Design and Construction Management Professional Reporter

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Gregg M. Lysko joins the Professional Practices Group at Donovan Hatem

Donovan Hatem is pleased to announce that **Gregg M. Lysko** joined the firm on September 17 as a Partner in our **Professional Practices Group**.

Gregg brings to Donovan Hatem a comprehensive scope of both professional and general liability litigation experience that encompasses liability assessment, contract disputes, coverage and excess exposure, unfair and deceptive acts and practices, settlement negotiation, mediation/arbitration, and defense trials in both state and federal courts. He has defended insured and self-insured businesses, corporations, professional associations, and individuals in complex and often high exposure contract and tort liability claims involving construction defects, product defects, premises liability, motor vehicle negligence, and allegations of unfair insurance practices. Gregg also advises insureds on assessment of liability, damages exposure, and settlement claims valuation.

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The Existence Of A Fiduciary Duty Between Architect And Its Client Is A Question Of Fact

By Jordan S. Rattray, Esq.

THE APPEALS COURT OF MINNESOTA recently decided that a design professional does not automatically owe a fiduciary duty to a client. In *Carlson v. SALA Architects, Inc.*, 732 N.W. 2d 324 (2007), a dispute arose between an architectural firm and its client in connection with the design of a new home in Eden Prairie, Minnesota. The Carlsons retained SALA Architects, Inc. ("SALA") to design a cottage-style home. SALA was selected for its experience in designing cottage-style homes. SALA assigned a new employee, David Wagner, to design the home. Although Wagner was an architect, he was only licensed in California. He did, however, work under the supervision of an architect licensed in Minnesota.

After numerous meetings and revisions to the design, the Carlsons terminated SALA. The Carlsons sued SALA for fees paid on the ground that SALA misrepresented the qualifications of Wagner and breached a fiduciary duty it owed to the Carlsons.

A fiduciary relationship is created when one party is in a position of superior knowledge and authority over the other and the other party places a high level of trust and confidence in the fiduciary.

The lower court granted summary judgment in favor of the Carlsons, and SALA appealed. On appeal, the court found that an issue of fact existed as to whether SALA held Wagner out as an architect licensed in Minnesota. Because there was substantial dispute on this factual issue, the judgment for the Carlsons was reversed. The court then went on to consider whether a *per se* fiduciary relationship exists between an architect and the client.

In reaching its conclusion, the court summarized some of the basic principles underlying fiduciary relationships. A fiduciary relationship is created when one party is in a position of superior knowledge and authority over the other and the other party places a high level of trust and confidence in the fiduciary. Fiduciary relationships are traditionally found between an attorney and client; a banker and client; a trustee and the beneficiaries of the trust; and between a board of directors and the company's shareholders. The fiduciary's obligations to the beneficiary of the relationship are greater than in the ordinary course of business. In *Carlson*, the court found that the question of whether a fiduciary relationship exists between an architect and his client is a question of fact determined by the expectation of the parties. The obligations of a fiduciary do not attach to an architect simply by accepting a new project; the parties must intend a heightened duty.

Massachusetts Supreme Judicial Court Recognizes Joint Defense Privilege Under The Common Interest Doctrine

By Amanda Y. Sirk, Esq.

THE MASSACHUSETTS SUPREME COURT recently formally recognized the joint defense privilege between parties with a common interest, also known as the common interest doctrine, as an exception to the waiver of the attorney-client privilege.

