Design and Construction Management Professional Reporter

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Recent CA Jury Verdict May Heighten Duty for Design Professionals

By Carrie G. Strasser, Esq.

In December, a California jury awarded the City of Victorville $52.1 million against an engineering firm the City hired to design and build a new power plant. The jury in Riverside County Superior Court found that the engineer negligently misrepresented key facts to City officials that led them to invest in the Foxborough Cogeneration Power Plant.

In 2004, the City retained the engineer to assist in implementing a plan to attract businesses to the area by offering companies power rates that were 10% less than those charged by Southern California Edison. The engineer was tasked with evaluating whether it was more economical for the City to build its own power plant or to simply pay 10 % of the new companies' electricity costs. The engineer recommended building a new power plant and was hired to design and build the Project.

Because of errors in the original projections, costs soon escalated from $22 million to $110 million, and the Project was abandoned in 2006.

According to attorneys for Victorville, this case represents the first time a California engineering firm was found liable for breach of fiduciary duty. However, California courts have previously implied in dicta that architects may have a fiduciary duty to their clients. *See* Palmer v. Brown, 127 Cal.App.2d 44 (1954) and E-Med, Inc v. Mainstreet & Planners, Inc., 2007 WL 1536803 (Cal. App. 2007). This verdict places all design professionals on notice that, depending on their contractual scopes of work and the facts surrounding the Project, they may now owe a heightened duty to their clients.

Inside this issue:

Comparative Analysis of Architect's Duty to Guard against Construction Defects which Threaten Public Safety

By Kristina S. Raevska, Esq.

A RECENT TEXAS COURT OF APPEALS (AUSTIN) DECISION imposed a duty on an architect to identify significant deviations from its design that implicate structural safety concerns; a duty owed not only to the residents of the home but to their guests as well. *See* Black + Vernooy Architects v. Smith, --- S.W.3d ---, 2010 WL 5019659 (Tex. App. – Austin, Dec 8, 2010). The plaintiffs in the case, guests of the owners, asserted a claim for negligence against the architect, the contractor, and a subcontractor, as a result of physical injuries sustained when the balcony the plaintiffs were standing on collapsed. The contractor and subcontractor settled prior to trial. The trial against the architect was focused on negligently performed architectural services, specifically, negligent construction administration. The plaintiffs prevailed and the architect appealed.

The Austin Court of Appeals held that the architect owed a duty to the homeowners and the guests to identify significant deviations from the construction drawings especially when (1) those deviations were open and obvious; (2) the deviations regarded the structural integrity of the balcony; and (3) the deviations were clearly viewed by the architect. As grounds for its holding, the Austin Court of Appeals first looked at the architect's contractual obligations with respect to construction administration, as memorialized in AIA Standard Form B151-1997, Section on Construction Administration:

> … The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the state of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 12, (1) to *become* generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to *endeavor to guard the Owner against defects and deficiencies in the Work*, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.
>
> … The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor. However, the Architect *shall not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents*.

See AIA Standard Form B151-1997 *(emphasis added)*

The Austin Court of Appeals interpreted this language to impose on the architect an obligation to become a "provider of information" regarding the construction progress to the owner and the contractor, and to alert the owner and the contractor of known deviations. The Austin Court of Appeals explained that such obligation does not mean that the architect guaranteed the contractor's work, or was going to be held responsible for the contractor's failure to carry out the work in accordance with the construction documents. Rather, pursuant to this clause, the architect had its own obligation to observe the work progress and to endeavor to guard the owner against defects in the work. In this case, the architect was on site when the balcony was being constructed and took pictures clearly depicting the construction deficiencies. However, the architect overlooked the construction defects, both on site and in a subsequent review, and failed to report them to the owner, the contractor, or to reject the non-conforming work.

