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Monticello

Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

Upcoming Events

- **First Annual Meeting, May 8, 2013!**

Join us for our first official membership meeting and election of officers and directors. The meeting will be held at the **Barton Creek Resort & Spa,** 8212 Barton Club Drive, Austin, Texas. The Meeting is being timed to coincide with Victor O. Schinnerer's 52nd Annual Meeting of Invited Attorneys, which is May 8-10. We will host a dinner the evening of May 8th at the Resort. Watch for report in the July newsletter and learn who the new officers and directors are.

- **AIA National Convention, June 20-22, 2013 in Denver:**

Anyone interested in hosting a get-together? Let us know. Some program topics of interest to you Architect-Lawyers may be: TH109, Politics and the Profession; TH202, Legal Considerations in Digital Practice; TH411, Access Law Overview; FR108, Designing for Risk and Reconstruction; FR205, Did You Get the Owner's Manual for Your Practice?; FR208, ADA and Fair Housing: Why Does It Go Wrong on Our Projects?; FR215, A Case Study in Professional Ethics; SA204, Expanding the Architect's Influence as Civic Leader; SA206, Understanding the General Conditions of a Construction Contract; SA215, The AIA Code of Ethics.

The Jefferson Society, Inc.
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Know of Another Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to interim president Bill Quatman at bquatman@burnsmcd.com or to Craig Williams at cwilliams@hksinc.com and we will reach out to them. Must have dual degrees in architecture and law.

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

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NEW WEBSITE:

www.thejeffersonsociety.org

In this issue

The Architect-Lawyer's Role in Legislative Advocacy

By G. William Quatman, FAIA, Esq.
Burns & McDonnell

The 2013 legislative session is in full swing with more than 50% of State Legislatures adjourning by the end of May. Architecture is always a hot topic and bills pending this year deal with a variety of legal issues, such as use of the seal, volunteer immunity, statutes of limitations, certificates of merit and public procurement. On page 6 you will find a summary of some bills of interest that were introduced this year. This is where your dual degrees can really help the profession. Many architects are active in their AIA state government affairs committees and lobby in the State capitol for changes. But you are uniquely qualified to help with legislative research, bill drafting and editing, writing position papers, testifying and guiding the layperson through the maze of law-making in your State. You can have a direct impact on the laws of your state in a way that perhaps no other person can.

I have enjoyed three decades of engagement at the State government level. When you can step back and read a piece of legislation that you authored, lobbied for and passed into law, there is great personal satisfaction. Trying court cases can take years through trials and appeals to establish laws, but writing legislation can be a quicker way to have an impact on your State.

Oh, it's not easy. In fact, it's down-right frustrating most of the time to see a bill pass out of committee but die on the floor, or worse yet, pass both houses but suffer a veto. I've been there! But it's a thrilling process, part of the American-way of making laws, right out of your high school civics class. You have the training, in both professions to participate in this each year, and your peers (at least in architecture) will thank you for it.

So what are you waiting for? Get involved in the local AIA legislative committee, take a position, write a bill, change the world (or at least part of it)!

> "Instead of simply answering the certified question that our cases clearly control, the majority obliterates the use of the doctrine when the parties are in contractual privity, greatly expanding tort claims and remedies available without deference to contract claims. Florida's contract law is seriously undermined by this decision."
> - Two Dissenting Judges (03/07/13)

Spotlight on Florida: Economic Loss Doctrine Rejected by Supreme Court in 3-2 Decision.

The Florida Supreme Court's March 7th decision in *Tiara Condominium Assoc., Inc. v. Marsh & McLennan Companies, Inc.*, 2013 WL 828003 (Fla. March 7, 2013) has created an uproar in the A/E legal community. In that case, a condominium was damaged in two hurricanes and the condo association made a claim on its property insurance policy, under the belief that the policy provided $50 million "per occurrence." The insurer denied the $100 million claim, saying the policy provided only $50 million in the aggregate. In response, the condo association sued its insurance broker for breach of contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, negligence, and breach of fiduciary duty. A Federal judge granted summary judgment for the broker on all claims and the Court of Appeals affirmed in part and certified a question to the Florida Supreme Court. The State's high court ruled 3-2 that the economic loss doctrine only applies in product liability cases (two judges dissented). The opinion examines the history of the economic loss doctrine in Florida, stating although the doctrine has been extended over time to the contractual privity context, the rule has its roots in the products liability arena, and was primarily intended to limit actions in that context only. After a lengthy analysis, the court stated, "Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability. * * * Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability." The Court noted that a departure from its own precedent is required when necessary to "vindicate other principles of law or to remedy continued injustice." The two dissenters opined that the Supreme Court went beyond the question certified to it, i.e. whether an insurance broker provides a "professional service." The dissent stated that instead of simply answering the certified question, the majority obliterated the use of the economic loss doctrine when the parties are in contractual privity and that "Florida's contract law is seriously undermined by this decision."