In *Hanover Insurance Co. v. Rapo & Jepsen Insurance Services, Inc.*, 449 Mass. 609 (2007), the Hanover Insurance Co. ("Hanover") alleged that Arbella Mutual Insurance Co. ("Arbella") conspired with the defendants to have certain undesirable high risk auto insurance policies wrongfully transferred from Arbella to Hanover. Hanover claimed that Arbella secretly paid an exclusive representative producer (ERP) assigned to Hanover, Rapo & Jepsen Insurance Services, Inc. ("Rapo & Jepsen"), to take over some of its higher-loss auto insurance business, thereby forcing Hanover to accept the undesirable high risk business. Hanover further alleged that Arbella's assigned ERP did not disclose that they were agents of Arbella, targeted Rapo & Jepsen to induce them to buy the high loss business, and even financed Rapo & Jepsen's purchases of Arbella's high risk business transactions. Hanover accused Arbella of improperly trying to reduce its share of the high risk auto insurance business so Arbella could have new ERPs appointed with substantially lower risk (and more profitable) auto insurance business.

During the course of discovery, Hanover requested that Arbella produce all documents related to any contracts, agreements or understandings between Rapo & Jepsen and their respective counsel. Hanover specifically requested a copy of all communications and agreements by Arbella to indemnify Rapo & Jepsen for its legal costs including copies of Arbella's legal invoices and any payments made by Arbella. Arbella objected to Hanover's request based on the attorney-client privilege and the attorney work product doctrine. Arbella further claimed that a verbal joint defense agreement between Arbella and Rapo & Jepsen preserved the attorney-client privilege between the two defendants because they had a common interest in the litigation.

The Superior Court ordered production of the requested documents on the ground that the Commonwealth did not recognize the joint defense privilege and, even if it had, no written joint defense agreement existed between Arbella and Rapo & Jepsen. The Appeals Court granted the defendants' motion to pursue an interlocutory appeal.

On appeal, Hanover attacked the defendants' objection by making the following arguments:

(1) The common interest doctrine cannot be applied without the client's knowledge, and in this case, there was no evidence that any defendant was aware that their counsel purportedly entered into a joint defense agreement.

(2) There was no written joint defense agreement, and therefore, the shared communications between the Defendants were not privileged.

(3) Arbella and Rapo & Jepsen did not share a common legal interest sufficient to support the application of the common interest doctrine since their interests were not identical.

(4) The legal invoices for Rapo & Jepsen and Arbella's payment checks for those invoices were not protected by the attorney-client privilege because the identity of an attorney's client and the source of payment for legal fees are not normally protected by the attorney-client privilege. *Id.* at 617–620.

The Supreme Judicial Court ("SJC") ruled in favor of the defendants and concluded that Rapo & Jepsen's legal invoices submitted to Arbella for payment may contain privileged material protected by a joint defense agreement. The SJC remanded for a hearing to determine whether Arbella's and Rapo & Jepsen's purported verbal joint defense agreement existed to provide a valid basis to refute Hanover's discovery requests.

Additionally, the SJC rejected Hanover's argument that the trial judge's order should be upheld because there was no evidence that counsel for either defendant had informed their client of a joint defense agreement. "While it is certainly preferable to secure the client's consent before sharing a privileged communication ... we do not think a client's knowledge or express consent [is] essential." *Id.* at 617. The SJC further ruled that joint defense agreements do not need to be in writing and that the interests of parties sharing the privileged information do not need to be identical in order to qualify as common interests. "Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests." *Visual Scene, Inc. v. Pilkington Bros., plx*, 508 So.2d 437, 441 (1987). The SJC's ruling that joint defense agreements need not be in writing validated longstanding practice in the Commonwealth.

The SJC formally recognized that a joint defense privilege between parties with a common interest is an exception to the waiver of the attorney-client privilege.

In recognizing the joint defense privilege, the SJC adopted a broadened approach to the attorney-client privilege which "not only protects statements made by the client to the attorney in confidence for the purpose of obtaining legal advice in a particular matter, but also protects such statements made to or shared with necessary agents of the attorney or the client." *Id.* at 617 (citing *Commonwealth v. Senior*, 433 Mass. 453 (2001)). The SJC formally recognized that a joint defense privilege between parties with a common interest is an exception to the waiver of the attorney-client privilege. It becomes a practical necessity for aligned parties and their counsel to share privileged material with each other on a confidential basis in order to build a more effective and less duplicative case. Therefore, the SJC's decision is encouraging with respect to the free flow of information in cases where multiple parties are asserting or defending against common claims since. ■

There Is No Common Law Right To Indemnity Against Design Professionals For Violations Of The ADA

By Leslie P. King, Esq.

