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Fourth Circuit Court of Appeals Upholds Preclusion of Owner's Indemnification and Contribution Claims Against Architect Under the Fair Housing Act and the Americans with Disabilities Act

By Peter C. Lenart, Esq.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT recently upheld a federal District Court ruling which prevented a project owner from recovering indemnity and contribution damages from its architect in a suit involving accessibility violations imposed by the Fair Housing Act ("FHA") and the Americans with Disabilities Act ("ADA"). The case, *Equal Rights Center and Archstone Multifamily Series I Trust v. Niles Bolton Associates*, No. 09-1453. 4th Cir. Apr. 19, 2010, involved an action by a disability rights advocacy group against the developer and owner of 71 apartment communities located in the mid-Atlantic region. Both Archstone and Niles Bolton settled with the Plaintiffs. The appellate decision addressed Archstone's attempt to obtain indemnification and contribution from Niles Bolton for the settlement Archstone entered into. Archstone alleged that it was liable only for damages to Plaintiffs because Niles Bolton failed to follow the accessibility requirements contained in the FHA and the ADA. Both the District Court and the Fourth Circuit disagreed.

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The United States Court of Appeals for the Third Circuit Enforces a Waiver of Consequential Damages Provision and Holds that a Contractual Indemnity Provision applies only to Third-Party Disputes

By Rita C. Mercado, Esq.

THE SIGNIFICANCE OF INCLUDING A WELL DRAFTED LIMITATION of liability clause and a waiver of consequential damages was recently highlighted when a \$13,000,000 jury verdict was reduced to \$3,400,000. The judgment was cut after the United States Court of Appeals for the Third Circuit (“Appeals Court”) held that although contractual obligations may make certain damages foreseeable, it does not necessarily make those damages recoverable in the presence of a valid waiver of consequential damages provision. The Appeals Court further upheld the applicability of a contractual limitation of liability provision since it did not conflict with the indemnity provision covering third-party disputes. This decision represents a victory for the enforcement of waiver of consequential of damages and limitation of liability provisions contained within design contracts.

The Appeals vacated the judgment of the District Court of New Jersey (“District Court”) and remanded the matter for further proceedings. The Appeals Court disagreed with the District Court’s classification of damages awarded to the Owner by the jury on negligence and contract claims against the Architect. Specifically, the Appeals Court ruled that the District Court erred in allowing the Owner to recover certain contractually waived consequential damages. In addition, the Appeals Court held that the contractual indemnity provision was not applicable to first-party disputes between parties to a contract, and upheld the applicability of the limitation of liability provision.

In November 2000, the Architect (“Architect”) submitted a proposal (“Proposal”) to the Owner/developer (“Owner”), to provide architectural and design services for a mixed-use retail and commercial project. The Proposal contained a provision limiting the Architect’s liability to its fees, and a waiver of consequential damage clause that expressly excluded damages associated with “loss of use, loss of profit, or claims for delay, impact or disruption damages made by [Owner].”

Subsequently, the Architect and Owner entered into a contractual agreement (“Agreement”) that incorporated the Proposal. However, in the event of a conflict, the Agreement would prevail. The Agreement contained a mutual waiver

of consequential damages provision, a negligence-based indemnity provision, and the following standard of care provision:

All services provided by [Architect] hereunder shall be performed with such reasonable promptness as to cause no delay in the work or in the activities of [Owner], the Construction Manager, or the Contractors, and shall be consistent with the professional skill and judgment which can be reasonably expected from Architectural firms of a comparable size performing services similar to those required hereunder for high quality retail and entertainment spaces in the Eastern United States. . . (“Standard of Care Provision”)

On June 27, 2005, the Owner filed its Complaint against the Architect for breach of contract and professional negligence. On March 26, 2008, the Architect moved for partial summary judgment seeking a ruling that it was not liable for (1) consequential damages in light of the waiver provision in both the Proposal and the Agreement; or (2) damages in excess of its compensation pursuant to the limitation of liability provision in the Proposal. The District Court ruled that consequential damages were waived under the contract, but did not issue an opinion as to what type of damages were consequential. The District Court also held that because

the Proposal's limitation of liability provision conflicted with the Agreement's negligence-based indemnity provision, the limitation of liability was not applicable.

