UNINTENDED CONSEQUENCES OF OVER-PROTECTING NON-RESIDENTIAL DESIGN PROFESSIONALS

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Design professionals find themselves in a unique position under Nevada law. While nearly all residential construction industry participants have found themselves in the bull's eye of a construction defect case, commercial construction has largely escaped such claims. Commercial construction project owners are more focused on a facility's operation than recovering monetary damages, so contract disputes are the norm. Still, a commercial dispute of "Loch Ness" proportions can result in a professional negligence claim, especially when access to available insurance coverage is necessary to resolve the issue.

Whether or not such claims were actually prolific during Nevada's construction boom, perceived abusive professional negligence claims gave design professionals a privileged status in Nevada. In 2007, NRS 11.256, et seq., was enacted, forbidding the filing of design professional negligence complaints arising from non-residential projects, unless a pre-litigation expert report, certifying the complaint as meritorious, was also filed. But that was not all. Since 2009, the Nevada Supreme Court has been systematically limiting design professional negligence claims in "complex commercial construction" cases. With the *Halcrow, Inc. v. Dist. Ct.* decision,[1] design professional negligence claims are eliminated entirely. Only *contract* claims are now available to address design professional negligence in the non-residential construction context.

> *"[I]n the context of commercial construction design professionals … 'contract law is better suited' for resolving [negligent design] claims. … [T]he highly interconnected network of contracts delineates each party's risks and liabilities in case of negligence, which in turn 'exert significant financial pressures to avoid such negligence.' [¶] Additionally, complex construction contracts generally include provisions addressing economic losses. Therefore, the parties' 'disappointed economic expectations' are better determined by looking to the parties' intentions expressed in their agreements. … Thus, requiring parties that are not in direct privity with one another but involved in a network of interrelated contracts to rely upon that network of contracts ensures that all parties to a complex project have a remedy and maintains the important distinction between contract and tort law."*[2]

Unintended Consequences

The elimination of design professional negligence claims in non-residential construction raises new concerns for designers and developers, as well as their attorneys. For example, a commercial developer hires an architect to design a new building. The owner finances 70 percent of the $100 million construction cost. The design contract requires the architect to design a constructible building, but (as is quite common) mutually waives consequential damages and limits the architect's liability for "all claims" to the larger of available insurances or the architect's $1 million fee in the event of breach or negligence. The architect carries (at the owner's expense) a project-specific depleting errors and omissions insurance policy with an aggregate limit of $10 million. The

continued on page 24

UNINTENDED CONSEQUENCES OF OVER-PROTECTING NON-RESIDENTIAL DESIGN PROFESSIONALS

continued from page 23

architect subcontracts the structural engineering to a third-party structural engineer. The architect completes his work, integrating the structural engineer's design and calculations into final construction documents, which are sent out for bid.

During construction, a worker dies when part of the tower structure collapses. An investigation reveals a significant design error, rendering the tower unstable during construction, although it will be completely stable after completion. Having constructed the project according to the approved plans, the contractor is now delayed while figuring out an alternative construction sequence. He presents an impact claim for $20 million incurred for the delay and disruption caused by the design error. The owner seeks indemnity from the architect, but his insurance company rejects the claim and defense, citing *Halcrow* and a lack of coverage for breach of contract. The architect must pay for its own defense, but has insufficient capital to satisfy the eventual judgment and goes bankrupt. The owner is left with a $20 million change and a delayed completion date. The project lender declares a default and refuses further fund releases. The unpaid contractor records a mechanics lien and stops work, suing the owner for payment due.

In the design-bid-build construction method, the *Spearin Doctrine* holds the owner responsible for design errors in the construction documents and their impact on the contractor.

This is not a "worst case" possibility. Similar situations have happened numerous times during the last 20 years across Nevada. No construction design is perfect. Typically a large commercial project design will consist of thousands of design drawings, specifications and calculations. In the design-bid-build construction method, the *Spearin Doctrine* holds the owner responsible for design errors in the construction documents and their impact on the contractor.[3] If the impact is substantial, it can disrupt the contractor's planned construction sequence and "ripple" throughout the entire construction process, leading to unexpected cost increases for the owner. These claims can cause a project to fail. The largest Nevada construction disputes arose from this type of claim.