IN ***ACCESS 4 ALL, INC.*** *v. Trump International Hotel and Tower Condominium*, 2007 WL 633951, the United States District Court for the Southern District of New York held that there was no common law right to indemnity under the Americans With Disabilities Act ("ADA"). In the absence of contractual indemnity, owners sued under the ADA cannot seek indemnity from design professionals.

In the case cited above, Trump International Hotel and Tower Condominium ("Trump") was sued for ADA violations. Trump, in turn, filed a third-party action against the sponsor of the condominiums, Central Park West PT Associates Limited Partnership ("CPW") and two architecture firms, Philip Johnson, Ritchie & Firore ("PJRF") and CK Architects, P.C. ("CK") who previously contracted with CPW for renovations. Each third-party defendant filed a motion to dismiss.

Although the motions to dismiss were granted on grounds of collateral estoppel based on a prior case that involved identical claims against the same third-party defendants, the court considered the merits of the claims for common law indemnification under the ADA and concluded that no such right exists.

The court stated that there were only two ways in which a right of indemnity or contribution would be created for ADA violations. The first is in the statute itself, and the second was through common law. Because there is no supportive language in the statute itself, the third-party plaintiff asked the court to consider the latter option. In reaching its conclusion, the court noted federal courts have refused to create any common-law rights of indemnity or contribution in areas governed by comprehensive legislative schemes. Specifically, the court cited *Herman v. RSR Security Servs., Ltd*, 172 F.3d 132 (2d Cir. 1999), in which the Second Circuit reached similar conclusions in its analysis of the Fair Labor Standards Act. It also cited *Northwest Airlines, Inc. v. Transport Workers' Union of America*, 451 U.S. 77, 90 (1981), in which the Supreme Court held that Title VII did not create a right to contribution. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Access 4 All* at *7 (internal quotations omitted).

The favorable analysis in *Access 4 All* is *dicta* and, because the case is not an appellate court decision, it is not controlling law. Nevertheless, the case does provide persuasive support for arguing that, if a design professional does not contractually agree to indemnify an owner for actions brought under the ADA, the design professional is protected from any potential claims for indemnification or contribution brought by an owner.

California Appeals Court Rejects Public Owner's Attempt to Disclaim Geotechnical Data

By David H. Corkum, Esq.

THE COURT OF APPEALS FOR CALIFORNIA recently refused to enforce a public owner's contractual attempt to disclaim geotechnical data. *Condon-Johnson & Assoc. Inc., v. Sacramento Muni. Utility Dist.*, 149 Cal. App. 4th 1384 (April 2007). The contractor, Condon-Johnson & Associates, Inc. ("Condon-Johnson") relied on that data in estimating its cost of performing the work in spite of clear contractual language prohibiting such reliance. The Appeals Court determined that the disclaimers could not operate to "undo" the geotechnical data "indications" contained in the Contract Documents because such an attempt would be contrary to California law.

Background

A public authority, the Sacramento Municipal Utility District ("SMUD") devised a scheme intended to stabilize a failing slope that threatened its preexisting power house. The scheme entailed the installation of thirteen 6-foot diameter drilled piers, 60 to 80 feet deep, that penetrated the overlying fill and native soils and were socketed into rock below the slide horizon.

