warranty of habitability of construction arises between the builder-seller and the buyer because of their “unusual dependent relationship.”

- Court concluded that designer’s role in the design of the condominiums did not create such a relationship. The fact that the builders of the condominium complex were insolvent did not justify expanding implied warranty liability to design professionals.

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- Court rejected condo association's argument that design professionals and builders are similar because both are already subject to the implied obligation to perform their tasks in a “workmanlike” manner.

- Citing to Black's Law Dictionary, the court noted a “workman” is a person who is “employed in manual labor, skilled or unskilled."

  – “Thus the term “workmen” does not include professional persons such as design professionals, and design professionals are not obligated to perform their professional services in a workmanlike manner.”

- **Contract Lesson**: Architects and engineers should be careful not to agree to contract provisions that require them to perform their services in a "good and workmanlike manner." While the phrase is seemingly innocuous, a court could find that it imposes a higher standard than the professional standard of care.

Proving Damages

(Condo HOA case)

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Condo Suit Dismissed where Expert Provided Damage Estimates – not Actuals

- Experts failed to present detailed evidence of the various elements of the damages claimed, and one expert failed to demonstrate his qualifications to testify.
- Broad estimates of damages, even though based on R.S. Means, were not sufficient to take the matter to jury, where no detailed analysis of each of the 23 elements of a claim.
- One expert's report lacked sufficient disclosure of the method and calculations that formed the basis of the report
- Other expert was, by his own admission, not qualified to provide cost estimates relating to this other opinions concerning structural defects.
- Decision demonstrates importance of presenting qualified damage experts to present detailed analysis of actual costs for each claim element.

Inn by the Sea Homeowners Assoc. v. Seainn, LLC, 170 So.3d 496 (Miss 2015)

A/E Liability to Contractor that Relies on Geotech Report

Engineer May Be Liable to Contractor for Both Breach of Professional Duty and Negligent Misrepresentation

- Engineer who prepares documents that contractors will rely on when preparing their bids owes duty of care to contractors, and can be subject to liability for both breach of professional duty and negligent misrepresentation.
- Before project was put out to bid, the engineer conducted geological studies and prepared reports describing the conditions on the project. Geotechnical Baseline Report ("GBR"), was furnished to bidders so they could estimate the cost of performing the work. According to the contractor, the GBR indicated that "the majority of the subterranean region … was composed of stable soils suitable for HDD."

Apex Directional Drilling, LLC v. SHN Consulting Eng'rs & Geologists, Inc., 2015 U.S. Dist. LEXIS 105537 (N.D. Cal. Aug. 11, 2015).

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- Contractor states it encountered mud and flowing sands very different from the soils described in the GBR.
- When contractor reported these different conditions to city, the engineer “continued to maintain that the project was proceeding in the competent soils described in the GBR, and, on that premise, repeatedly gave Apex illogical instructions.”
- City, acting on the engineer’s recommendations, rejected change order requests and ultimately terminated the contractor.
- Contractor sued city for breach of contract and then filed a separate complaint against the engineer asserting claims for breach of professional duty and negligent misrepresentation.
- Engineer filed motion to dismiss, arguing it did not owe contractor an independent duty of care.
- Court denied the motion – finding engineer could owe contractor a duty of care and the issue must go to jury.

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- Court observed that in the context of a negligence claim seeking economic damages where there is no contractual privity, California courts use a six-factor balancing test to determine whether a duty of care exists.
- Factors are: **1)** the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to the plaintiff; **3)** the degree of certainty that the plaintiff suffered an injury**; 4)** the closeness of the connection between the defendant's conduct and the injury suffered; 5) the moral blame attached to the defendant's conduct ; and 6) the policy of preventing future harm.
- Court found that first, third and fourth factors favored imposing a duty of care, as the GBR was prepared for the purpose of establishing a baseline upon which the contractor would base its bid; mistakes in the GBR and the engineer's subsequent actions caused the contractor to suffer considerable losses.
- The court stated that because the duty was owed to "a specific, foreseeable and well-defined class", there would not be "unlimited liability to a nebulous group of future plaintiffs."

Code Compliance

Standard of Care May Exceed Code Requirements

- Tragic death of a two-year-old child who fell to his death from the third floor of Staples Center in Los Angeles.
- Parent's sued architect. Court dismissed based on statute of limitations applicable to "patent", easily discovered defect
- Parent's also claimed against the owner of the arena, arguing it negligently breached a duty of care owed to patrons.
- The appellate court reversed summary judgment for owner because foreseeable that someone would sit or stand on the shelf, and could suffer injuries or death from a fall.
- Even if the arena owner could prove it had conformed to building codes, that would not be a complete defense in a negligence action. The individual facts would have to be considered to determine what "reasonable care" required.

Henry Tang v. NBBJ, LP, 2014 WL 555163 (Cal. Appl. 2 Dist. (2014).