The Austin Court of Appeals emphasized that its holding does

not mean that the architect would have a duty to inspect the construction site for defects, discover hidden defects, or ascertain all deviations from the design drawings, regardless of their significance or safety implications. Rather, the architect's duty is to visit the site periodically and to *endeavor to guard* against defect and deficiencies of the work, to identify significant deviations from the design drawings when those deviations implicate critical structural integrity concerns and are plainly visible on photographs taken by the architect himself in the course of performing construction administration services. The Austin Court of Appeals narrowed its holding only to the facts of the case, where the architect actually observed the deviations that would affect structural integrity and did not address those as part of its construction administration services. The Austin Court of Appeals made it clear that this holding does not impose a duty upon the architect to ensure that the construction site was safe, or any other obligation regarding means and methods.

The architect further argued that even if it should have noted the structural construction deficiencies, its duty, pursuant to its contract, extends only to the owners of the home, not to their guests. The Austin Court of Appeals rejected this argument, explaining that the plaintiffs did not have to be in privity of contract to be able to assert negligence claims against the architect. Rather, in determining whether a legal duty exists, foreseeability of the risk is the dominant consideration. The Austin Court of Appeals held that it was foreseeable that guests would step out on the balcony to enjoy the view of the lake at a summer home. Therefore, where the structural defects were open, obvious, observable to the architect, implicated critical safety and structural integrity, and were overlooked by the architect, a duty to third-parties would be imposed upon the architect.

In contrast, in an earlier decision, the Fort Worth Court of Appeals refused to impose a duty upon a consulting architect and an assessment architect to guard third-parties from safety defects. *See* Dukes v. Philip Johnson/Alan Ritchie Architects, P.C. et al., 252 S.W.3d 586 (Tex.App. – Fort Worth, March 27, 2008). A family of four drowned in a fountain (Active Water Pool) in the Fort Worth Water Gardens. The plaintiffs filed suit against, among others, the original architect also retained as a consultant, an architect retained to perform architectural assessment, and a project manager for the project associated with the renovation of the Water Gardens. The lower court granted the defendants' separate motions for summary judgment and the plaintiffs appealed.

The Fort Worth Court of Appeals held that the defendants did not owe a duty to assure the plaintiffs' safety at the Water Gardens because such obligation was not contemplated in their respective agreements for services. Specifically, the original architect, later retained as a consultant, was retained only to provide a review of existing conditions and development of appropriate repair options. The architectural assessment architect was retained to assess the existing civil, structural, mechanical, and electrical engineering services. There was some evidence that the City may have initially contemplated that the assessment architect would address safety issues, however, the actual agreement between the City and the assessment architect imposed no responsibility to address and remedy safety issues. The Fort Worth Court of Appeals held that the defendants' duties depend on their respective agreements with the City and, because there was no evidence that the agreements required the defendants to report or make safe any hazards detected, no duty would be imposed.

The plaintiffs argued that liability should be imposed under premise liability law. The Fort Worth Court of Appeals rejected this argument on two grounds. First, the City, as the owner of the property, owed the invitees a duty of care, not the architects. Second, the Fort Worth Court of Appeals noted that a duty may be imposed if a party has agreed to make safe a known, dangerous condition on the premises. However, neither the consulting architect's agreement for services, nor the assessing architect's agreement for services reflected that either defendant agreed to undertake a "duty to correct."

The Fort Worth Court of Appeals also rejected the argument that the defendants voluntarily undertook to perform services that they knew or should have known were necessary for the plaintiffs' protection and they failed to exercise reasonable care in their performance. The Fort Worth Court of Appeals explained that the defendants' performance of their obligations pursuant to their respective agreements, i.e. inspection of the Fort Worth Water Gardens, and architectural assessment, did not constitute a "voluntary undertaking[1]."

Once again, the Fort Worth Appeals Court emphasized that the architect's duty depends on its particular agreement with its employer. The Fort Worth Court of Appeals refused to disregard the plain language of the defendants' agreements, clearly defining the scope of their duties.

The Fort Worth Court of Appeals also rejected the plaintiffs' theory that the architects should be held liable on the basis of potential violation of their ethical obligations. The Forth Worth Court of Appeals explained that there is no binding authority in Texas law to support that proposition. In fact, the Texas Supreme Court had recently ruled that the rules of professional conduct do not define standards of civil liability in the context of lawyers. The Forth Worth Court of Appeals adopted that same reasoning and refused to impose liability on architects for potential "ethical violations."

