

Design and Construction Management Professional Reporter

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Is Perfection Possible? Managing Uncertainty and Expectations in Building Design and Construction

By Sue E. Yoakum, Esq., AIA

IN SEPTEMBER 2014, MCGRAW HILL CONSTRUCTION released the report “Managing Uncertainty and Expectations in Building Design and Construction.” This report was commissioned in 2012 and many in the industry have been waiting for the results. The AIA Large Firm Roundtable commissioned the McGraw Hill Construction Research & Analytics group to gather data relating to uncertainty and managing expectations in the design and construction process.

The Objectives of the Research were to:

1) Identify

- a. Which aspects of uncertainty have the most negative impact?
- b. What are their causes?
- c. What tools and processes are available to project teams to reduce their occurrence and mitigate their impact?

2) Understand

- a. What are the varying perspectives of owners, designers and contractors on their own and each other's level of performance?
- b. What are the most meaningful aspects of performance?
- c. How should they be measured?
- d. How can all parties more productively align around reasonable expectations?

3) Determine

- a. The most impactful aspects of uncertainty

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Variations on Enforcement of the Economic Loss Rule

By Lindsey D. Smith, Esq.

A. INTRODUCTION

It is difficult when a client asserts a professional liability claim against a design professional. However, all too frequently, third-parties with whom the design professional has no contractual relationship assert such claims ("third-party claims"). In the context of defending these third-party claims, the carefully negotiated terms of the design professional's contract with its client may have little or no legal relevance, regardless of the fact that the design professional received no compensation from the third-party. Indeed, the third party complaints usually pertain to allegations concerning the design professional's services rendered to its client, the outcome of which has run afoul of the third party contractor.

Courts in the 50 states address the permissibility of third-party claims against design professionals in various ways. In some states, those claims are absolutely precluded, and in other states such claims are allowed, but only in certain circumstances. In all states, however, the permissibility of such third-party claims is a subject hotly debated in the design and construction industry. Recently, two cases involving third-party claims against design professionals were decided by the highest courts in two states: California and Texas. The decisions in those two cases are in many respects irreconcilable. However, both decisions are controversial and likely to influence further development of the law in other states.

B. The California Case

The California case involved a residential complex comprising 595 units.¹ Although the owner/developer originally planned to lease the units, ultimately it decided to sell the units as condominiums. The owner/developer retained under separate contracts two separate architectural firms to design the complex. One architect provided the general conceptual designs necessary to evaluate the project. The other architect produced the detailed design documents for the contractor on the project. During the design process, when the parties thought they were designing rental units, the owner/developer decided that, in compliance with the applicable building code, ventilation for the complex would be provided without an HVAC system. Even when the owner/developer changed the use of the complex to condominiums, it decided not to provide a design that included HVAC or other type of system to ventilate the complex.

After the owner/developer disclosed this aspect of the condominiums to potential homebuyers, those homebuyers who actually purchased a unit executed a release in favor of the owner/developer acknowledging that the units did

not contain an HVAC or other system. However, when the homebuyers moved into the units and became uncomfortable due to the existing designed, code-compliant ventilation system, the Home Owners Association ("HOA") filed a lawsuit on behalf of the unit owners alleging "design defects." Having signed releases with the owner/developer, the HOA sued the architects for professional negligence, including design errors or omissions related to the owner/developer's decision to ventilate the complex without an HVAC or other system. The HOA alleged that the complex sustained "solar heat gain" which rendered the units uninhabitable and unsafe during certain periods due to high temperatures.

The architects filed a motion to dismiss on the basis that they owed no duty of care to the HOA, only to the client and the owner/developer. The trial court agreed because, absent a contract between the architects and the unit owners, no privity existed through which the unit owners could establish the existence of such a duty. An intermediate appellate court reversed the decision.