Prior to trial, the District Court denied the Architect's motion to exclude the Owner's consequential damages from evidence. The District Court held that, to the extent the consequential damages could be shown by expert evidence to flow from a breach of the promise not to delay, these damages were direct damages not barred by the waiver.

This matter proceeded to trial and the jury returned a verdict awarding the Owner the following damages for both the negligence and contract claims:

Additional Construction Costs	
to Fix Errors	approx. \$1.3 million
Lost Rental Income approx.	\$3.6 million
Additional Payment to Contractors	
due to delay	approx. \$1.6 million
Additional Administrative Costs.....	approx. \$966,231

The District Court then issued an order allowing the Owner's motion for attorney's fees, costs and pre-judgment interest, bringing the Owner's total judgment to approximately \$13 million. The Architect appealed from the judgment arguing that the District Court failed to apply several clauses in the parties' agreement prohibiting the recovery of consequential damages. The Architect also appealed from the judgment on the grounds that the District Court failed to enforce the contractual limitation of liability, which limited recovery to the Architect's fees for the Project or \$3.4 million.

Waiver of Consequential Damages

On appeal, the Appeals Court concluded that the District Court erred in allowing the Owner to recover consequential damages that included lost rental income, additional payments to the contractors due to delay, and additional administrative costs. Applying New Jersey Law, the Appeals Court held that "the fact that damages are foreseeable does not necessarily render them direct." The Appeals Court further noted that "the difference between direct and consequential damages depends on whether the damages represent (1) a loss in value of the party's performance, in which case

the damages are direct, or (2) collateral losses following the breach, in which case the damages are consequential. As a result, the Appeals Court held that the majority of the damages sought by the Owner were consequential since they went beyond the loss of value in the Architect's performance, and the contract barred the Owner from collecting these damages. Therefore, the Owner was allowed to recover only the additional construction costs associated with the repair of the errors on the Project, or \$1.3 million.

Limitation of Liability Provision

The Appeals Court also disagreed with the District Court's position that the Proposal's limitation of liability provision conflicted with the terms of the Agreement, thereby rendering it inapplicable. The District Court had held that, because the Agreement's indemnity provision applied to first-party disputes between the Owner and Architect, the indemnity provision allowing the Owner to recover damages for the Architect's negligence conflicted with the Proposal's limitation provision restriction on the Architect's exposure to claims. However, the Appeals Court and the New Jersey Appellate Division have issued decisions expressly rejecting the District Court's argument that the contractual indemnity clause applies to first-party disputes.

In *Travelers Indemnity Co. v. Dammann & Co.*, 594 F.3d 238 (3d Cir. 2010), the Appeals Court held the following:

Under New Jersey law, we must interpret the parties' contract according to its plain language, by reading the document as a whole in a fair and common sense manner. We must also endeavor to avoid ignoring certain words or reading the contract in such a way to make any words meaningless. In other words, we must interpret the word "indemnify" in relation to words "defend" and "hold harmless." When we apply these principles to the clause on which IFF relies, it becomes clear that, just as Dammann cannot "defend" IFF from itself or "hold harmless" IFF for IFF's own wrong, Dammann cannot "indemnify IFF for IFF's own loss. Put another way, the only sensible reading of that clause evidences a requirement that third-party liability exist for the clause to be triggered...

In this case, the Agreement contained similar indemnity language limiting its applicability to third-party claims:

[Architect] agrees to indemnify, hold harmless, protect [Owner]... against any all and all claims, loss, liability, damages, costs and expenses, including reasonable attorney's fees, to the extent caused by the negligent acts, errors, or omissions of [Architect]

As a result, because the Owner never alleged that it sought indemnification for third-party losses, the indemnity provision

was not triggered and the limitation of liability provision applied to the damages sought by the Owner.

