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The Critical Path

The Newsletter of the Construction Law Committee

October 26, 2017 Volume 21 Issue 3

Articles of Note

Recent Developments in Architects and Engineers Claims

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There have been several recent noteworthy decisions from courts across the U.S. examining liability and insurance coverage issues that impact architects and engineers. These cases deal with, among other issues:

• the scope and application of the "professional services" exclusion in a commercial general liability policy;
• interpretation of what constitutes engineering "incidental" to the practice of architecture, as used in Missouri Code for disciplinary violations involving the unauthorized practice of engineering;
• the breadth of "declarant" liability for breach of implied warranties for condo associations provided in the Minnesota Common Interest Ownership Act; and
• an architect's liability for a contractor's defective work pursuant to the contractual duty to reject non-conforming work.

We provide brief summaries of these cases below.

***Orchard, Hiltz & McCliment, Inc. v. Phoenix Ins. Co.,* 676 Fed.Appx. 515 (6th Cir. 2017): Sixth Circuit, applying Michigan law, affirmed lower court's determination that engineering firm was not entitled to defense or indemnity, as firm's supervisory duties as to fatal explosion at wastewater treatment plant fell within "professional services" exclusion in general contractor's CGL policy.**

The Village of Dexter, Michigan hired engineering and architecture firm Orchard, Hiltz & McCliment, Inc. ("OHM") to oversee and supervise upgrades to its waste water treatment plant. The general contractor ("Contractor") obtained CGL coverage naming OHM as an additional insured, which excluded coverage for claims arising out of the rendering or failure to render "professional architectural, engineering or surveying services." During the project, a torch operated by a subcontractor to remove a lid caused a deadly explosion. Lawsuits were brought alleging negligence by OHM, including its failure to ensure that engineering plans and specifications, including related safety precautions, were followed. OHM's professional liability insurer defended it in the actions, but OHM also sought coverage under the Contractor's CGL policy.

In finding that OHM's project work fit squarely within the "professional services" exclusion of the CGL policy, the Sixth Circuit rejected OHM's argument that the underlying allegations did not assert solely deficiencies in OHM's performance of engineering services but, rather, included *some* allegations regarding general project operations and work place safety, such as "unskilled" construction and accident prevention meetings and the posting of warning signs, for which OHM was not responsible. Under Michigan's broad interpretation of "professional services" exclusions, pursuant to which "professional services" are defined as those involving specialized skills of a predominantly intellectual nature, the Court found that *all* underlying allegations – even those that, in and of themselves do not involve specialized skill – are reasonably related to OHM's overall provision of professional engineering and supervisory services for this project.

***Curtis v. Missouri Bd. for Architects, Prof'l Engineers, Prof'l Land Surveyors & Prof'l Landscape Architects*, No. WD80174, 2017 WL 2241516 (Mo. Ct. App. May 23, 2017): Highlighting that architects should be cautious in providing related project engineering services, Missouri Court of Appeals affirmed state disciplinary violation against architect for unauthorized practice of engineering, interpreting statute's meaning of engineering "incidental" to the practice of architecture as a matter of first impression and finding architect lacked knowledge in field of engineering to "safely and competently" perform lighting and plumbing work without jeopardizing public welfare and, thus, exceeded the scope of "incidental practice."**

A licensed architect was placed on probation by the Missouri Board of Architects, Professional Engineers, Professional Land Surveyors, and Professional Landscape Architects (the "Board"). As part of the probation, the architect was required to submit project plans for the Board's review. The Board filed a probation-violation complaint after reviewing plans for a restaurant renovation, finding a violation in completing an architectural project that included professional engineering that was beyond his education, skill, and training as an architect.

The Board's decision was affirmed by a Missouri Circuit Court judge, and the architect appealed the disciplinary order to the appellate court arguing, in part, that there was insufficient evidence. The architect asserted that rather than engaging in the unauthorized practice of engineering in violation of Missouri Code (Section 327.191), his work instead fell within the statute's express exception for a licensed architect "who performs only such engineering as incidental practice and necessary to the completion of professional services lawfully being performed by such architect."