SMUD issued a Request for Proposals to potential contractors interested in performing the work according to contractor selected means and methods. As required by California procurement regulations, a differing site condition ("DSC") clause, Public Contract Code Section 7104, was included as a part of the Contract Documents. While somewhat uniquely worded, § 7104 operated similarly to the federal and most other state DSC clauses providing that a contractor would be entitled to recover its excess costs by change order if subsurface conditions at the site differed materially from those indicated in the Contract Documents. The Contract Documents also contained Section SC-10 *Subsurface Soil Condition*, which provided:

> District has performed soil borings for the penstock adjacent to the job site. The boring logs are provided in Appendix C. . . . It is the intention of the District to provide the soil boring information for the purpose of determining what type of rock may be encountered and not for determining the profile of the backfill to rock. The District has completed compression testing on two samples from the M-2 boring at 20 and 25.7 feet. These tests were completed to give additional information as to what may be expected in the pier drilling. . . . The compression test results are as follows: M-2 at 20 ft. – 7,300 PSI and M-2 at 25.7 ft. – 3,600 PSI. . . .

Despite providing this geotechnical data, SMUD clearly telegraphed its intent to transfer all risks for constructability and productivity of the piers to the contractor. To accomplish this risk transfer, the Contract Documents contained a number of general disclaimers and the specific disclaimer of subsurface conditions. Indeed, the final paragraph of SC-10 *Subsurface Soil Conditions* stated:

> It is the sole responsibility of the contractor to evaluate the site and make his own technical assessment of the subsurface soil conditions for determining the proposed drilling process, equipment and make his own financial impact assessment prior to drilling. The District makes no guarantee of the soil report's accuracy, findings or recommendations. The District will make no additional compensation or payments nor will it accept any claims if the subsurface soil conditions are different from that assumed by contractor.

During the course of pier installation, Condon-Johnson encountered material it believed was significantly harder and stronger than the 3,500 to 7,300 PSI indicated by SMUD. Subsequent investigation and testing by Condon-Johnson confirmed that the rock actually encountered had strengths in excess 13,000 PSI. Condon-Johnson filed a claim for differing site condition, which SMUD denied, stating that the contract did not indicate a condition so that there could be no differing condition. Condon-Johnson filed suit alleging breach of contract, negligent misrepresentation and negligent concealment.

At the inception of the trial, Condon-Johnson moved in limine to exclude evidence of SMUD's disclaimers. According to Condon-Johnson, those disclaimers were inconsistent and incompatible with § 7104. The trial court agreed and the trial went forward with the offending disclaimer language and any reference to those disclaimers in any correspondence between SMUD and Condon-Johnson excised from all exhibits. The motion in limine essentially eviscerated SMUD's defense and Condon-Johnson prevailed at trial obtaining a judgment for more than $1.6 million. SMUD appealed, arguing that the trial court misinterpreted the differing site condition language of § 7104 resulting in the erroneous exclusion of the disclaimer evidence.

The Court's Analysis

In a 2 to 1 decision with a vigorously argued dissent, the Appeals Court upheld the lower court's ruling. The Appeals Court focused its attention on the mean of the word "indicated" as found in the statute. The clause containing the word that triggered the requirement for a change order and scrutinized by the Justices stated: "2) Subsurface or latent physical conditions at the site differing from those 'indicated' by information about the site made available to bidders prior to the deadline for submitting bids." The Appeals Court noted that, while § 7104 was enacted in 1989, its proper interpretation could be found in two forty-year-old cases decided by the California Supreme Court. The two cases, *Wunderlich v. State of California*, 65 Cal.2d 777(1967) and *E.H. Morrill Co. v. State of California*, 65 Cal.2d 787 (1967), were decided on the same day and authored by the same Justice. When read together, as the Appeals Court assumed the legislature must have done when drafting the statute, the meaning of the word "indicated" became clear.

In *Wunderlich*, the Court refused to find that the State had breached an implied warranty even though the contractor's reasonable interpretation regarding quality and quantity of sand and gravel material in the area located between two test borings performed and provided for the project. *Wunderlich* stated that *the borings were merely indications from which deductions might be drawn as to actual conditions*. (emphasis added). According to the Court, the only implied warranty was as to the accuracy and not to the deductions drawn from them. In *Morrill*, the contract described "boulders which may be encountered in the site grading and other excavation work on the site vary in size from 1ft. to 4ft. in diameter. The dispersion of boulders varies from approximately 6ft. to 12ft. in all directions including vertical". *Morrill* described this characterization as a "positive assertion of fact" from which a contractor could calculate quantity of material.