In conclusion, this decision demonstrates that, although a contractual provision may make certain damages foreseeable, it does not necessarily change the inherent nature of damages, and will not allow an owner to avoid a valid waiver of consequential damages provision by simply alleging the damages are direct. Further, a litigant must know and apply its own jurisdiction's interpretation of indemnification. Here, that interpretation clearly provided that contractual indemnity provisions apply only to third-party losses. ■

Texas Supreme Court Holds that Parties Are Permitted to Agree to Expand Judicial Review of Arbitrator's Decision

By Meredith L. Murphy, Esq.

IT IS COMMON FOR CONSTRUCTION AND DESIGN CONTRACTS to contain provisions in the contract whereby the parties agree that any dispute arising out of the project shall be submitted to binding arbitration. It is well-established that an arbitrator derives his power from the parties' agreement to submit to arbitration. However, in the past, the parties have been held to the award granted by the arbitrator, even if the award was contrary to the law and fact, and parties have been restricted in their ability to seek judicial review of an arbitrator's decision.

In a recent case that could have significant impact on clients who practice and litigate in Texas, the Texas Supreme Court held that parties to an arbitration agreement can seek expanded judicial review of arbitration awards pursuant to the Texas Arbitration Act ("TAA").

The case of *Nafta Traders, Inc. v. Quinn*, 2011 WL 1820875 (2011) arises out of the alleged wrongful termination of Margaret A. Quinn ("Quinn") by her former employer, Nafta Traders, Inc. ("Nafta"). Shortly after her termination as a Vice President of Operations, Quinn filed a lawsuit against Nafta for sex discrimination in violation of the Texas Commission on Human Rights Act. Nafta's employee handbook included a provision whereby any employment disputes must be submitted to arbitration in accordance with the TAA.

The case proceeded to arbitration and the arbitrator awarded Quinn significant damages, including attorney's fees. Nafta moved for vacatur under the Federal Arbitration Act ("FAA"), the TAA and common law. Nafta disputed both the ruling on Quinn's behalf as well as the damages awarded. Nafta asserted that the arbitration provision in the employee handbook stated that the arbitrator "does not have authority (1) to render a decision which contains a reversible error of state or federal law, or (2) to apply a cause of action or remedy not expressly provided for under existing state or federal law." Nafta argued that this provision allowed either Nafta or Quinn to seek judicial review of the arbitration award.

The 160th District Court of Dallas confirmed the arbitrator's award and Nafta appealed. While the appeal was pending, the United States Supreme Court heard the case of *Hall*

Street Associates, LLC v. Mattel, Inc., 552 U.S. 576 (2008). Prior to the Texas Court of Appeal's holding, the United States Supreme Court in *Hall Street* ruled that the FAA's grounds for vacatur and modification are exclusive and cannot be supplemented by contract. In keeping with the ruling in *Hall Street*, the Texas Court of Appeals held that the similarities between the TAA and FAA were such the Appeals Court construed the TAA as the Supreme Court construed the FAA in *Hall Street*. Accordingly, the Texas Court of Appeals upheld the lower court ruling, and held that parties cannot contractually agree to expand the scope of judicial review of an arbitration award governed by the TAA.

The TAA contains specific grounds for vacating, modifying or correcting an arbitration award. For example, the TAA states that an arbitration award can be vacated if the arbitrators have exceeded their powers. The TAA further states, however, that unless such grounds are offered, the court shall confirm the award. Quinn argued that her agreement with Nafta to limit the arbitrator's authority is, in effect, an agreement for broader judicial review than is permitted by the TAA. Quinn further argued that the Texas Supreme Court was compelled to follow the ruling in *Hall Street*.