On further appeal, the Supreme Court affirmed the decision of the intermediate appellate finding that the unit owners did not need to establish privity to create a duty of care owed by the architects. The court noted that, although the law historically required privity of contract between professional service providers and those seeking to recover damages related to those services, under certain circumstances, an increasing number of courts were finding a duty owed absent a contract. The court focused on the closeness of the connection between the architects' conduct and the unit owners' injury, and noted that the degree of specialization provided by the architects was a significant factor. Even the fact that the developer sold the units two years after construction and failed to disclose the lack of an HVAC or other active ventilation system did not distance the architects' conduct from the unit owners' alleged damage. Further, the court found the HOA's argument that

the architects knew that the units in the complex would be sold as condominiums persuasive. The court found that the architects provided their services with the intent to produce safe and habitable residences for homeowners, "a specific, foreseeable, and well-defined class."

Most disconcerting, the Supreme Court decided that the HOA could sue for design "errors and omissions" that were the result of the owner/developer's design decisions. The HOA alleged that the owner/developer made the final decision as to building ventilation without the use of an HVAC or other active system. The court noted that the trial court had relied on this allegation in reasoning that the architects provided only recommendations and that, even if the architects had ventured beyond their typical role, "so long as the the final decision rested with the owner, there is no duty owed by the architect to the future condominium buyers."² Nonetheless, the Supreme Court found that the architects acted as "principal architects," not subordinate to anyone, even if they did not "actually build the project or exercise ultimate control over construction decisions."

C. The Texas Case

In contrast, a recent decision of the Supreme Court of Texas involved whether a contractor may recover the increased costs of performing its construction contract with the owner by asserting a third-party claim for negligent misrepresentation against the owner's design professional.³ The project in question was a light rail project. The owner, a municipal transportation authority, entered into a contract with the design professional to prepare the designs, drawings, specifications and other services. Pursuant to its contract, the design professional agreed to accept liability for damages caused by its negligence.

The owner ultimately selected and contracted with the contractor to construct the project. Shortly after beginning construction, the contractor discovered several alleged errors and omissions and other defects in the design, which the contractor alleged caused delays and the significant loss of approximately \$14 million in cost overruns. The contractor asserted claims against the owner and subsequently settled for \$4.7 million.

While its dispute with the owner was pending, the contractor commenced a third-party action against the design professional for negligence and negligent misrepresentation. The contractor alleged that, although it had not contracted with the design professional, the design professional had a duty to prepare design specifications and drawings without errors and omissions. A jury agreed, in part, with the contractor and awarded the contractor \$5 million.

The Texas Supreme Court overturned the jury verdict, holding that contract principles would adequately protect contractors in similar situations by encouraging them to allocate risk. The court noted that, "if the architect is contractually liable to the owner for defects in the plans, and the owner in turn has the same liability to the contractor, the contractor is protected." Stressing the significance of contracts in allocating risk, the court stated, "The [owner] could not estimate the loss that the [contractor] would incur . . . but the [contractor] could . . . and, therefore, was in a better position to avoid the loss." In deference to the role of contracts in a construction project, the court determined that the better rule was to allow parties to resolve economic loss through their contracts, thereby enabling them to allocate risk in accordance with their needs and those of the project. The court held that, absent a contractual relationship, the contractor could not recover delay damages caused by errors or omissions in the design from the design professional. The court concluded that deferring to the contract would promote clarity which would allow "parties to do business on a surer footing."

D. Conclusion

For better or for worse, these recent cases will certainly spark controversy and influence the development of law surrounding third-party claims against design professionals. In part, the unfavorable decision espoused by the Supreme Court of California may be attributable to the fact that the court had an extremely limited record available for review based upon early dismissal of the third-party claims against the design professional. However, even with that qualifier, the decision is problematic for design professionals and will be the source of much litigation by aggressive third-party claimants in the years to come. ■

¹ In this case, the defendant-architects appealed a lower court decision overturning the trial court's grant of their motion to dismiss. Accordingly, the Supreme Court of California reviewed the lower court's decision applying a standard of review appropriate to motions to dismiss, which requires that the Court "accept as true the well-pleaded facts in the operative complaint." The significance of this procedural note will be explained more fully below.

² The trial court allowed the HOA to amend its complaint to specifically allege that the defendants "actually dictated and controlled the decision to eliminate [ventilation] ducts, acting in a manner that was contrary to the directions of the owner, or that ignored the owner's directions," but the HOA declined to do so.