Failure to Design According to the IBC Was Not Grounds for Breach of Contract Suit, but Could be Negligence Action

- IBC was applicable design criteria but not explicitly referenced in the contract that required engineer's services be provided "in a manner consistent with the standards of care and skill exhibited in its profession for projects of this nature, type and degree of difficulty."
- Court noted that this provision simply incorporated the common-law standard of care for a professional into the contract.
  - Even if ordinary obligations related to professional's standard of care are made express terms of contract, that does not remove violation of the obligations from the realm of negligence, nor does it convert a malpractice claim into a breach of contract claim.
- Held: Breach of contract claim based on violation of contract provision would simply duplicate the malpractice claim.
- *Mary Imogene Bassett Hospital v. Cannon Design, Inc*. ,127 A.D.3d 1377 (2015).

Slander & Liable Suits against Designers

"Or Equal" Vendor Allowed to Sue Designer for Rejecting Equipment

- For construction of athletic field the GC chose a vendor of artificial turf that the a/e rejected as not meeting the design specs.
- Court concerned that architect allegedly "used specifications that were narrowly drafted to specifically favor A-Turf and did so despite protests from plaintiff" on at least two additional projects.
- Court concerned that the plaintiff's product had been successfully used for identical purposes on numerous sports facilities.
- "Plaintiff contends that [Architect] was in contact with A-Turf and plotted ways to favor A-Turf while excluding plaintiff and other competitors."
- This would be "*disguised sole source*" bidding.

Chenango Construction v. Hughes Associates, 128 A.D.3d 1150, 8 N.Y.S 3d 724 (2015).

Conditional Privilege Protected Designer from Contractor Defamation Suit

- Homeowner hired professional firm to investigate the cause of their leaky roof, and based on investigator's report that roof had been installed over soaking wet fiber-board roof insulation, the homeowner sued the roof installer, who in turn brought a third-party defamation claim against the investigator, asserting that his statement concerning the installation of the roof was false and defamatory.
- Court found report included statements of "fact" and not just "professional opinion."
- But court found statement was conditionally privileged and the investigator did not act with reckless disregard for the truth so as to waive the privilege.

Downey v. Chutehall Construction, 19 N.E. 3d 470 (Mass. 2014).

Indemnification

Indemnity Clause Void & Unenforceable Because Sub was not Sole Cause of Damages

- Condo indemnification clause stated subcontractor responsible for indemnifying Prime for damages caused "in whole or in part" by the sub.

- Held: North Carolina anti-indemnity statute made the clause unenforceable.

New Bern Riverfront Development v. Weaver Cooke Construction, LLC, 515 U.S. Bankruptcy Court, Raleigh Division (2015).

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- Court declined to apply the saving language that introduced the contract clause with:
  - "To the fullest extent permitted by law," to "blue line" the clause to pare it down to what would have been allowed under state law.
- Only indemnity language requiring the sub to indemnify others for claims to extent caused by indemnitor would be enforceable.
- Since the prime contractor's pleadings asserted negligence on the part of multiple subs (and there was even evidence that the prime itself was partly at fault), court held there was no subcontractor duty to indemnify the prime.

Incorporation by Reference: Flow Down Clauses

Flow Down Clause in Subcontract Limited the Incorporation of Design-Build K Terms and Conditions

- Sub filed summary judgment motion asserting that prime contract's limitation of liability (LoL) clause, incorporated into the subcontract through a flow-down clause, limited prime's ability to recover damages from subcontractor.
- Trial court granted the motion on the basis that the LoL clause in the prime contract applied to the subcontract by virtue of a flow-down clause.
- Reversed on appeal. Held: Prime contract LoL clause did not flow down to the benefit of the subcontractor.

Centex/Worthgroup, LLC v. Worthgroup Architects, L.P., 2015 WL 5316873.

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- The subcontract included a flow-down clause, which stated:
  - Worthgroup [the subcontractor] shall, except as otherwise provided herein, have all rights toward Centex which Centex has under the prime contract towards the Owner, and Worthgroup shall, to the extent permitted by applicable laws and except as provided herein, assume all obligations, risks and responsibilities toward Centex which Centex has assumed towards the Owner in the prime contract with respect to Design Work.
- Subcontract included a general liability clause making sub responsible for any redesign costs and additional construction costs required to correct its errors and omissions.

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- How the court explained it:
- Under the prime contract, Prime's liability to Owner for design defects was limited to the proceeds of the subcontractor's errors and omissions insurance.
  - The limitation of liability would not flow-down to the benefit of the subcontractor, however, because a provision of the subcontract specifically addressed the allocation of liability of the subcontractor's liability to Prime.
- Subcontract stated the sub would be liable for any redesign and additional construction costs required to correct the subcontractor's errors or omissions.
  - No mention in subcontract was made of any limitation upon that responsibility.