Breach of contract is a factual issue, but whether the breach occurred due to a mistake, triggering insurance coverage, is often a matter of opinion. Thus, the value of a "certificate of merit" is to opine whether or not a known act or omission was negligent, and on that basis, the complaint is not frivolous. It has no relevance to whether or not the act or omission complained of actually occurred. If there is no longer to be liability for professional negligence under *Halcrow*, the need for a "certificate of merit" is questionable.

The Certificate of Merit was Designed for Professional Negligence Claims

But the Nevada Supreme Court, in *In re CityCenter Const. & Lien Litigation,*[4] does not address this question when it holds filing *any* complaint against a non-residential design professional arising from a project needs a "certificate of merit." The court could have returned the case to the trial court for additional consideration. Instead, the court confirms the certificate of merit and expert report requirement, and clarifies when multiple parties are involved in a case, such a dismissal of the initiating pleading on this ground will not affect other party claims in the case. Only the offending complaint need be dismissed. Troubling to construction litigators, however, is the *CityCenter* court's finding that a certificate of merit is required in "*any* cause of action against a design professional that concerns the construction of a nonresidential building."[5] A plain reading of such language would include all basic breach of contract claims of any sort (even simple money owing claims), arising from the construction project.

This seems to go well beyond the certificate of merit's purpose. Introduced as Senate Bill 243 in the 2007 Legislature, nearly all testimony focused on professional negligence. In the March 23, 2007, Senate Judiciary hearing, an American Counsel of Engineering Companies of Nevada representative testified that:

> *"This bill only applies to construction defect claims and specifically nonresidential claims. A construction defect claim against a design professional, unlike claims against a contractor or subcontractor, is a professional negligence claim. To prove a professional negligence claim you have to show the design professional failed to meet a standard of care. There is only one way to prove that. You have to bring an expert to the hearing to show the standard of care and that the design professional fell below that standard of care."*

Other committee transcripts contain similar comments and none complain of the need for expert reports or a certificate of merit in the context of a complaint for breach of contract.

Most construction litigators would agree that an expert opinion is generally *not* necessary to prove a breach of contract claim, such as complaints for unpaid consultant labor or equipment rental fees. But a plain reading of *CityCenter* requires that a certificate of merit and expert opinion be filed for *every* complaint against a design professional that arises, in any way, from a nonresidential construction project. The unnecessary

expense of such a requirement could prohibit an otherwise justified claim. The unintended consequences of both our legislation and attendant court interpretations may be worse than the harm prevented.

Resolving design professional negligence in nonresidential construction projects by limiting disputes to contract breach will not protect design professionals from liability. Design-bid-build is a claim maker; it does not promote cooperation between the construction project participants and in fact, sets them up as adversaries. What is needed is an alternative to design-bid-build that reduces the impact of the *Spearin* doctrine. Alternative contracting methods such as construction management at risk, design-build and design integration (aka integrated project delivery), can make construction projects more efficient and less adversarial for everyone involved. ■

1 *Halcrow, Inc. v. Dist. Ct.*, 129 Nev.Adv. Op. 42 (June, 2013).
2 *Halcrow*, *supra*, 129 Nev.Adv.Op. 42., at 9-10 (internal citations omitted).
3 The *Spearin* Doctrine refers to the rule issued in the seminal case of *United States v. Spearin*, 248 U.S. 132 (1918), confirmed as applicable in Nevada in *Halcrow Inc. v. Dist. Ct.,* 129 Nev. Adv.Op. 42, fn. 3 (June, 2013); *Home Furniture, Inc. v. Brunzell Construction Co.*, 84 Nev. 309, 313-14, 440 P.2d 398, 401-02 (1968), which essentially holds that when an owner presents a set of construction documents to a contractor bid, the owner guarantees to the contractor that the project can be built from those documents. The contractor is not responsible for errors in the design that impact the construction of the project.
4 *In re CityCenter Const. & Lien Master Litigation*, 310 P.3d 574, 129 Nev.Adv. Op.70 (Oct., 2013).
5 *CityCenter*, *supra*, 129 Nev.Adv.Op 70 at page 8 (emphasis in the original).

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