³ Unlike the above case decided by the Supreme Court of California, this case went to trial, and the jury returned a verdict. Both parties appealed from the verdict, and the Court of Appeals affirmed the verdict. The case came before the Supreme Court after it granted both parties' petitions for further review. Accordingly, unlike the case above involving a motion to dismiss, which required the court to accept as true the alleged facts in the plaintiff-homeowners' complaint, here, the Supreme Court of Texas considered the facts as proven at trial and the jury relied upon the same in reaching a verdict.

Massachusetts Courts Deny Contractor's Differing Site Condition Claim Based on Disclaimer Language in the Contract Documents

By Joseph M. Gesker, Jr., Esq.

THE MASSACHUSETTS COURT OF APPEALS' MARCH 2015 DECISION in *Celco Constr. Corp. v. Town of Avon* demonstrates the importance of including exculpatory clauses and disclaimers in Contract Documents. This is important because differing site condition claims can result in significant schedule impact and additional cost claims that an owner might otherwise try to shift to the design professional. Using contractual exculpatory clauses and disclaimers allows for allocation of the liability for differing or unknown site conditions to the contractor.

Celco concerned a public water main and roadway reconstruction project, which required an indeterminate amount of rock excavation. The Contract Documents reflected an estimated quantity of rock removal of 1,000 cubic yards. The Contract Documents also noted that this was an "[i]ndeterminate quantity assumed for comparison of bids." Believing the rock on site would be less than what was estimated in the bid documents, and to secure a competitive bid advantage, the successful bidder listed a unit price for rock removal of a penny per cubic yard.

The amount of rock removed was actually 2,524 cubic yards. The contractor filed a claim for equitable adjustment pursuant to M.G.L. ch. 30, § 39N, which permits contractor claims for differing site conditions on public projects. The contractor claimed that the additional rock caused 150 feet per day of lost production and wanted its unit price adjusted from a penny to \$190 per cubic yard. The trial court granted summary judgment in favor of the town and the appellate court affirmed.

The appellate court upheld the trial court's dismissal of the contractor's equitable adjustment claim for two principal reasons. First, the bid documents did not specify only 1,000 cubic feet of rock. Moreover, there was an express disclaimer in the bid documents that the amount was an estimate and the actual amount was unknown. Second, the contractor did not provide any evidence that the type of rock itself or the means or methods of rock removal differed in any way from what should have been anticipated in the Contract Documents. In so ruling, the appellate court recognized the contractor's attempt to make up its "wholly artificial and unrealistic" bid. In the appellate court's own words, differing site condition claims are "designed to protect contractors from unknown or unforeseen subsurface conditions, not from the consequences of their decisions to bid a unit price for the performance of work that is wholly unrelated to their anticipated cost to perform the work."

This case highlights for design professionals, especially civil and geotechnical engineers, the importance of being mindful of what conditions they are representing in the Contract

Documents. An owner may try to pass on liability for a differing site condition claim to the design professional if the Contract Documents do not accurately reflect the actual site conditions. Unambiguous disclaimers and exculpatory clauses are useful

methods of shifting the risk of differing and unknown site conditions to the contractors to hold them responsible for inspecting and verifying site conditions prior to submitting bids and commencing work. ■

Florida Defines the Zone of Foreseeable Risk

By Lindsey D. Smith, Esq.

A RCHITECTS AND ENGINEERS UNDERSTAND AND APPRECIATE that by signing a contract to perform professional services, they owe a duty of care in performing those services. Furthermore, they understand that the duty is owed to the other party to the contract. However, in today's legal system, courts are looking for ways to extend the duty of care to third parties who are, or may be, affected by the professional services performed as part of the contract. For design professionals who are aware of the risks associated with agreeing to perform design services, this development can be unwelcome, but with an understanding of when and how courts find a duty, today's design professional can identify the risks associated with any project even when the potential plaintiff is unknown.

Recently, the Supreme Court of Florida reviewed one of the tests the courts use to determine the scope of the duty owed by a defendant to a plaintiff, even when the defendant did not directly cause the plaintiff's injury. Although the case did not involve an architect or engineer and no contract existed between the parties, the decision illustrates how the courts may find the existence of duty by determining whether the defendant's conduct created a "foreseeable zone of risk." This situation is especially relevant to design professionals whose design work potentially affects numerous known and unknown third parties, from general contractors and employees to sub-consultants and future occupants and guests.