The Texas Supreme Court agreed that it must follow *Hall Street* in applying the FAA. However, this matter involved the TAA, and the Court held that it was permitted to reach its own determination. The Court held that "(w)hen parties have agreed that an arbitrator should not have authority to reach a decision based on reversible error—in other words, that an arbitrator should have no more power than a judge—a motion to vacate for such error as exceeding the arbitrator's authority is firmly grounded" in the TAA and FAA. The Court further held that "a national policy favoring limited judicial review that turns out to be inimical to arbitration could hardly reside comfortably alongside the 'national policy favoring arbitration' that the Supreme Court has held Congress declared in the FAA." The *Nafta Traders* Court concluded that, under the TAA and FAA, an arbitration award must be vacated if the arbitrator exceeds his powers. The Court noted

that the Supreme Court should be given deference when appropriate; it could not reach the same conclusion as the Supreme Court. Rather, the Court cited the California case of *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (2008), which also declined to follow *Hall Street* in construing its own state statute relating to arbitration.

The *Nafta Traders* Court further held that the FAA does not preempt the TAA, since the TAA does not create any impediments to arbitration agreements themselves. As such, it does not preempt state law that allows the parties to agree to a greater review of arbitration awards.

The purpose of the TAA is to facilitate arbitration agreements, which have been enforceable in Texas since 1845. Each party in an arbitration benefits from the TAA's granting of judicial review for reversible error. The *Nafta Traders* Court held that "the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and, thus, allows for judicial review of an arbitration award for reversible error."

Arbitration under the TAA is a matter of consent and parties are generally free to structure their arbitration agreements as they see fit. In the case of *Nafta Traders*, the parties agreed to expand judicial review of an arbitration award, the TAA contains no provisions which bar them from doing so.

The Texas Supreme Court overruled the Appeals Court holding and remanded the matter to the lower court for consideration of Nafta's challenges to the arbitration award. Of course, Nafta is still required to show reversible error, and "if error cannot be demonstrated, an award must be presumed correct."

This case will have a significant impact on arbitration awards. If the parties' contract contains arbitration provisions similar to those in *Nafta Traders*, an aggrieved party should be permitted to seek judicial review of what it believes constituted reversible error. ■

New Hampshire Court Finds Plaintiff's Claims Barred by The Statutes of Limitations and Repose and Dismisses All Claims against Architect

By Jacqueline J. Rompre, Esq.

A NEW HAMPSHIRE SUPERIOR COURT RECENTLY HELD THAT a Plaintiff's claims against an Architect were barred by both the Statute of Limitations and the Statute of Repose, and dismissed the Plaintiff's claims against all of the parties.

The Plaintiff filed claims against the Architect in the Rockingham County Superior Court alleging negligent design of her 9,500 square foot home in New Hampshire. The Plaintiff also sued the Contractor she hired to construct the home and the Subcontractor hired to install the home's stonework for negligence and breach of warranty. The Plaintiff alleged that significant defects in the masonry had required her to replace all of the stonework on the property.

The Plaintiff began living in the home in November 2001, and did not file the complaint against the Defendants until April 2010. New Hampshire's Statute of Limitations requires a Plaintiff to commence suit within three years of sustaining injury. (N.H. R.S.A. 508:4, I); and the Statute of Repose requires lawsuits to recover damages arising out of improvements to real property, including design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection, be brought within eight years of the date of substantial completion of the improvement. (N.H. R.S.A. 508:4-b, I). New Hampshire defines "substantial completion" as when "construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended." (N.H. R.S.A. 508:4-b, II).

The Defendants moved to dismiss the Plaintiff's claims based on the Statutes of Limitation and Repose. The Plaintiff argued that the Statute of Limitations did not bar her claims because they fell within the Statute's "discovery rule" exception which extends the time a plaintiff may bring an action if she could not have discovered her injury with the exercise of reasonable diligence. (N.H. R.S.A. 508:4, I). The Plaintiff alleged that she

did not discover the damage to the home until 2010 when a mason advised her of defects in the stonework. However, the Plaintiff's original complaint alleged that defective exterior stonework had caused damage to appear within one year of substantial completion of the home. The Plaintiff's subsequent pleadings also reflected that she observed defects in the stonework in 2006 and 2008, and hired the original Subcontractor to fix the defects on both occasions.