Some fear that the ruling opens the door wide to tort claims by owners against design firms and contractors regardless of the contract terms. The economic loss doctrine was dealt a blow for design professionals back in the 1999 case of *Moransais v. Heathman*, 744 So.2d 973 (Fla.1999), in which a homeowner brought a negligence action against engineers who made a pre-purchase inspection of a house. The Supreme Court held that a professional negligence claim could be made against individual professionals who did not sign the contract with the homeowner, and that the economic loss rule did not bar negligence claims where there was no personal injury or property damage.

On a related front, and perhaps more in response to the *Moransais* case, two Florida bills were introduced this year that would prevent suits against individual professionals. SB 286 and HB 575 are each entitled: "Design professionals; contractual limitation on liability." The bills provide that design professionals employed by a firm (a "business entity") are not personally liable for pure economic damages from their negligence, if the claimant has a contract with the firm that does not name the individual, contains a bold notice (5 point sizes larger than the rest of the text), and the firm carries professional liability insurance as required by the contract. The statute would not apply to claims of personal injury or property damage. If passed, the law would go into effect on July 1, 2013. Both bills were heard in committee in late March. The Senate bill passed that chamber by a vote of 37-1. The exact wording of the pending bills is set out below.

What do you think? Should a client be able to pierce the contract and sue the individual professional, rather than the company it hired? When there is pure economic loss?

Committee Substitute for Fla. SB 286 (2013):

(1) A design professional employed by a business entity or an agent of the business entity is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if:
(a) The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;
(b) The contract does not name as a party to the contract the individual employee or agent who will perform the professional services;
(c) The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence;
(d) The business entity maintains any professional liability insurance required under the contract; and
(e) Any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.
(2) As used in this section, the term "business entity" means any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

A Call for Replacing the Secretary's Standards with a Model Historic Building Code

By Gary L. Cole, AIA, Esq.
Chicago, IL

> "The Standards are neither technical nor prescriptive, but are intended to promote responsible preservation practices that help protect our Nation's irreplaceable cultural resources. *For example, they cannot, in and of themselves, be used to make essential decisions about which features of the historic building should be saved and which can be changed. But once a treatment is selected, the Standards provide philosophical consistency to the work."* Introduction to Standards and Guidelines. National Park Service.

On January 25, 2013, U.S. Secretary of the Interior Ken Salazar asked the National Park Service (NPS) to conduct an internal review of the Federal Historic Preservation Tax Incentives Program (HTC) to *". . . make sure that we are doing everything we can to work in partnership with local communities, developers and other stakeholders to provide guidance and promote restoration efforts."*

This is welcome news, though as a former Illinois State Historic Preservation Office (SHPO) staff architect charged with interpreting the *Secretary of the Interior's Standards for Rehabilitation* (Standards) for the HTC and other historic rehabilitation tax-incentive programs and now as a private practice attorney, I temper expectations. Governmental reform is rarely a swift or revolutionary process.

Many of historic preservation's laws and programs are nearly old enough for their own historic designations and are in dire need of rehabilitation. The public would certainly benefit from a little regulatory tinkering with the HTC program, starting with eliminating application fees and the redundant SHPO and NPS review process.

However, meaningful reform includes reforming the way historic properties and communities are able to attract reinvestment capital for business growth, job creation and local economic stability. This should start by relegating the Standards to their intended role of simply providing *philosophical consistency* to historic rehabilitation efforts, and not as a *de facto historic building code* by historic preservation administrative entities. Hardly changed since their inception in 1977, the Standards comprise a ten-point manifesto of historic preservation's essential rehab doctrine as enforced by federal, state and local historic preservation regulatory entities. While philosophical guidance can inform the development of federal regulations with high social and legal aspirations, the vague language of the Standards bars the public from any objective, plain meaning understanding of their text. Published "Interpretations" of the Standards by the NPS have merely transformed doctrine into dogma. Though most of the Standards have retained their relevance, some, such as the unloved Standard No. 9, is the product of an outdated 1970's Modernist architectural bias and should be eliminated.

Communities seeking to redevelop their historic properties compete with other communities for a limited pool of private reinvestment capital. When faced with choices, developers and investors will often chose the more predictable and less risky of those options. The ambiguous Standards and their unpredictable interpretations by administrative entities can decrease the former, increase the latter and discourage reinvestment in historic properties.

But the solution is simple: the Secretary of the Interior should support phasing out the Standards and replacing them with a *Model Historic Building Code* that conforms to the *Federal Plain Language Guidelines*, combines the ethics of the Standards with clear performance and prescriptive rehabilitation requirements; embraces 21st century preservation technology and materials science; and, incentivizes reinvestment to create economic sustainability. A model code should be created as a deeply integrative collaboration between public regulatory and private development and investment interests with significant contribution from historic preservation, architectural, construction, community development, sustainable design, and accessibility, legal and financial interests.

A *Model Historic Building Code* should also be adopted and administered at the municipal level according to local conditions and community support in a way the Standards, as intractable federal regulations, cannot. Historic properties are a special type of real estate, but all real estate, as they say, is local. Decisions to adopt the model code should also be local.