In *Dorsey v. Reider*, the Supreme Court of Florida decided that a defendant owes a duty of care to a plaintiff if the defendant's conduct creates a "foreseeable zone of risk" and the plaintiff is sufficiently within that zone at the time of injury. The case arose out of an altercation that occurred outside of a bar. The plaintiff and defendant, along with a third man, had been drinking together at the bar when they began to argue. At some point, the plaintiff left the bar and headed to his car in the parking lot. The defendant and third man followed the plaintiff outside. The defendant got in front of the plaintiff as they were between two parked cars, while the third man blocked in the plaintiff from behind. When the plaintiff attempted to flee, the defendant grabbed him and they struggled with one another. During the struggle, the third man grabbed a hatchet from the defendant's vehicle and hit the plaintiff.

The plaintiff sued the defendant based on the theory that the defendant's conduct in preventing him from fleeing had caused the plaintiff's injury. The defendant denied responsibility because he claimed that he could not be held liable for the

plaintiff's injury because he had not swung the ax and hit the plaintiff. After a jury verdict in favor of the plaintiff, the appeals court reversed, noting that the defendant did not owe a duty to the plaintiff to prevent the third man from grabbing the ax and using it to injure the plaintiff. In making its decision, the trial court applied the "foreseeable zone of risk" test, which holds, generally, that a defendant must take steps to lessen the risk or take sufficient precautions to protect others from the risk, where the risk was created by the defendant's conduct. However, instead of finding that the defendant had created a foreseeable zone of risk when he struggled with the plaintiff and was, therefore, liable for the plaintiff's injuries, the appeals court found that the defendant did not owe a duty to the plaintiff because he did not collude with the third party to obstruct the plaintiff's escape and hit him in the head with an ax, nor did he have advance knowledge that the third party would use the ax to strike the plaintiff in the head.

Noting that whether a defendant colludes to cause injury or has advance knowledge of the injury is not the test, the Supreme Court of Florida reversed the appellate court because it found that the defendant's conduct in preventing the plaintiff from leaving had "broadened the zone of risk," such that it was foreseeable that a third party could injure the plaintiff as he struggled with the defendant. These facts alone were sufficient for the court to determine that the defendant owed a duty of care to the plaintiff to prevent a third party from injuring the plaintiff. However, the court stopped short of deciding that the defendant was liable for the plaintiff's injuries because "[w]hether that duty was breached in a particular instance is ordinarily reserved for the [jury] ..."

In the case of professional design services, this issue of

“foreseeable zone of risk” arises often where architects and engineers must comply with a number of industry standards, building codes, and the client’s wishes. The issue of who can sue a design professional for errors or omissions in the design is decided by determining to whom the design professional’s conduct broadens the “zone of risk” beyond merely the client. As the *Dorsey v. Reider* case indicates, the test for whether a duty is owed does not depend on what the design professional actually knew or intended to do with its design services, but rather, on whether the design professional’s conduct broadened the “zone of risk” by creating opportunities for others to

cause injuries or put a person unnecessarily in harms way. Furthermore, the issue of whether to find a duty rests solely with the court, which is rarely as experienced with design issues as a design professional would like. When agreeing to perform professional services, a design professional seeking to adequately protect him or herself should understand the nature of this particular risk and consider what aspects of the project could broaden the zone of risk, and thereby subject the design professional to liability from unknown third parties. ■

Is Perfection Possible? *continued from page 1...*

- b. Owner, architect and contractor performance expectations
- c. Respondents’ recommendations and practices regarding opportunities for reducing uncertainty and improving performance

4) Intended Outcome

- a. Frame the problem so you can initiate an honest discussion with a client
- b. Establish the groundwork for continuing study and understanding to improve outcomes for everyone

The research process consisted of over 2,500 owners, architects and contractors utilizing an online survey. A phone survey targeted 155 owners, 82 architects, and 78 contractors mostly involved in complex projects. Finally, an owner’s advisory group consisting of 7 owners each from different building types was contacted.