During the hearing on the Motions to Dismiss, the Plaintiff argued that the Statute of Repose did not bar her claims because the home was not substantially complete when she began living in it in November 2001. In support the Plaintiff proffered that, when she moved in, the stairway was not finished and one of the kitchen stoves was not working. The Plaintiff further contended that she was not using the home for its intended purpose: a "showcase home" that she "could entertain in and show off." The Plaintiff also claimed that fraudulent concealment by the Subcontractor rendered the Statute of Repose inapplicable. Essentially, the Plaintiff argued that because the Subcontractor had made repairs to the stonework 2006 and again in 2008, he should have alerted her to his defective work, and that in not doing so he engaged in fraudulent concealment.

The Architect countered that the Statute of Limitations applied because the Plaintiff, by her own admission, had noticed damages in 2001 or, at the latest, in 2006 when she hired the Subcontractor to make repairs. The Architect also contended that the Statute of Repose barred the Plaintiff's claims because it began to run in 2001 when she began using the home for its intended purpose, a residence, and that there

was no fraudulent concealment because the defects were open and obvious to the Plaintiff in 2001, 2006 and 2008.

The Court agreed with the Architect, finding that the Plaintiff had clearly stated in her initial complaint that she first noticed the defective stonework within one year of substantial completion of the home. The Court found that the fact that the Plaintiff may not have known the extent of the damage to the home at that time did not toll the running of the Statute of Limitations, and that the Plaintiff's claims were

barred under the Statute. The Court went on to rule that the Plaintiff's claims were also barred by the Statute of Repose. In doing so, the Court found that the home was substantially complete when the Plaintiff living in it in 2001 and that the Plaintiff had not proven that the fraudulent concealment exception applied. Accordingly, the claims against the Architect, Contractor and Subcontractor were dismissed with prejudice, thereby precluding the Plaintiff from re-filing at a later date. ■

Fourth Circuit Court of Appeals Upholds Preclusion *continued from page 1...*

The District Court granted Summary Judgment to Niles Bolton on the basis that Archstone's state-law claims for contribution were preempted under Federal law. The District Court also granted Summary Judgment to Niles Bolton for four state-law claims which Archstone was pursuing against its architect. The court held that: 1) Archstone's claims were all essentially indemnification claims for violations of the FHA and ADA; 2) no right of indemnification existed under these laws; and 3) allowing indemnification under state-law claims would be contrary to the purposes of the FHA and ADA, and were thus preempted under the Federal law doctrine of conflict or obstacle preemption. This doctrine holds that Federal law controls when Federal and State law obligations differ or conflict.

In upholding the District Court's opinion, the Fourth Circuit ruled that the FHA and ADA were both regulatory and not compensatory, and that compliance with them is "non-delegable." The Court concluded that "... the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity." Here, as with all contemporary U.S. construction projects, both the owner and architect have specific duties under the FHA and ADA to provide housing which comports to the requirements of federal accessibility law. This duty cannot be transferred by legal concept or contract.

The Fourth Circuit's decision does not prevent private Plaintiffs, such as the Equal Rights Center or other disability advocacy groups, from filing suits against both owners and architects for purported FHA and ADA violations. The Fourth Circuit's holding serves to prevent the owner and architect from recovering damages from each other when a settlement or judgment is paid to a private Plaintiff or disability advocacy group. Such cases are not uncommon. Upon receipt of a Notice of Claim or Civil Action, design professionals must work with their attorneys to evaluate the allegations thoroughly and prepare a factual defense to the alleged accessibility violations.

In general, design professionals must exercise care in comporting with accessibility requirements in designing public buildings, especially housing. The remediation of inaccessible structures is time consuming, is often difficult, and is almost always very expensive. As was demonstrated by the litigation underlying the Fourth Circuit's decision, accessibility violations of public housing are frequent litigation targets of professional disability advocacy groups. ■

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