Recent legislation may both mandate and foreshadow reforms to the Standards by the passage of the "*Plain Writing Act of 2010,*" already implemented by the National Park Service and which requires federal agencies to communicate clearly with the public, and President Obama's Executive Order 13563, "*Improving Regulation and Regulatory Review*," dated January 18, 2011, which states: *"Our regulatory system must . . . promote predictability and reduce uncertainty . . . It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand."*

And the pending *"Plain Regulations Act of 2012,"* which has as its stated purpose*:* "*To ensure clarity of regulations to improve the effectiveness of Federal regulatory programs while decreasing burdens on the regulated public,"* speaks directly to the problem with the Standards and makes the development of a *Model Historic Building Code* all the more timely.

Secretary Salazar's directive to reform the HTC program is commendable, but it should include a mandate to replace the Standards with a *Model Historic Building Code* the public can objectively understand and that better assists historic properties and communities to attract reinvestment capital.

"Sustainability" is a much-bandied term in historic preservation, but there's really only one kind of sustainability that actually preserves historic properties: *economic sustainability*.

It's certainly the kind that matters most to struggling historic communities.

Gary L. Cole AIA, Esq. is a member of The Jefferson Society, Inc., an Illinois and Florida licensed attorney and Illinois licensed architect with over 20 years of experience in a wide variety of historic presservation roles including state government; as a Visiting Associate Professor of Architecture/Preservation at the University of Illinois, as General Counsel and Founding Board Member of the Chicago-Midwest Institute of Classical Architecture & Classical America; and in private architectural and law practice specializing in historic property redevelopment. He publishes frequently about a wide range of real estate development, construction, dispute resolution and historic preservation related subjects at his website: www.garylcolelaw.com/

Membership Grows to Over 60 Professionals!

The following new members have joined since our last Newsletter:

NEW MEMBERS:

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Broad and Cassel
Orlando, FL

Robyn Baker, Esq.
RTKL
Los Angeles, CA

Terrance L. Brennan, Esq.
Deutsch Kerrigan & Stiles LLP
New Orleans, LA

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Mark Stockman, Esq.
Frantz Ward LLP
Cleveland, OH

2013 SURVEY OF STATE BILLS DEALING WITH ARCHITECTURE

Alaska. H.B. 5 deals with the registration board and allows it to hire an investigator. The bill was voted "do pass" in committee in mid-February. S.B. 16 likewise deals with the State Board of Registration and passed the Senate on March 15th by a vote of 19-1.

Alabama. H.B. 126 is a Certificate of Merit law which requires a plaintiff in an action against a licensed design professional to file a certificate of merit affidavit of a third-party design professional attesting to at least one negligent act, error, or omission of the defendant. S.B. 181 deals with the same issue. *See page 7 for the exact wording.*

California. A.B. 630 adds a new Section 5536.4 to the Business and Professions Code relating to architects. That section would provide that no person may use an architect's instruments of service, as specified, without a written contract or written assignment allowed by a written contract authorizing that use.

Colorado. S.B. 52 deals with construction defect actions involving transit-oriented development. The "Transit-oriented Development Claims Act of 2013" would give a right to repair for construction professionals that receive a notice of claim with respect to a construction defect, much the way some states give these rights in condo litigation. The Act also mandates arbitration and provides immunity for environmental conditions including noise, odors, light, temperatures, humidity, vibrations, and smoke or fumes causally related to transit, commercial, public, or retail use. The new law provides a 6-year statute of repose for actions against architects, contractors, builders, vendors, engineers, or inspectors involved in improvements to real property. S.B. 161 requires architects to report to the board any malpractice claim that is settled or reduced to judgment, under the same conditions as apply to engineers and land surveyors.

Florida. On page 3 of this newsletter, we discuss S.B. 286 and H.B. 575 which prevent direct suits against design professionals for economic loss when the claimant has a contract with a firm.

Hawaii. H.B. 137 prohibits governmental procurement contracts of any amount that are exclusively for the services of design professionals from requiring the contractor to indemnify the governmental body against liability not arising from the contractor's own negligence or fault. S.B. 504 is the Senate version of this same bill.

Iowa. H.F. 44 (formerly "study bill" 44) would provide immunity from civil liability for registered architects and professional engineers providing disaster emergency assistance pursuant to a disaster emergency declared by the governor or a major disaster declared by the president of the United States. This bill passed the House 57-40 on March 19th and moved on to the Senate as part of SF 376 (formerly SSB 1140) which would also provide for immunity from civil liability to design professionals providing disaster emergency assistance under specified circumstances.

Indiana. Like Iowa, H.B. 1027 would grant civil immunity to registered design professionals who, without compensation, render professional services related to a declared emergency. The bill passed the House overwhelmingly 93-0 in early February and likewise in the Senate 46-0 in late March, with amendments. S.B. 259 is the Senate version of the same law, rendered moot by the passage of the House bill.