In *Condon-Johnson*, the Appeals Court noted that the legislature's decision to use the word "indicated" (the past tense of indications) rather than "positive assertion of fact" 22 years after *Wunderlich* and *Morrill* meant that the legislature had intended for contractors to be able to make deductions and inferences based on the "indicated" information provided by the public owner. The Appeals Court held that the geotechnical data provided in the Contract Documents were clear indications and that disclaiming what is indicated would run counter to the requirements of § 7104. It also noted that this holding was consistent with the legislature's apparent allocation of the risk between public entity and contractor.

Analysis

The Court of Appeals holding in *Condon-Johnson* is consistent with the majority of jurisdictions throughout the country where contractors are entitled to rely on geotechnical data provided or "indicated" in Contract Documents and to make reasonable interpretations from that data. The frailty of this decision, however, is in the dissenting justice's discussion of the majority's decision. He provides a compelling discussion of appropriate contract interpretation, noting that a reviewing court is required to reconcile the entire contract, giving meaning to all provisions, and that the majority's decision to excise the disclaiming language was a flawed interpretation. Indeed, according to the dissenter, the disclaimer should serve to announce to bidding contractors that it was the State's intention

that the geotechnical data provided was not an indication. "Read together these provisions provide the bidders information about what subsurface conditions may exist at the site but do not 'indicate' the actual conditions for purposes of the changed conditions provisions required by § 7104." The dissenter suggests that the majority had already decided that the geotechnical data represented indications about the subsurface conditions, making it a foregone conclusion that the disclaimer would be rejected as contrary to statute. If, as he suggests, the Appeals Court interpreted the entire contract including the disclaimer, there would be no indications to run afoul of the statute.

This 2 to 1 decision suggests that practitioners preparing or bidding public projects in California should be extremely careful in their treatment of geotechnical data that is or is not intended to be an indication for purposes of § 7104. As noted by the majority in *Condon-Johnson*, public policy desires an equitable allocation of risk as between public owner and bidding contractor. A public owner attempting to provide information to induce bidders but disclaim that information for purposes of § 7104 will likely (given the current makeup of the Appeals Court) not be successful. A more interesting scenario presents itself when the public owner attempts to disclose all geotechnical data for the sake of information but only intends that certain information be considered indications for purposes of § 7104. Tools such as geotechnical baseline reports, non-contract document, "information only" reports, and specific disclaimers that are intended and worded to explain and provide context to the data may be useful in accomplishing this objective.

David Hatem to speak on project alliancing at Build Boston 2007

Title: Project Alliancing and Public-Private Partnerships: New Roles, Risks and Opportunities for Design Professionals *(Build Boston workshop #C61)*

When: Thursday, November 15, 2007
3:15 pm - 4:45 pm

Where: Seaport World Trade Center, Boston, MA

Description: Project Owners are exploring new forms of "relationship" project delivery approaches—grounded in an expectation of collaboration among primary project participants—that represent new roles, risks and opportunities for Design Professionals. Project Alliancing is structured in a manner in which project risk is pre-allocated among primary project participants and the traditional adversarial and claims environments are "designed out" of the design and construction process. Public/Private partnerships represent an alternative approach in which the public and private sectors contract to have the latter participant fund, program, plan, design, construct, operate and maintain a project intended for public use. This session will examine these alternative approaches, and discuss the roles, risks and opportunities for Design Professionals.

Donovan Hatem to sponsor Women In Design Conference

Donovan Hatem is pleased to once again sponsor the Women in Design Awards Luncheon at the BSA's 8th Annual Women In Design Conference, to be held on Tuesday, November 13, 2007 at the Seaport World Trade Center in Boston. This year's conference is titled "Full Spectrum: Layers of Design", and features workshops, events, and exhibits throughout the day. The Awards Luncheon runs from noon - 2:00 pm and will honor three women in recognition of their outstanding contributions to the profession of architecture.