In summary, there appears to be a split between Texas Courts regarding an architect's duty with respect to the public's safety. When an architect is performing construction administration services, i.e. agrees to "endeavor to guard," at least with respect to open and obvious defects which the architect has actually observed, a duty to guard the public's safety will be imposed. However, no duty for the public's safety would be imposed when the architect's services on a given project are limited to only discrete sets of review and consulting tasks even if certain hazards have been noted, when there is no contractual language regarding safety. Design professionals should carefully review their contractual obligations and, if possible, safe-guard against the imposition of such duty by negotiating provisions that would limit their obligations to the public at large.

[1] The assessment architect made some recommendations with respect to the Active Water Pool, which were rejected by the City. Accordingly, there was no voluntary undertaking by the assessment architect because there was no reliance by the City. Additionally, the inspection work performed by the assessment architect did not increase the risk of harm.

Wyoming Court Adheres to the Economic Loss Doctrine to Bar Negligent Misrepresentation Claims

By Luke R. Conrad, Esq.

IN A POSITIVE DEVELOPMENT FOR DESIGN PROFESSIONALS, the Wyoming Supreme Court has reaffirmed its strict adherence to the Economic Loss Doctrine to bar claims for negligent misrepresentation where no contractual privity exists. This decision represents a divergence from recent trends whereby courts have permitted parties to assert negligent misrepresentation claims for recovery of purely economic loss against third parties and thereby avoid the effects of the Economic Loss Doctrine.

In general terms, the Economic Loss Doctrine bars claims for purely economic loss between parties not in contractual privity; the exception is those claims that involve personal injury or damage to other property. However, many jurisdictions recognize negligent misrepresentation as an exception to the Economic Loss Doctrine, permitting a claimant to recover damages from a third-party where the claimant has allegedly relied upon information or representations to its detriment. Recently, in Excel Construction v. HKM Eng'g, Inc., the Supreme Court of Wyoming declined to adopt this exception to the Economic Loss Doctrine.[1]

The Excel Court held that the Economic Loss Doctrine barred a contractor's negligent misrepresentation claim against the project engineer due to a lack of privity between the parties. The contractor sought recovery for what it believed were improper decisions made by the engineer, including (a) the engineer's requirement of additional backfill beyond the scope of the contract and refusal to authorize additional

compensation for such backfill; (b) the engineer's assessment of liquidated damages after the contractor understood that it had been released; and (c) the engineer's decision to deny substantial completion, thereby barring access to the retainage.[2] The Wyoming Supreme Court rejected the contractor's arguments and ruled that **the parties to a construction contract have the opportunity to allocate the economic risks associated with the work, and that they do not need the special protections of tort law to shield them from losses arising from such risks, including the alleged negligence of a design professional.**[3]

The Excel decision represents a divergence from other jurisdictions where parties have been utilizing negligent misrepresentation causes of action to circumvent the Economic Loss Doctrine for years. In M. Miller Co. v. Dames & Moore, an early California Court of Appeals decision, a subcontractor was permitted to assert a claim against an engineer on a sewer project on the basis that the bid documents allegedly failed to disclose unstable subsurface materials.[4]

In many jurisdictions, the application of the negligent misrepresentation exception to the Economic Loss Doctrine is grounded in the Restatement (second) of torts, § 552 ("Restatement"), which states:

> *§ 552. Information Negligently Supplied for the Guidance of Others:*
> *(1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.*

One such jurisdiction is Pennsylvania. In Bilt-Rite Contractors, Inc. v. The Architectural Studio, the Pennsylvania Supreme Court, citing the Restatement, allowed a contractor to recover losses incurred as a result of the architect's exterior wall design. The Court permitted the contractor to maintain its negligent misrepresentation lawsuit against the design professional despite the clear lack of privity of contract, opening the door to further claims against design professionals.[5]