In affirming the Board's decision, the Court of Appeals first rejected the Board's implication that only it can determine whether certain conduct falls within the definition of "incidental practice." In interpreting this definition as a matter of first impression, the Court focused on the statute's requirement that "incidental practice" must be "safely and competently performed…without jeopardizing the health, safety, and welfare of the public." Although the Court found that the architect's engineering work was, in fact, "substantially less in scope and magnitude" when compared to the normal services of an architect, as also used in the definition of "incidental practice," it also found deficiencies in his knowledge of lighting and plumbing calculations and industry sizing standards and his failure to apply the same to the renovation project. Highlighting the Board's apparent concern that such information was not familiar to the architect or conducted in the interest of "health, safety, and welfare of the public," the Court of Appeals found sufficient evidence that his work exceeded the "incidental practice" of engineering.

***650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478 (Minn. Ct. App. 2016): Opening architects and engineers up to increased claims for indemnification or contribution by developers and other "declarants" under Minnesota Common Interest Ownership Act, Minnesota Court of Appeals determined, in part, that condo developer was liable for architectural defects performed by vendor and deemed the direct cause of condo association's water damage.**

Upon discovering water damage, a residential association brought suit for negligence and breach of certain statutory warranties against its developer pursuant to, in part, the Minnesota Common Interest Ownership Act ("MCIOA") (Section 515B.4-113), which provides for implied warranties in the development of common interest communities. The jury found no breach by the developer but that the architect's design was defective, the direct cause of the association's damages.

Although a non-party, the jury attributed over $100,000 in damages to the architect, and also to the builder, but none to the developer. The trial court later granted the association's motion for judgment as a matter of law regarding the design defect findings, concluding that the developer who hired the architect was responsible for his defects and liable for his damages under the MCIOA. The developer appealed.

Section 515B.4-113 provides, in relevant part, that a "declarant" warrants to the purchaser of a common interest community that "any improvements… made or contracted for by the declarant… will be (i) free from defective materials and (ii) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner."

In affirming the lower court (in part) and finding that the plain language of Section 515B.4-113 encompassed *architectural* design defects, the Court of Appeals broadly interpreted the phrase "sound engineering and construction standards" to include architectural standards. The Court further reasoned that the "declarant" – here, the developer – is in the best position to ensure sound construction, despite contracting out the work to the third party architect. Thus, even though the developer did not cause the defective work, the Court found the developer liable for breach of statutory warranties as a matter of law because the developer hired the architect that did cause the defective work.

The Court rejected the developer's argument that the association did not meet the procedural requirements of Section 544.42 with regard to the architect's liability and, thus, could not argue that the developer breached the statutory warranties because of the design defects. As Section 544.42 applies only to actions for *negligence or malpractice against professionals*, such as architects, and the developer was instead found liable for statutory warranty breaches, and also failed to bring the architect into the action, the Court found that the developer could not rely on the protections of Section 544.42 to assert procedural failures.

***Rusnak v. Brent Wagner Architects*, 55 N.E.3d 834 (Ind. Ct. App. 2016): Highlighting potential liability of architect for contractor's defective work, Indiana Court of Appeals reversed trial court, finding that genuine issues of material fact exist as to nature of architect's duty under provisions of standard AIA design contract to "reject" non-conforming work by general contractor and whether such obligations were met.**

A home owner entered into a contract with Brent Wagner Architects ("BWA") for the design of a home pursuant to the provisions of an American Institute of Architects ("AIA") standard form contract and conditions. The contract provided, in part, that, if requested, BWA shall act as the

owner's representative and administer the contract between the owner and the general contractor (the "Contractor"), yet BWA does "not have control over or charge of and will not be responsible for construction means, methods, techniques… or for safety precautions and programs," or the Contractor's failure to carry out work in accordance with contract terms. The contract also provided that BWA's services include rejecting non-conforming work on behalf of the owner.

The owner, unsatisfied with the work, refused payment, and the Contractor sued. The owner filed a third-party complaint against BWA, among others, alleging breach of contract, namely breach of the duty to properly design and supervise by allowing the construction to fall below the standard of care. The trial court granted summary judgment in BWA's favor, finding that BWA performed all of its duties owed under the parties' contract and was not liable for defects by the Contractor.

In reversing this decision, the Indiana Court of Appeals focused on BWA's contractual obligation to reject non-conforming work and its admission in discovery that it observed a deviation from the intended design of the property's front steps. Per BWA, it brought this issue to the Contractor's attention, only to be advised that it was too late to fix the problem. The Court rejected BWA's argument that the contract's exculpatory clause relieves it of liability. Instead, the Court found an independent obligation to reject work that knowingly constitutes a failure to conform. As the question then turns on the meaning of the term "reject" in the AIA provisions and what actions BWA must have taken as to the non-conforming stairs, the Court of Appeals remanded this issue to the trial court.

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