Professional Liability Exclusion in CGL Policy

Court Applied 'Professional Liability Exclusion' so Carrier had no 'Duty to Defend' Designer Under CGL Policy

- An architectural firm was sued by former client for improper building design and inadequate coordination with builders during construction.
- Architect sought legal defense from its CGL carrier who refused -- citing the "professional liability exclusion" provisionin the policy.
- Insurer argued no duty to defend because allegations against the architect concerned the rendering of professional services.
- Architect argued the allegations were of mere “general negligence” and not specifically “professional negligence.”
- Court looked at the factual allegations and concluded they were of “professional negligence.’ Held for insurance company.

Wisznia Co., Inc. v. General Star Indemnity Co., 759 F.3d 446 (5th Cir. 2014).

An Analysis of Contractor v. Federal Agency Disputes (CFMA 9/2015)

- Evaluation of 107 reported federal decisions issued between 2000 and early 2015
  - 25 DB, contractor prevailed (fully or partially) 32% of time
  - 74 DBB, contractor prevailed 45% of time
- Major conclusions
  - Misunderstandings regarding specifications are often at the root of disputes
  - Contractors lose because of inadequate evidence
  - DB has no advantage over DBB in generating favorable outcomes for contractors involved in a dispute

CFMA Analysis of Disputes (cont'd)

Conventional wisdom suggests that design-build project delivery methods, which emphasize pre-construction collaboration, should generate better outcomes. The expectation is that better upfront documentation may help contractors pursue their claims, though of course the same documentation is also available to agencies pursuing their points of view.

CFMA Analysis of Disputes (cont'd)

We conclude that while pre-project collaboration is useful, design-build has no discernible advantage along this dimension since many disputes arise over the course of performance. At the beginning of projects, parties are likely to feel optimistic. As performance proceeds, conflicts and misunderstandings arise. Eventually, these circumstances give rise to conflict that pre-planning neither necessarily foresaw nor could prevent. This is arguably the most surprising finding in this study.

Failure to Properly Manage the Design Process Creates Major Risk Exposure to Design-Builders

Flatiron-Lane v. Case Atlantic Company (2015)

- Dispute between design-builder and foundation subcontractor
  - NCDOT bridge project with drilled shafts
  - Foundation took 44 weeks vs. 16-22 weeks
- Conflicting design assumptions
  - Oversized temporary steel casings vs. oversized permanent casings
  - Designers did not know what Case planned
  - FL did not permit Case to directly communicate with designers
  - “With advance notice, the designers could have accommodated this construction method”

Flatiron-Lane (cont'd)

- Relationship adversarial on first day of construction and parties prepped for litigation
  - Responding to RFIs and accommodating Case's plan
  - Issues over annular space
  - Changing diameter of shafts
  - Support crane usage
  - Failure of designers to develop acceptance criteria for highly variable subsurface conditions
  - 11% of shafts had to be redesigned due to conditions encountered at plan depths

Flatiron-Lane (cont'd)

- Court finds both parties bore responsibility for delay
  - Design-builder
    - Should have known that its designers were designing in a manner inconsistent with Case's plan
    - Failed to coordinate subcontractors
  - Case
    - Not familiar with NCDOT practices and customary techniques
    - Abnormal equipment breakdown
    - Workmanship
- Neither party attempted to apportion delay

Carefully Consider All Applicable Contracts When Evaluating Rights and Obligations

URS Corporation v. Transpo (2015)

- Dispute between lead engineer and subconsultant on Seattle road project
  - Failure of sign structures to meet contract requirements
  - Issue over what contract governed liability
    - Teaming agreement and prime contract each included waiver of consequential damages
    - Subcontract agreement silent

URS (cont'd)

- Result:
  - Teaming agreement waiver survived expiration
  - Prime contract waiver flowed down to subconsultant
- Court has not yet ruled on which damages were consequential and whether subconsultant breached its obligations

Promises Made to Team Members During Proposal Process May be Binding

MetroplexCore v. Parsons Transportation Group (5th Cir. 2014)

- Houston Metro design-build-operate project
  - Original team included MetroplexCore (MC) as member of PTG team to manage geotech and hazmat work
  - PTG eventually awarded contract but doesn't use MC
  - MC sues for lost profits ($3-4MM)
- 5th Circuit allows MC to maintain a promissory estoppel theory
  - Promise
  - Foreseeability of reliance
  - Substantial reliance to MC's detriment

MetroplexCore (cont'd)

- Repeated assurances from PTG's vice president that MC would be part of the team (promises)
  - "Commitment to you is still in play"
  - We are still committed to MC being on management team"
- Metro Board expected MC to be involved on Parsons team
- Reliance to MC's detriment
  - Keeping 10-15 workers on staff for Parsons contract
  - Maintain open capacity to handle business on "moment's notice"
  - Divesting interest in first DBO contractor

Questions? Use the Chat box Please.

And after Presentation, feel free to call:

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