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CONSTRUCTION LAW

Claims Against Architects And Engineers

By **Kenneth M. Block**

One of the unfortunate realities of the construction process is the prevalence of claims and disputes among owners, design professionals, contractors and subcontractors. To aid in the understanding of the fundamentals of claims against construction professionals and contractors, and helping to achieve a favorable outcome if litigation becomes necessary, we offer a two-part primer on construction litigation for owners. This first part deals with claims against architects and engineers (collectively, "A/E"). The second part, to be published this September, will deal with contractors.

A typical claim of an owner against an A/E involves an error or omission in the design of an element of the project. In the case of an architect, the error may involve the faulty design of the roof or façade of the building. In the case of a mechanical engineer, the error may involve the defective design of the building's HVAC system. In both instances, once the error is identified and remedial steps are taken, the owner will face additional cost in the form of a change order from its contractor and the general delay and disruption of the project. It is usually at that point that the owner asks the questions: How did this happen? Who is responsible? What recourse do I have?

The Theory of A/E Liability

The theory of liability against an A/E is based on the breach of the Standard of Care, that is: Did the A/E perform its services in accordance with the standard of care exercised by professionals in the community? In order to answer this question, the nature of the error must be examined as well as the consequence to the owner. An A/E is not required to be perfect, but if the error results in damage to the owner, and would not have occurred had the A/E exercised reasonable care, the A/E will be liable for the owner's damages. However, in order to establish malpractice, expert testimony will be required, both as to liability and damages.

Recoverable Damages

Generally speaking, all damages which naturally flow from the malpractice of an A/E are recoverable, subject to any contractual limitations. There are also distinctions between the amount of damages which can be recovered as a result of an error *or* omission.

In the case of an error, where previously installed work needs to be rectified or retrofitted, the full cost of the remedial work is recoverable. In the case of an omission, where *additional* work or equipment is necessary, only the incremental cost of the work or equipment is recoverable, under the theory that, had the A/E not omitted the work, the owner would have had to pay for the work in the first instance, and that the A/E is not responsible for a "betterment." In this case, the A/E would be responsible for the upcharge due to the purchase of the work on a "retail" basis, rather than the cost the owner would have paid had the work initially been specified.

In addition to the recovery of the "hard" costs arising from the error

KENNETH M. BLOCK *is chair of Tannenbaum Helpern Syracuse & Hirschtritt LLP's Construction Law Practice.*

or omission, an aggrieved owner is also entitled to recover other actual damages incurred, such as additional general conditions and consulting costs. Moreover, unless there is a waiver of consequential damages in the underlying contract, the owner can recover delay damages, such as lost rent and, where applicable, continuing real estate taxes and finance charges.

Practical Recoverability of Damages

The foregoing establishes the theoretical bases for cost recovery from the A/E, but the question of more practical import is: What is the likelihood of recovery from the A/E? The answer lies in the insurance being carried by the A/E. Without adequate insurance, it is rare for the owner to be made whole from the assets of the A/E.

Before delving into the question of insurance, it bears noting that principals of A/E firms formed as professional corporations may bear personal liability for the errors or omissions of their firms. It is, therefore, incumbent on the principals to maintain adequate professional liability insurance. Often, counsel for A/E firms seek to limit the liability of the firms and their principals to *available* insurance proceeds at the time of judgment or settlement.

We counsel owners against this and insist that any limitation of liability relate to the *amount* of insurance required to be maintained by the contract. In this manner, if there is an erosion or termination of the policy, the firm (and the responsible principals) will be liable for damages found due to the aggrieved owner.

Coverage under professional liability insurance policies is very broad and usually includes all damage resulting from the negligent acts of the A/E, whether considered direct or consequential. It is for this reason that we oppose requests for waivers of consequential damages, such as the owner's lost income; the typical professional liability policy covers such losses. It also should be noted that most professional liability policies provide that legal fees incurred in defending claims against the A/E are deducted from the face of the policy, thereby diluting the available proceeds for settlement.

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Assertion of the Claim

We have found that the best course for an owner to seek redress for the damages caused by A/E malpractice is the assembly of a team of experts and consultants to analyze the perceived errors, and prepare a detailed claim against the culpable A/E. We usually start by first examining the direct and indirect costs incurred by the owner, as well as the delay damages which were a consequence of the errors. Plans, bulletins, change orders and other job records are then examined and experts reports, such as engineering, scheduling and financial, are gathered. The documentation is gathered into a comprehensive report for submission to the A/E, its counsel and insurance carrier.

Many insurance carriers take a proactive approach to dispute resolution and may request an informal settlement conference, failing which mediation may be suggested (even where the relevant contracts may provide for litigation). Where appropriate, we will agree to mediation, but reserve the right to pursue litigation if mediation fails.

As should be apparent from the foregoing, the A/E claims process can be complex and costly, but may be necessary to provide the aggrieved owner some degree of cost recovery. The key, however, is understanding the full extent and validity of the A/E claim, and the detailed preparation, presentation and prosecution of that claim.