Kansas. Following the passage of Missouri's "peer review" immunity law in 2012, neighboring Kansas introduced S.B. 42 this year which closely follows the Missouri law, but provides even broader protection. The bill passed the Senate unanimously 40-0 in mid-March and moved onto the House.

Massachusetts. Following a national trend, S.D. 351 protects architects, engineers and other design professionals and contractors who render voluntary services at the scene of a disaster or catastrophe. S.B. 795 addresses the same topic.

Nebraska. L.B. 7 deals with licensing and would eliminate certain provisions relating to signatures and seals on documents. The bill passed 46-0 and was signed into law by the Governor on March 7th.

New Mexico. S.B. 134 amends public procurement law by providing for QBS (Qualifications-Based Selection) of design professionals. The bill failed to pass in late February when it gained a tie vote of 19-19.

New York. A.B. 1536 relates licensing consequences for architects or engineers who seriously abuse their self-certification privileges. A.B. 1267 increases to $50,000 the cost of the construction of a building, structure or public work, above which an architect, engineer or land surveyor must be utilized, as does S.B. 4333. New York's S.B. 3458 establishes a preference for New York entities who contract with design professionals who also have their principal place of business within New York state. A.B. 5301 and its companion, S.B. 3334, repeal and reenact provisions on time limitations on certain actions against design professionals and construction contractors. Also following the national trend for volunteer immunity, A.B. 4380 creates the "Engineers', Architects', Landscape Architects' and Land Surveyors' Good Samaritan Act.

Ohio. S.B. 68 deals with reinstatement of certificates issued by the licensing board, and permits the board to deny renewal of, revoke, or suspend certificates without an adjudication hearing when such a hearing is not requested. The bill also makes changes related to landscape architects.

Oklahoma. H.B. 1401 creates the oddly-named "Architect Involvement in State Property Roof Replacement Reform Act."

Oregon. H.B. 2268 clarifies qualifications for firms that provide architectural services and amends terminology describing the type of documents that are subject to architect stamping, identification information and other requirements. This bill was passed in the House by a vote of 56-0 in early February and was sent to the Senate for consideration.

Did we miss one in your State? Let us know, or write an article about it for our next newsletter. Share your successes (and failures) in the State House with other members – The Editor.

CERTIFICATES OF MERIT

Alabama's H.B. 126 and S.B. 181 propose the following language:

"(a) In any civil action for damages alleging professional negligence by a registered architect, registered landscape architect, licensed professional engineer, licensed professional geologist, or licensed professional land surveyor of this state, the plaintiff shall be required **to file within 75 days** of serving its complaint **a certificate of merit affidavit** of a third-party architect, landscape architect, professional engineer, professional geologist, or professional land surveyor registered or licensed in any state of the United States who is competent to testify and practicing in the same area of practice as the defendant. The affidavit shall set forth specifically a professional opinion as to **at least one negligent act, error, or omission by the defendant** that caused the plaintiff's alleged damages and the factual basis for each such opinion.

* * *

c) The plaintiff's failure to file the affidavit in accordance with subsection (a) or (b) **shall result in dismissal with prejudice** of any claim based upon professional negligence against the particular defendant for which such affidavit is required. A plaintiff who fails to file the affidavit in accordance with subsection (a) **shall be liable to that defendant for reasonable attorney's fees and expenses incurred** by it, its insurer, or any other person or entity on behalf of that defendant in responding to the complaint and any discovery propounded by the plaintiff."

CONTRACT RISKS FOR SUBCONSULTANTS

By Tim Burrow, Esq.
Burrow & Cravens, P.C.

The risks addressed in this article are imposed upon subconsultants by contract, whether to another A/E firm or to a design-builder. The most troublesome clauses tend to be: "pay-if-paid" clauses, broad indemnity/defense clauses, lien waivers and "no damages for delay" clauses. The ancient principle of "freedom of contract" allows parties to allocate risks and assign responsibilities almost without limitation, whether fair or unfair, unless they violate statutory requirements or public policy. Therefore, unless there is a statute to protect you, a court will likely enforce the terms that you sign.

On principles of fairness, risks should generally be allocated to the parties who are the most capable of controlling them. That is often not the case, however, when contracts other than standard forms are used, especially when written by owners or design-builders of large projects who flex their financial "muscles" to strong-arm into submission subconsultants who cannot afford to walk away from the work. By being in a stronger negotiating position, it is common for owners and design-builders to attempt to allocate as much risk as possible to subconsultants. It is therefore important for subconsultants to understand the extent of risk that they are assuming when they sign on the dotted line. Consultants need to have alternative contract language that allocates risks more fairly. It is easier said than done, however, and even more difficult for smaller consultants. Before addressing specific risky subcontract terms, it is good to know general tips.

Tips to Minimize Risks

1. Beware of hidden commitments: Review all Contract Documents referenced in the subcontract as being binding on the subconsultant (together referred to as "Subcontract Documents"). Alternatively, include language that declares that the subconsultant is bound only to those Contract Documents specifically identified in the subcontract and that have been provided to the subconsultant.