Pursuing Legal Defenses At The Outset Of Litigation Can Be The Difference Between Winning And Losing

By Damian R. LaPlaca, Esq. and Alberto G. Rossi, Esq.

MORE OFTEN THAN NOT, clients, and in some instances their counsel, tend to overlook the importance of pursuing legal defenses at the outset of litigation and focus their attention on what will happen at trial. Seasoned litigation attorneys, however, know that the failure to recognize and pursue a legal defense at the early stages of litigation can be just as harmful as a misstep at trial. For example, in a recent lawsuit arising out of the construction of a municipal golf course in Massachusetts (the "Project"), through the foresight of its attorneys at Donovan Hatem LLP, an architectural firm (the "Architect") was able to avoid the costs associated with a prolonged litigation and the risks of a trial.

The General Contractor on the Project brought a lawsuit against the Owner for breach of contract, promissory estoppel, and misrepresentation. The breach of contract claims were based on the failure of the Owner to pay the General Contractor for the work performed on the Project and the additional construction costs incurred as a result of the Owner's delays. The Owner in turn filed a third-party complaint against the Architect for indemnification and contribution.

The Architect's attorneys moved for summary judgment based on the following two arguments. First, the Architect's attorneys argued that because the Owner/General Contractor Agreement contained an express no damages for delay provision, the Owner could not be held liable for "delay damages" and, therefore, as a matter of law the Owner could not bring a claim for either contribution or indemnification against the Architect. Second, the Architect's attorneys argued that because the Owner satisfied the definition of a "public employer" under the Massachusetts Tort Claims Act, the Owner was exempt from suit for an intentional tort, i.e., misrepresentation, and therefore, as a matter of law, the Owner could not bring a claim for either contribution or indemnification against the Architect. Counsel for the Owner likewise moved for summary judgment against the General Contractor based on the Architect's arguments.

The Court granted judgment in favor of both the Architect and the Owner and, therefore, the Architect was dismissed from the lawsuit. The Owner and General Contractor proceeded to trial on the remaining breach of contract claims for failure to pay for work performed on the Project. At the jury-waived trial, the Court entered a significant verdict against the Owner.

In hindsight, had the Architect's attorneys failed to pursue summary judgment based on the no damages for delay provision in the Owner/General Contractor Agreement and the status of the Owner as a "public employer", at trial the Court may have also entered a verdict against the Architect. Accordingly, although often overlooked, the legal defenses pursued by counsel at the outset of litigation can mean the difference between a significant adverse verdict and a favorable outcome.

Upcoming Design Professional Roundtables

October 18, 2007
Boston
"BIM Professional Liability Issues"

October 25, 2007
New York
"Mergers & Acquisitions—An Overview of the Acquisition Process for a Private Company Transaction"

November 8, 2007
Boston
"The Design Professional's Risks During the Construction Phase"

November 28, 2007
New York
"BIM Professional Liability Issues"

More information about these events will be posted on **www.donovanhatem.com**.
To register, please e-mail **roundtable@donovanhatem.com**.

About Donovan Hatem

Established in 2001, Donovan Hatem LLP is a multi-practice law firm, currently ranked as one of the 25 largest firms in the Boston area. With more than 55 litigation and general business attorneys, and offices in Boston and New York, we serve a diverse clientele of private companies, nonprofit organizations, government entities and individuals. Our clients rely on our experience and expertise, on a range of personal, professional liability and business issues, for focused advice and counsel that can minimize risk and exposure.

Committed to the principles that Donovan Hatem was founded on, our attorneys provide dedicated legal services to our diverse client base—services delivered in a responsive manner with a strategic understanding of our clients' businesses.

For more information, please visit our website at donovanhatem.com.

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