Massachusetts has also adopted the negligent misrepresentation exception to the Economic Loss Doctrine. In Nota Const. Corp. v. Keyes Associates, Inc., the Appeals Court ruled that an engineer can be liable for errors and omissions where the engineer failed to portray subsurface ledge encountered during the design and construction of a new school. The court stated that liability for the negligent furnishing of services to one not a party to the contract will turn on whether the defendant (engineer) knows that the party will rely on the services rendered. Finally, the court stated that it found no reason why a design professional should be exempt from liability for negligent misrepresentation merely because there is no privity of contract.[6]

Subsequently, in KDK Enterprises, Inc. v. Peabody Construction, a Massachusetts Superior Court demonstrated that the negligent misrepresentation exception to the Economic Loss Doctrine has its limits. When faced with a negligent misrepresentation claim for economic loss by a subcontractor against an architect with no contractual privity, the court found that the contractor premised its negligent misrepresentation claim on specifications that invoked the professional's judgment, rather than on specifications that are susceptible to actual knowledge (facts), and denied the subcontractor's claim.[7]

Similarly, in Delaware Art Museum v. Ann Beha Architects, Inc., a Delaware court faced with a negligent misrepresentation claim, where the plaintiff was not in privity with the defendant-engineer, examined whether the engineering consultant was producing information as the 'end and aim' product of its work. The court stated that where the end product of the services is information, there can be liability for negligent misrepresentation. However, where a professional's end product is considered the tangible outcome of its design — professional judgment — the professional is not in the business of supplying information and cannot be pursued by a third-party under a negligent misrepresentation theory.[8]

Contrast these nuanced holdings with Floor Craft Covering, Inc. v. Parma Community General Hospital Ass'n, where the Ohio Supreme Court barred a claim against an architect that furnished plans and specifications by a flooring subcontractor. The Supreme Court ruled that the purely economic damages sought by the subcontractor could not be recovered from the architect because "in the absence of privity of contract no cause of action exists in tort to recover economic damages against the design professionals involved in drafting plans and specifications."[9]

Like Ohio, Wyoming has embraced the fundamental and encouraging position (from the vantage point of the design professional) that a claim for economic loss, even when asserted as a negligent misrepresentation claim, cannot be asserted without privity. The Excel Court espouses the theory that the apportionment of risk between parties to a construction contract should be determined by that contract and not by judge and jury. This divergence from recent court decisions that allow tort recovery against design professionals for negligent misrepresentation is a positive development for design professionals and, perhaps, a symbol of courts' recognition that negligent misrepresentation is a misused and misunderstood avenue for parties to a contract to reallocate risk that should have been negotiated and apportioned prior to contract performance. In jurisdictions where the Economic Loss Doctrine acts as a complete bar to tort claims in the absence of privity, design professionals can feel more secure in working in a cooperative manner with members of a project team to advance a project, without fear of claims from third-party project participants.

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1 Excel Const., Inc. v. HKM Engineering, Inc., 228 P.3d 40 (Wyo. 2010).
2 Id. at 42 (Wyo. 2010).
3 Id. at 45 (citing Rissler & McMurry v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228 (Wyo. 1996)).
4 M.Miller Co. v. Dames & Moore, 18 Cal.Rptr 13, 16 (Cal.App. 1962).
5 Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 480 (Pa. 2005).
6 Nota Const. Corp. v. Keyes Associates, Inc., 694 N.E.2d 401, 405-06 (Mass.App.Ct. 1998).
7 KDK Enterprises, Inc. v. [Architectural Firm], Commonwealth of Massachusetts, Midlesex Superior Court, Civil Action No. 04-1305, Memorandum of Decision and Order, June 1, 2006.
8 Delaware Art Museum v. Ann Beha Architects, Inc., No. 06-481 GMS, 2007 WL 2601472, at *3 (D.Del. 2007).
9 Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Ass'n, 560 N.E.2d 206, 212 (Ohio 1990).

Florida Court Bars Limitation of Liability Provisions in Professional Negligence Cases against Individual Professionals

By Kristen R. Ragosta, Esq.