2. Understand all terms: If a term is not clear, ask the design-builder to explain it, or better, ask an experienced construction lawyer.

3. To help assess risks imposed in Subcontract Documents, develop a checklist of onerous clauses to look for in reviewing them. It should be a working tool that is regularly updated. Such a checklist can be used as a "Go/No-Go" system for each project. It may help you get a quick handle on whether or not a particular project is worth pursuing. Develop a "Payment Probability Assessment" list that is designed to focus your attention on questions that may affect the probability that you will get paid on a particular project.

4. Submit assumptions and exclusions with your proposal. Include either (1) language qualifying your willingness to enter into a subcontract on the negotiation of a mutually acceptable standard form subcontract, or (2) specific terms and conditions that must be accepted before your proposal can be accepted. It is advisable to begin with a standard form of assumptions and exclusions that is updated regularly; it can serve as a checklist of sorts.

5. Beware of counteroffers. (Your proposal includes assumptions and exclusions, and the design-builder submits a subcontract stating that prior negotiations are not binding, or that its terms take precedence over other conflicting terms.)

6. As a last resort to overcome onerous clauses, they can be deemed as waived by actions of parties that do not comport with their requirements. Also, although contracts frequently include an "anti-waiver" clause that states that a waiver of a contract term must be in writing, parties can waive any term by their actions: The reason is the overriding principle of law that any contract term may be expressly or impliedly modified or waived by the actions of the parties, even an anti-waiver clause.

7. Use standard forms, such as AIA forms and EJCDC forms. In 2007, the AGC discontinued endorsing the AIA forms, which it had done previously for at least 50 years. The AGC, in collaboration with what are now more than 35 construction industry groups, created new form contracts and documents with the name ConsensusDocs. Use care in reviewing such forms as they are not endorsed by the AIA or any of the major engineering associations.

8. As opposed to revising, line by line, the design-builder's subcontract form, consider proposing an addendum that states, in effect, "notwithstanding anything to the contrary in the main body of the subcontract, the following terms shall control . . . ."

Beware, however, that the design-builder might propose an addendum that includes similar language, and can create issues as to which takes precedence. Additionally, a dispute might later arise as to what is considered "anything to the contrary."

Risky Clauses for Subconsultants

- Pay-if-Paid Clauses. First, check to see if the state where the project is located allows the enforcement of pay-if-paid clauses. If it is allowed, the following are negotiation considerations. Other than striking the clause altogether, an option is to edit the language to make it a **pay-when-paid** clause (addressing only the timing of payment) rather than a pay-if-paid clause (meaning that the design-builder's obligation to pay does not arise unless the owner pays). Another option is to state that the pay-if-paid risk applies only to certain circumstances, such as the complete insolvency or bankruptcy of the owner, or that nonpayment is based solely on the deficiency of the subconsultant's work. Insist on having the right to stop work if a pay-if-paid clause defense is raised.

- Lien Waivers. Although submission of interim and final lien waivers with payment applications is traditional on most construction projects, design-builders and owners are increasingly asking subconsultants to sign lien waivers that do far more than simply waive lien rights. These waivers also may waive claims, require the design consultant to make representations and promises not required by the subcontract, impose new indemnity obligations, and impose other legal obligations. Frequently, the subcontract (or the prime agreement incorporated by reference) will simply state that the contractor or subconsultant will provide interim and final waivers, "without alteration or addition, on forms to be provided by the owner." Subconsultants should demand to see any such waiver forms prior to signing the subcontract. Those forms, after being altered to include only standard lien waivers, should be specifically identified as an exhibit to the subcontract. Keep in mind that in some jurisdictions, lien waivers *must* either follow the statutory form or cannot depart from it in any meaningful way. Non-compliant lien waiver forms may be invalid.

- Overly Broad Indemnity Clauses. The original legitimate purpose of an indemnity clause was to protect one party (e.g., the design-builder) from third-party claims made against that party, and for which another party (the subconsultant) was legitimately responsible. For example, if a subconsultant's design errors result in a structural failure, the design-builder would invoke its indemnity rights by demanding that the subconsultant assume responsibility for the claim. That traditional notion of the purpose of an indemnity clause has been long since lost. Today, construction contracts contain indemnity provisions that demand the subconsultant to indemnify and defend the design-builder for much more, sometimes even for the design-builder's own negligence. Some jurisdictions have "anti-indemnity" statutes, which provide protection for subconsultants against overly broad indemnity provisions. Recent cases have upheld "defense" obligations, however, even when the subcontractor was not at fault. Use care here. In all cases, attempt to limit your indemnity obligation to damages and claims that are covered by insurance — a CGL policy or a professional liability policy.

- Consequential Damages and Liquidated Damages. It is usually unnecessary for subcontracts to include a waiver of consequential damages clause, which are in all of the industry forms. A waiver of consequential damages usually preserves claims for liquidated damages, in case the owner assess such costs against the design-builder.