The research was organized into the following three categories:

1) Understanding Uncertainty

- a. Top causes of uncertainty and their underlying drivers
- b. Impact on quality, cost, schedule

2) Performance Expectations and Metrics

- a. Owners’ perceived satisfaction
- b. Performance metrics for design, construction

3) Opportunities for Performance Improvement

- a. Mitigating elements
- b. Contingencies

Understanding Uncertainty

The survey identified the following as the top seven causes of uncertainty:

Owner-related causes:

Owner-driven changes to program or design

Accelerated schedule

Architect-related causes:

Design errors

Design omissions

Contractor-related causes:

Coordination problems

Contractor-caused delays

Non-aligned cause

Unforeseen conditions

Not surprisingly, depending on your perspective, whether you are an owner, designer or contractor you may have a different opinion of the causes of uncertainty and its impact on the project and other project members. For example, owners and contractors rank unforeseen site or construction issues as the top cause of uncertainty while architects rank owner-driven changes as the top cause of uncertainty. It is interesting to note that the contractors separated design errors and omissions into two separate causes, with omissions being more impactful than errors. Both owners and contractors rank design omissions as the second cause of uncertainty and architects rank these causes much lower.

The report investigated and questioned whether any party benefits more than another from uncertainty. Owners and architects ranked contractors as benefiting from uncertainty and contractors ranked trade contractors as benefiting from uncertainty. Owners and architects benefiting from uncertainty ranked very low.

Performance Expectations and Metrics

The report investigated and asked how frequently owners are satisfied with quality, cost and schedule. Not surprisingly, architects and contractors believe that owners are satisfied with quality, cost, and schedule on a much higher percentage than owners say they are. From the architect and contractor perspective, the project is complete, they are paid, and architect and contractor move on to the next project. However, owners continually see the end product and may not be as satisfied with the results as architects and contractors believe.

Regarding measuring the design teams' performance, all parties are aligned with "the single most important metric," which is the ability of the designer to develop documentation that meets the owner's program requirements and is constructible within the budget. Second on the list of measuring the design teams' performance is the ability of the designers to solve issues related to working with the design and construction teams without escalating the issues to the owner. Most interesting is the architects' belief that the number of change orders on a project is not a good measure of uncertainty, with almost half of owners citing the number of change orders as a good performance metric.

Only a small fraction (10%) of owners, architects and contractors believe perfection is possible, with the majority clearly believing that perfection is not possible. So what is the impact on cost with imperfect construction documents, if any?

The majority of owners (80%) expect to encounter additional costs due to imperfect construction documents. For architects and contractors this might be a surprisingly high percentage, but it is a good result and should be expected. With 80% of owners expecting additional costs due to imperfect construction documents, do owners have a contingency for these additional costs, and what is the range of such contingency? The majority of owners (80%) report that they include a contingency on their projects. The interesting result is how often, or how infrequently, owners tell the architects and contractors about such a contingency. Owners report they often do not share their contingency with architects and contractors because they simply do not want to fight with the architects and contractors over how to spend the contingency. One owner, Chuck Hardy of GSA, states, "...from an inside-the-owner's view, a contingency is seen as [part of] the project costs. If they manage the project within that cost, it's a success. So they'll track that like it's the last glass of water they have in the desert."

Opportunities for Performance Improvement

There are 13 factors that have an impact on reducing overall uncertainty (none to very high) composed of the following:

Importance of the Owner's Role:

Clearer direction from owners
More active leadership by owner

Integration and Collaboration:

More integration between design and build parties during design and coordination
More time for design firms to participate in coordination
Clearer definition of deliverables between parties during the design process

Team Formation and Project Delivery Approach/Strategy:

"Best Value" or other team selection criteria not based primarily on low fee
Use of: Contracts construction manager as constructor
Integrated project delivery
Design-Build
Lean design and construction principles

Use of Building Information Modeling (BIM):

Use of: BIM/virtual tools by single firm
BIM/virtual tools by entire project team

Importance of Budget Contingency

Contingency in owner budget to accommodate design errors and omissions

Conclusion

So what do we do with this report and how will it impact the design and construction industry? The parties involved in the report readily agree this report is the first step in the uncertainty conversation.

The next step might be to determine how to accurately "handicap" a project to ascertain a contingency for taking into account project complexity, delivery method, project owner and design and construction team familiarity with the project type, project location and other issues that impact a successful project.

What steps do you think would assist your projects? ■

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