A FLORIDA APPELLATE COURT HAS HELD THAT CONTRACTUAL LIMITATION of liability provisions are invalid and unenforceable, as a matter of law, with respect to malpractice claims against individual professionals.

Gerhardt M. Witt and Associates, Inc. ("GMWA"), a geotechnical firm, entered into various agreements with the La Gorce Country Club ("the Club") to provide hydrogeological consulting services and project coordination ("the Agreements") during the installation of a reverse osmosis water treatment system to irrigate a golf course ("the Project"). The Agreements contained a limitation of liability clause which limited liability for GMWA and its sub-consultants to the total fee for services rendered on the Project. The Project experienced numerous technical problems during design and construction, and the irrigation system essentially failed approximately fourteen months after the Project's completion.

Subsequently, the Club filed suit against various parties, including GMWA and individual geologist Gerhardt M. Witt ("Witt"). After a two week trial, the trial judge found that both Witt and GMWA were liable to the Club for professional malpractice and that the limitation of liability clause applied to GMWA but not to Witt. In determining that Witt could not benefit from the limitation of liability clause, the trial judge reasoned that Witt was not a party to the Agreements containing the limitation clause and that "it is questionable whether Florida law allows a professional to ethically limit a client's remedies by contract."

Section 492.111 (2005) states, in relevant part, that:

> "The fact that a licensed professional geologist practices through a corporation or partnership shall not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by her or him. Partnership and all partners shall be jointly and severally liable for negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. Any officer, agent or employee of a corporation shall be personally liable and accountable only for negligent acts, or misconduct committed by her or him or committed by any person under her or his direct supervisions and control, while rendering professional services on behalf of the corporation…The corporation shall be liable up to the full value of its property…"

Witt appealed the lower court's ruling arguing that, while he may be liable for professional negligence, any such liability should be capped by the limitation of liability provisions present in the GMWA Agreements. The Appeals' Court disagreed with Witt's argument and affirmed the lower court's ruling. The Appeals' Court held that the limitation of liability provision was invalid and unenforceable as a matter of law as to Witt. The Appeals Court reasoned that, "a cause of action against an individual professional exists irrespective, and essentially, independent of a professional services agreement."

The Appeals Court ruling in Witt extends the argument in *Moransais* that claims against professionals exist independent of contractual agreements. In *Moransais v. Heathman*, 744 So.2d. 973 (Fl. 1999), the court held that the Economic Loss Doctrine does not bar a negligence claim against a professional where the professional is not in privity with the plaintiff, reasoning that the cause of action against the professional exists independent of any contract. The Witt case expands the reasoning in *Moransais* so that, not only can a plaintiff sue a professional with whom the plaintiff has no contract, it is questionable whether a professional may contractually limit his or her liability. These cases are examples of a growing trend in Florida to allow suits against professionals.

United States Court of Appeals for the Ninth Circuit Recognizes Exception to Economic Loss Doctrine in Washington State

By Daniel C. Poteet, Esq.

THIS CASE, AFFILIATED FM INSURANCE COMPANY V. LTK CONSULTING Services Inc., No. 07-35696; D.C. No. CV-06-01750-JLR, arises out of a fire that occurred on the Seattle Monorail, a monorail system that runs between Seattle Center and downtown Seattle, in 2004. The case involves an engineer that was hired by the City of Seattle to design certain elements of the monorail ("Engineer"), a company that the City of Seattle hired by virtue of a concession agreement to operate and perform certain types of maintenance of the monorail ("Operator"), and an insurer of the Operator ("Insurer"). After the fire that occurred on the monorail, the Operator became subject to the expenses in repairing the damages caused by the fire, as well as alleged losses in revenue attributable to the inoperability of the monorail because of the fire. The Insurer ultimately paid these damages and, through a process known as subrogation, was able to "stand in the shoes" of the Operator and file suits as if the Insurer were in the position of the Operator. By virtue of its subrogation rights, the Insurer filed suit against the Engineer alleging that the Engineer's negligence caused the fire and, accordingly, the resultant damages. The ruling in this case may result in a significant expansion in the scope of claims that could be filed against design professionals that will be able to survive early resolution in litigation.