- No-Damages-for-Delay. Many contracts include a no-damages-for-delay clause, which limits the remedy for a delay to an extension of time. Because of an aversion to harsh forfeiture provisions in contracts, some states have passed laws to void such provisions.

The short story is to read carefully before signing!

SCREENING PANELS AND CERTIFICATE OF MERIT LAWS: WHAT BENEFIT TO ARCHITECTS?

Bill Quatman, FAIA, Esq.
Burns & McDonnell

IN THE LATE 1980's, as part of tort reform to curb frivolous suits, many states began to pass laws aimed at limiting suits against professionals. Today, about 2/3 of all states have either a "certificate of merit law" or a "malpractice screening panel" law, each aimed at curbing frivolous suits against licensed professionals, particularly in the health care industry.

Certificate of Merit Laws. 18 states currently have some form of certificate of merit law. The purpose of such laws are to reduce unnecessary lawsuits by requiring plaintiffs to consult with an expert, licensed in the same profession as the defendant, prior to filing a suit for malpractice or negligence. Some states also require that the third party expert be willing to testify in the case. In several states, this law applies to actions against any licensed professional; while in others it is limited to health care providers, and still others limit this law to just design professionals.

The effectiveness of such laws was seen in Pennsylvania, where this law was implemented by the state's supreme court, not by the legislature. In one article, it was reported that in 2008, there was a 41% decline in malpractice filings from the "base years" of 2000-2002. In Philadelphia alone, with the largest caseload, the decline was 54% during the same period. In another article, it was stated that the number of medical malpractice cases filed in the year after Maryland enacted a certificate of merit law dropped by 36%. Those are pretty impressive stats!

Malpractice Screening Panels. Another 14 states have a "malpractice screening panel" law, which permits a licensed professional to request a panel of other licensees to review the facts of the suit for a determination of negligence. Statutes vary in scope and whether the report of the panel is admissible into evidence at trial. This is not a true "certificate of merit" but a close cousin, in that the expert panel of licensed professionals reviews the claim for merit.

The decision of the panel is typically non-binding, but does carry some weight. If a panel of licensed architects concludes that there was no malpractice, perhaps the plaintiff's lawyer should spend his or her time on another suit and drop this one. Likewise, if the panel finds fault, then the architect and its insurer should consider settling the suit.

Variations Across the US. Statutes nationwide differ widely in scope, depending on a broad range of issues. Most states require the certificate of merit to be filed with the lawsuit, but some permit it to be filed afterwards. For example, Maryland permits filing up to 90 days after suit. Minnesota allows up to 180 days from filing of suit for the certificate to be filed. New Jersey requires the expert certificate within 60 days from defendant's Answer being filed, subject to a one-time 60 day extension. Pennsylvania allows up to 60 days from filing of suit. In five states the certificate must be that of a licensed professional in the same profession as the defendant, attesting to the merit of the suit; while in eight others the certificate is signed by the lawyer filing suit or by the plaintiff saying that he or she consulted with an expert licensed in same state and the expert said the suit had merit. Illinois and Nevada go further and require a written report of the expert to be attached to the lawyer's certificate. If the lawyer makes a "good faith" attempt to find an expert, but cannot, nine states permit a suit to be filed without a certificate if the lawyer files an affidavit swearing that he or she was unable to obtain the expert consultation after making three "separate good faith attempts" with three separate experts, none of whom would agree to the consultation. The name of those three experts must generally be disclosed.

While these laws do not totally prevent frivolous suits, they are a deterrent. The listing on page 11 of this newsletter shows all states with Certificate of Merit laws or Screening Panels laws. These do not all apply to design professionals. *But why not?* The design community needs to approach the State Legislature to lobby for the same protection granted to health care providers. *Are architects any less susceptible to frivolous suits than Docs?*

WHICH STATES HAVE THESE LAWS?