This case originated in and was removed from Washington State Court to a Federal District Court in the State of Washington. In the District Court, the Engineer prevailed on a motion for summary judgment based on Washington's application of the economic loss rule ("ELR"). As Washington applied the ELR, if an entity (the Operator/Insurer in this case) incurred only economic damages and those damages were caused by the negligence of an entity (in this case, the Engineer) with whom the damaged party did not have a contractual relationship, then the damaged party could not recover damages from the other party. After losing the summary judgment motion, the Insurer appealed the ruling to the Ninth Circuit Court of Appeals, which is the next step up in authority in the Federal Court system.

In the appeal, the Ninth Circuit Court of Appeals, which in such a case is bound to apply Washington State law, certified a question to the Washington State Supreme Court. In sum and paraphrased to apply to these facts, the Ninth Circuit asked the Washington State Supreme Court whether the Operator's interest in commercially operating the monorail, which was granted by the Operator's agreement with the City, entitled the Operator to bring a negligence claim against the Engineer for costs that the Operator incurred because of damages to the monorail. Prior to this ruling, the ELR would have been expected to prohibit such a claim.

The Washington State Supreme Court answered the Ninth Circuit's question in *Affiliated FM Insurance Company v. LTK Consulting Services, Inc.*, 170 Wash.2d 442 (2010), by allowing the suit to proceed. This is significant because in doing so, the Court may have substantially curtailed and, arguably, even eliminated the ELR in the State of Washington. Rather than basing its decision on the contractual relationships of the various parties, as would typically be done pursuant to the ELR, the Washington State Supreme Court applied a general duty of reasonable care to the Engineer and then applied that duty to persons who hold a legally protected interest in damaged property.

This decision suggests at least one exception where the ELR does not apply to tort claims between parties that are not in contract with each other. Now, by virtue of this ruling, if an entity such as the Operator has a legally protected interest in the property of another, such as the City, then the Operator may bring a negligence claim against an entity such as the Engineer, even though the only damages the Engineer's negligence may have caused the Operator are monetary

damages, if the Engineer's negligence can be tied to damage of the property in which the Operator has a protected interest.

Many jurisdictions have some degree of property damage "exception" to the ELR. However, those exceptions are frequently applied to instances where the third party's own property is damaged. So, in this case if the Operator owned the monorail, rather than merely had a right to operate the monorail, there likely would have been initial motion by the Engineer. The potentially greater significance to the Washington State Supreme Court's decision in answering the Ninth Circuit's question is that it did not apply the ELR to the facts of the case. Rather, it viewed the Engineer's duty, applicable across the board, as a duty of reasonable care.

Although the Washington State Supreme Court focused heavily on the fact that it was property that was damaged, and damaged in what could easily have been a catastrophic scenario, the principle guiding whether a negligence claim should be permitted is whether the Engineer violated a duty of reasonable care, not whether the damages were economic or tangible, or minor or severe.

Thus, it is possible that Washington is moving away from the ELR to a general, and considerably broader, duty of reasonable care. If so, it may substantially undermine design professionals' ability to defeat lawsuits by a summary judgment motion and could also substantially expand the types of claims to which design professionals may be subject.

Mechanic's Liens for Design Professionals in Massachusetts: A New Frontier

By Luke R. Conrad, Esq.

MASSACHUSETTS RECENTLY JOINED THE MAJORITY OF STATES by extending Mechanic's Lien rights to design professionals, thereby allowing them to secure property as collateral for non-payment of fees for professional services. The Massachusetts legislature amended the existing Mechanic's Lien statute, G.L. c. 254 ("Statute"), to encompass lien rights for professional services in legislation signed into law on January 5, 2011, effective July 1, 2011 ("Amendment"). Prior to the Amendment, design professionals could not seek the protection of the Statute because their services were not deemed to provide the necessary "improvement" to real property.[1] 1996 amendments to the Statute opened the door for lien rights to those who provided general contractor, construction management and rental equipment to a construction project, but still did not include design professionals.

The Mechanic's Lien is a statutory right for a person or entity to place notice with the registry of deeds of outstanding monies owed to the party seeking to establish the lien. The Mechanic's Lien secures collateral in the property interest of the party for whom the services, labor or materials are being provided. The Mechanic's Lien is a powerful tool because it allows the foreclosure and sale of the underlying property to satisfy the contractual obligation of the party seeking the Mechanic's Lien. Securing a valid lien requires that the design professional expressly satisfy the meticulous and unforgiving lien process, or risk the invalidation and dissolution of the Mechanic's Lien.

The Mechanic's Lien process is initiated by the filing of a Notice of Contract with the registry of deeds in the registry district where the property interest lies.[2] The Notice of Contract places interested parties on notice of an obligation pursuant to a written contract. The filing of the Notice of Contract determines the date of the priority of the lien against other liens, mortgages, and interests in the property. Priority determines the allocation order of the foreclosure proceeds when the liened property is sold at a foreclosure sale, although most Mechanic's Liens are bonded or resolved prior to foreclosure.

The Notice of Contract must also contain a precise legal description of the metes and bounds of the property interest to be liened. The legal description is best identified and provided by a professional title search corporation because an inaccurate property description can result in the invalidation and dissolution of the Mechanic's Lien. The assertion of lien rights through the Notice of Contract must be accomplished within the earlier of 60 days after substantial completion, or within 90 days of when the last design services are performed. Therefore, the design professional must be cognizant of its invoicing and payment status and not allow lien rights to be forfeited by the time the design professional determines that payment is not forthcoming.

Subsequent to the filing of the Notice of Contract, the lienor must file a Statement of Account, itemizing the amount due and owing, crediting fees already paid, and listing modifications or changes to the base agreement. The Statement of Account deadline is 30 days beyond the Notice of Contract deadline; thus, it must be filed within the earlier of 90 days after substantial completion or within 120 days of when the last design services are performed. Similar to the Notice of Contract, the Statement of Account should contain a precise legal description of the property interest to be liened.

The Mechanic's Lien is finalized, or "perfected," by following the Notice of Contract and Statement of Account with a lawsuit. The lawsuit, or the "complaint," must be attested — certified by the court for authenticity — and the attested complaint must be recorded with the registry within 30 days of filing the lawsuit. The Mechanic's Lien process,

and its abstruse requirements and conditions, is fraught with opportunity for error and misstep, even for the most accomplished professional. The Mechanic's Lien is a statutory recourse with the impactful ability to encumber real property without appearing in front of judge or jury. Failure to adhere to each and every step of the lien process will result in the invalidation and dissolution of that lien.

In addition to the pitfalls surrounding the technical application of the Mechanic's Lien process, there are a number of tactical and strategic considerations that should be weighed regarding how and when the Mechanic's Lien is utilized. The design professional should consider its lien rights in negotiating professional services agreements with owners, developers, contractors, and its subconsultants, ensuring that payment provisions align with the Statute to preserve lien rights. Further, the design professional should weigh the benefit of preservation of its lien rights with the impact of initiating a Mechanic's Lien and the accompanying lawsuit during a project, and the resultant influence on the relationship between the project participants, lenders, insurers and sureties.

While the Mechanic's Lien framework and time periods enumerated above may appear rigid and elementary in their application, the facts of each individual case and the method of project delivery will alter the lien relationships and propel the process within the purview of the countless exceptions to the rules, or further, the exceptions to the exceptions to the rules. Thus, while the conscientious design professional will develop forms and processes by which the lien process is initiated upon non-payment of fees, the perils of the Mechanic's Lien process are best navigated with the assistance of counsel.

This article is intended to provide an introduction to the Amendment to the Mechanic's Lien Statute. As the July 1, 2011, effective date of the Amendment approaches, Donovan Hatem LLP will provide further information and guidance in this regard.

[1] Mitchell v. Packard, 168 Mass. 467 (1897).

[2] Where the design professional is retained through a construction contractor or subcontractor, additional lien protection is available through a "Notice of Identification." See G.L. c. 254 § 4.

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