C/M = Certificate of Merit; **MSP** = Malpractice Screening Panel

State	C/M or MSP	Statute or Rule
Alabama	C/M Pending	*See H.B. 126 and S.B. 181 on page 7 of this Newsletter.*
Alaska	MSP	ALASKA STAT. § 09.55.536
Arizona	C/M	ARIZ. REV. STAT. §§ 12-2601 and 12-2602
California	C/M	CA. CODE OF CIV. PRO. § 411.35
Colorado	C/M	COLO. REV. STAT. § 13-20-602
Connecticut	C/M	C.G.S.A. § 52-190a
Delaware	MSP	DEL. CODE ANN. tit. 18, §§ 6803-6814
Florida	C/M	F.S.A. § 766.203
Georgia	C/M (1)	GA. CODE ANN. § 9-11-9.1(a)
Hawaii	MSP	HAW. REV. STAT. § 671-11
Idaho	MSP	IDAHO CODE ANN. §§ 6-1001 TO 6-1011
Illinois	C/M	735 ILCS 5/2-622; IL R 3 CIR, PART 5, Pt. 5, Rule 7.
Indiana	MSP	IND. CODE ANN. §§ 34-18-10-1, et seq.
Kansas	MSP	K.S.A. §§ 65-4901, et seq.; S. Ct. Rule 142
Louisiana	MSP	LA. REV. STAT. ANN. §§ 40:1299:47 & 40:1299:57
Maine	No longer (2)	Former ME. REV. STAT. ANN. tit. 24, §§ 2854-2858
Maryland	C/M	MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02
Mass.	MSP	MASS. GEN. LAWS ANN. Ch. 231, § 60B.
Michigan	MSP	MICH. COMP. LAWS ANN. §§ 600.4901 to 600.4921
Minnesota	C/M	MINN. STAT. § 544.42
Missouri	C/M (3)	MO. REV. STAT. § 538.225
Montana	MSP	MONT. CODE ANN. §§ 27-6-101 to 27-6-105 & 27-6-704
Nebraska	MSP	NEB. REV. STAT. §§ 44-2840 to 44-2847
Nevada	C/M	NEV. REV. STAT. ANN. 40.6884
New Jersey	C/M	N.J. STAT. ANN. §§ 2A:53A-26 to 2A:53A-29
New Mexico	MSP	N.M. STAT. §§ 41-5-14 to 41-5-20
New York	C/M	McKINNEY'S CPLR § 3012-a (Civil Practice Law and Rules)
Ohio	C/M	OH. CIV.R. 10
Oregon	C/M	OR. REV. STAT. ANN. § 31.300
Pennsylvania	C/M (4)	PA.R. CIV. P.1042.1 to 1042.8 et seq.
So. Carolina	C/M	S.CAR. CODE § 15-36-100
Texas	C/M	TEX. CIV. PRAC. & REM. CODE ANN. §§ 150.001-.002
Utah	MSP	UTAH CODE ANN. §§ 78-14-12 to 78-14-16
Virginia	MSP	VA. CODE ANN. §§ 8.01-581.2 to 8.01-581.8
Washington	No longer (5)	Former RCW 7.70.150
Wyoming	No longer (6)	Former WYO. STAT. §§ 9-2-1801 to 9-1812

NOTES:

1. GA: Upheld as constitutional in *Lutz v. Foran*, 427 S.E.2d 248 (Ga. 1993).
2. ME: Struck as unconstitutional in *Smith v. Hawthorne*, 892 A.2d 433 (Me. 2006).
3. MO: Upheld as constitutional in *Mahoney v. Doerhoff Surgical Services*, 807 S.W. 2d 503 (Mo. banc 1991).
4. PA: Upheld as constitutional in *Bertelson v. Sacks Tierney, P.A.,* 60 P.3d 703 (Pa. App. 2002).
5. WA: Struck as unconstitutional in *Putman v. Wenatchee Valley Medical Center*, 216 P.3d 374 (Wash. 2009).
6. WY: Struck as unconstitutional in *State ex rel. Wyo. Assn of Consulting Eng. v. Sullivan*, 798 P.2d 826 (Wyo. 1990).

LEGAL BRIEFS

OHIO:
Mixing of AIA Forms with Others Creates a Costly Legal Dispute.

In a case dealing with the priority between claims by a lender and subcontractors who filed mechanic's liens, the mixing of AIA Contract Documents with non-standard forms cost all parties a lot of money in legal fees. The Owner and Contractor entered into a standard AIA A111 Contract which incorporated the A201 General Conditions. However, the Contractor did not use AIA Subcontracts. While the A201 document contained a subordination clause, the Subcontracts did not. The appellate court noted that the AIA contracts, "are the most widely used construction contracts and are familiar to most entities in the construction industry," adding that the subcontracts at issue did not correlate to the AIA forms. However, the Subcontracts included a broad "flow down" provision which the Court said was enough: "When a 'flow down' clause is used in a subcontract, the subcontract need not contain additional language of incorporation in order to impose on a subcontractor duties owed by the general contractor to the project owner." As a result the Court said the Subcontracts sufficiently incorporated the Prime Contracts, and more specifically, the General Conditions and subordination clauses. The trial court's ruling for the lender was upheld. The case is *KeyBank Natl. Assn. v. Southwest Greens of Ohio, L.L.C.,* 2013 WL 1305334 (Ohio App. 10 Dist. 2013).

GEORGIA:
Insurers Allowed to Sue A/E's For Contribution.

In this 2013 Georgia case, a contractor's liability insurers sued the project architect, his company, the consulting engineer and his firm, asserting claims for professional negligence, third-party breach of contract, negligent misrepresentation, contribution and indemnity regarding the owners' claims for mildew and moisture damage. The owners filed for arbitration against the contractor and architect, asking that the award be made "jointly and severally" based upon the con-tractor's negligent construction and the architect's negligent design. After the architect was dismissed from the arbitration, the owners sued the architect and his firm in state court. The contractor and its insurers settled with the owner, consenting to a $6.2 mil. arbitration award, and agreeing to pay $2.3 million if the owners agreed not to seek any further recovery. Later, the owners settled their claims against the architect for $100,000. The contractor's insurers later sued both the architect and engineer under various theories. The trial court granted the A/E defendants' motions holding, in part, that the insurers' settlement should be construed as a "voluntary payment" because of professional services exclusions in their policies. The trial court said that because the policies excluded coverage for professional services, the settlement payment could not be construed as a payment caused by the A/E's alleged professional negligence. The Court of Appeals reversed, however, because the insurance policies excluded only coverage for professional services rendered by or on behalf of ***the insured contractor***, not other parties. Also, the Court disagreed that the insurers made a voluntary payment based upon a mold exclusion, finding that the insurers ***did not*** pay for mold damage, but for "property damage claims" resulting from structural issues and water intrusion, as well as loss of use. The case is *Zurich American Ins. Co. v. Heard*, 2013 WL 1245359 (Ga.App. 2013).

TEXAS:
Architect Is Not Liable Where Contractor's Settlement Covered 100% of the Owner's Alleged Damages.

An owner hired an architect to design a large house and a contractor to build it. When not happy with the results, the owner sued both for negligence and breach of contract. The trial court ordered that the claims be submitted to arbitration. The contractor settled out for $1 million and the case proceeded solely against the architect, who was found liable for failing to meet applicable standard of care by not observing and addressing "readily observable" construction defects. The arbitrators awarded the owner $643,228, plus $196,300 in attorneys' fees, but reduced the award by the $1 million paid by the contractor, resulting in a net -0- award to the owner. The architect moved to confirm the award and the owner sought to vacate it. The Court of Appeals upheld the award, in part, because there was no record of the proceedings and, therefore, no evidence upon which the Court could find such error. The Court stated that, "The general rule is that without an arbitration transcript, we must presume the arbitration evidence adequately supported an award." See, *Goldman v. Buchanan,* 2013 WL 1281744 (Tex. App. 2013).

AIA's LFRT Tackles Industry "Cost of Imperfection" Study

By R. Craig Williams, AIA, Esq.
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What is the standard of care for design professionals? Stated another way, what is the cost of imperfection that should be anticipated in complex design and construction projects? The answers to those questions are vigorously debated by architects and their clients, and by their lawyers when claims and litigation arise from imperfect project delivery, by insurance companies who base coverage for professional liability claims on evidence of negligence, by contractors…basically, by the entire design and construction industry. The readers of this newsletter are all too familiar with the debate, the case law, and positions of the relative stakeholders.

Although there is general, if not universal, agreement that no human endeavor is undertaken with the expectation of perfect results, there is a dearth of literature among the various industry publications that credibly address, analyze, discuss, and comment on what is meant by the terms "standard of care" or "cost of imperfection", or any other description of what is to be expected of the services of design professionals.

This question, and these issues, have been taken up by the ***AIA Large Firm Roundtable***, a group of the largest architecture firms in the U.S., associated with the American Institute of Architects. Several industry partners who represent owners, constructors, and consultants -- have offered to participate as co-sponsors in this effort. The identities of those partners are confidential at this time, as details of the research project are still being finalized. The Large Firm Roundtable selected a well respected publishing firm to research the issues and publish a report, and the expectation is that the report will be published no later than the first quarter of 2014. ***Stay tuned for updates.***

If you have any interest in contributing to the effort, contact Craig Williams at cwilliams@hksinc.com.

LEGAL BRIEFS

MORE FROM TEXAS:
Moldy, Wet Cigars Lead to Lawsuit.

The owner hired an architect to design a humidor system for a "cigar bar." The architect then hired an engineer. Customers complained that cigars were too wet and would not burn properly. Water condensation dripped from the ceiling of the humidor, destroying boxes of cigars, as well as affecting the contents of members' lockers. When black mold began to grow on the cedar wood and cigars, the bar had to close down. The owner sued the designers and other parties for negligence, breach of contract, violations of the Deceptive Trade Practices Act, and common-law fraud. As required by Texas law, the plaintiffs filed with their petition a Certificate of Merit affidavit of a professional engineer who outlined several design errors and violations of the standard of care. The defendant-engineer filed a motion to dismiss, claiming that the Certificate of Merit did not comply with Texas law, and failed to specifically set forth for each theory of recovery, the alleged negligence, error or omission. The motion was denied and the engineer appealed. The Court of Appeals upheld the denial, in part, finding that the affidavit provided a factual basis for plaintiff's claims for negligence, misrepresentation, breach of contract and deceptive practices. As to the fraud claim, however, the Court held that the affidavit did not identify or otherwise discuss any knowingly false or recklessly made representations by the engineer upon which the owner was intended to rely to its detriment. Therefore, the fraud claim was dismissed. The case is *Packard Engineering Assoc. v. Sally Group, L.L.C.,* 2013 WL 1247676 (Tex. App. 2013).

Editor's Note:

The Texas statute at issue, Texas Civ. Prac. & Rem. Code Section 150.002, requires that, in "any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor." The affidavit must set forth "specifically ***for each theory of recovery*** for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional."