Blueprint

for Design Professionals

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Navigators
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Welcome to our fifth installment of Blueprint for Design Professionals. The articles for this issue provide insight on integrated project delivery and an overview on the increased reporting of FHA/ADA accessibility claims. Let us know your thoughts, as it helps us to deliver to you information relevant to your practice. Send us article ideas, risk management questions, and any other comments you might have to David Soltero at dsoltero@navg.com. While we may not be able to respond to you directly, we will do our best to incorporate the answers and ideas in future issues.

INTEGRATED PROJECT DELIVERY – CHANGING THE STATUS QUO

By Benjamin Soristo

"...one thing is certain: IPD is changing the roles, responsibilities, risks and rewards for the project players."

Many in the construction industry believe that Integrated Project Delivery (IPD) promises to be the delivery method that most effectively reduces or even eliminates claims on projects. Others favor more traditional delivery methods over the collaborative project environment of IPD. Wherever the preferences lie, one thing is certain: IPD is changing the roles, responsibilities, risks and rewards for the project players.

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RECENT LEGAL AND ENFORCEMENT DEVELOPMENTS WITH REGARD TO ACCESSIBILITY CLAIMS

By Kevin O'Neill

Statutory Overview

The design professional community continues to experience the effects of a more active regulatory climate in the enforcement of accessibility requirements in the built environment. The U.S. Department of Justice ("DOJ") has initiated investigations and litigations across the country seeking to enforce what it considers to be the "black letter law" requirements of the Fair Housing Act ("FHA"), Title 8 of the Civil Rights Act of 1968, as amended, 42 U.S.C. §3601, et seq, and Title III of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12181, et seq.

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The owner, design professional and contractor are the typical IPD participants. Subconsultants, subcontractors and manufacturers, among others, may also join the project team. Through joint decision-making early in the project, IPD meshes the collective skills of the participants to accomplish an efficient and cost-effective project for the owner from inception through completion and operation.

IPD participants share the benefits of a successful project and the financial risks of escalating costs. This financial incentive fosters cooperation throughout the programming, design development and construction phases of the project. Early collaboration by IPD participants calling on their respective expertise, coupled with evolving building design models such as Building Information Modeling (BIM), can significantly reduce the number of RFIs, time-consuming submittals and change orders inherent in traditional project delivery methods. IPD can reduce the costs associated with these historically built-in processes and the number of claims at the end of the project.

IPD's Impact on the Design Professional

IPD can blur the traditional delineation of the project participants' roles, responsibilities, risks and potential liabilities, including those of the design professional. Traditionally, the design is approved by the owner without input from the contractor until the final contract documents are issued. The contractor becomes involved in the design process only after the design is complete, most often through RFIs and shop drawing submittals.

If claims arise, the project players often argue that the design professional is liable for any deficiencies in the design and the contractor is liable for work not in conformance with the contract documents. IPD impacts contractors' long-standing legal defenses to these arguments affirmed by courts in certain jurisdictions that have determined that the owner impliedly warrants to the contractor that the design is complete and free of defects. IPD also weakens the legal defense under the *Spearin* doctrine which generally provides that a contractor will not be liable to the owner for loss or damage which results solely from the deficiencies or defects in the plans and specifications.

Under IPD, the participants are involved in the design process as early as possible. After IPD participants reach consensus on project goals, programming, budget, cost and scheduling, the design is finalized in the design development stage with all participants collaborating and agreeing on the specific design and the coordination required to achieve the design intent.

To achieve the requisite collaboration for the IPD project, the design professional may be asked to take on additional responsibilities to facilitate the design development. A design professional's primary potential risk on the project could arise out of sharing the design responsibilities with other participants during the design development phase. Certain risks correspond with the design professional's "loss of control" of the design. For example, a design professional is typically responsible for the safety, life and health of the public in its design. Recognizing that architectural and engineering licensure and registration laws and regulations vary from state to state, in an IPD setting, a design professional responsible for the final design may be exposed to liability arising out of a defect in the design modifications prepared by an unregistered or unqualified participant. The design professional must avoid assuming responsibility for a delegated design.

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Managing The Design Professional's Risks Through Contracting

Traditional owner/architect and owner/contractor agreements, clearly defining the allocation of responsibilities and liabilities, can present obstacles to a successful collaborative IPD project. To overcome these hurdles, selecting a proper agreement between IPD participants with certain risk-sharing mechanisms is paramount.

For example, ConsensusDOCS 300 aims to minimize RFIs, disputes about work scope and unanticipated site conditions, to name a few. ConsensusDOCS 300 is an agreement between the owner, designer and contractor which requires consensus on all decisions while preserving the owner's right to make the final decision if consensus cannot be reached. Although the design professional may remain responsible for the completeness and accuracy of the design under the agreement, the contractor provides pre-construction services such as constructability reviews to determine completeness, accuracy and coordination. Article 3.8 of ConsensusDOCS 300 offers a risk-allocation provision wherein the participants release each other from claims for decisions made collectively by the participants. However, each participant remains liable for its own negligence, breach of contract and breach of warranty in performing under the contract.

A multi-party agreement is another option for IPD. In a multi-party agreement, such as the AIA A295 documents drafted jointly by the National AIA and the AIA California Council, the key members of the project team are parties to the agreement wherein the owner has a guaranteed maximum price for construction from which only the actual cost of the design professional's services and the contractor's labor will be paid. This contract structure provides incentive for the design professional and contractor to cooperate to ultimately avoid escalating project costs.

The Single Purpose Entity (SPE), typically structured in the form of a limited liability company (which structure, management, funding and tax requirements vary between the states), aligns the interests of the owner, design professional and construction manager into a relationship of trust and confidence with the common goal of a successful project. The SPE encourages cooperation to maximize the members' profits by achieving the project goals at a target cost while sharing in cost savings. However, by sharing financial risks, SPE's can fail when certain members, whether true or perceived by the other members, do not perform to the best of their abilities for the good of the project. Except for the guaranteed maximum price, the typical SPE agreement may not offer additional allocation of risks between the participants.

Insuring the Design Professional's IPD Risks

The evolution of IPD and the shifts in the contractual allocation of risks may bring about additional changes to insurance coverage for design professionals. Traditional professional liability coverage can be at odds with IPD agreements. For example, at the most fundamental level, professional liability coverage depends upon a finding of negligence. However, IPD's risk-sharing seeks to avoid assignment of blame between the participants. IPD agreements often assign contractual responsibilities and liabilities to the participants. Conversely, professional liability policies typically exclude coverage for liability assumed by contract. Consequently, design professionals should not assume a contractual responsibility which may not be insurable.

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Spotlight on Navigator's Accountants Professional Liability Program

Program Highlights

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Professional liability coverage for IPD projects hinges on the terms of the IPD agreement, the delegation of specific design responsibilities to other IPD participants, and statutes and regulations governing the design professional's services. This becomes more significant when the other IPD participants contributing to the design are not licensed design professionals with professional liability insurance. It is strongly recommended that the design professional have its insurance broker and legal counsel review the IPD agreement to ensure there will be insurance coverage.

Published case law lags years behind project experiences in terms of understanding liability regarding IPD. As the project-comes-first IPD method continues to emerge, design professionals may for the first time be faced with the challenges of the collaborative project. Design professionals must be mindful of the potential new risks and need for risk management arising out of a project delivery method that may ultimately reduce construction litigation.

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Recent Legal and Enforcement Developments with Regard to Accessibility Claims – continued from page 1

The unhappy recipients of the DOJ's enforcement efforts include developers, owners, contractors, and design professionals. Additionally, owners and developers typically respond to such complaints by seeking redress in a claim over for contribution, indemnity, professional negligence, or breach of contract against their design professionals.

The federal statutory scheme allows private litigants who contend to have been harmed by a pattern of discrimination evident in the built environment to bring claims in Federal Court on their own. These private litigants benefit from a fee shifting provision that allow them, if successful, to impose their attorneys' fees upon the unsuccessful defendants. The defendants, if unsuccessful, are burdened with the less than joyful prospect of paying two sets of attorneys' fees. It is an experience that certain litigants have compared to having to pay twice for the same root canal.

The claims typically allege a violation of the FHA Accessibility Guidelines and/or the ADA Standards for Accessible Design. By way of differentiation, the FHA prohibits discrimination in housing on the basis of disability. Discrimination is defined in the statute to include failure to design and construct covered multi-family dwellings after March 13, 1991, in such a manner that: (i) public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all doors are designed to allow passage into and within all premises by handicapped persons in wheelchairs; and, (iii) all premises contain certain features of adaptive design including accessible routes, light switches, outlets, reinforcements in bathroom walls to allow later installation of grab bars, and usable kitchens and bathrooms which provide for wheelchair maneuverability. The term "covered multi-family dwelling" as used in the statute refers to buildings consisting of four or more units (if the building has one or more elevators), and ground floor units in other buildings consisting of four or more units.

Compliance with the appropriate requirements of the American National Standard Institute ("ANSI") for buildings and facilities is generally the central focus of such claims, although compliance with State or Local Laws that incorporate accessibility requirements in compliance with the Federal Guidelines, or compliance with recognized "safe harbors," can satisfy the FHA requirements.

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The ADA, on the other hand, prohibits discrimination against persons with disabilities by "places of public accommodation" operated by private entities. Discrimination includes a failure to design and construct such places of public accommodation, after January 25, 1993, that are readily accessible to, and usable by, persons with disabilities.

The DOJ and the private litigants generally adopt the position that the FHA and ADA represent objective standards against which to determine actual compliance by reference to as-built conditions. In other words, it is a matter of simple "arithmetic"; either the doors, routes, kitchens, bathrooms and other spaces measure in compliance with the applicable standards, or they do not. Accordingly, both claimants assert that the applicable standards do not include State or Local Laws which may be less stringent than those referenced in the Federal Statutes. Thus, in their eyes, compliance with a Local Law, such as New York City Local Law 58, governing accessibility requirements for buildings located within the City of New York, does not satisfy the Federal requirements. In cases across the country, owners, developers and design professionals are asking courts to recognize that good faith compliance efforts, and compliance with State accessibility laws, should be recognized as viable defenses. Thus far, the DOJ has staunchly opposed such arguments.

Claimants, filing accessibility claims, generally seek some or all the following relief: statutory penalties for the alleged violation; a compensation fund for aggrieved persons; retrofits to the structure; and, other injunctive relief including FHA/ADA training and future reporting requirements on future projects. The DOJ has recently adopted the requirement that the targets of their investigations agree to settlements, embodied within Consent Decrees, that include an admission that the premises contain non-compliant features. That can be a troublesome component of the resolution of such an investigation since it could expose the design professional to a claim that they are making an admission against interest, unless language is incorporated, at a minimum, preserving all defenses in the context of potential future claims by the owner or developer.

Defense of Design Professionals

Despite the more aggressive regulatory environment, design professionals are not without defenses.

As a threshold matter a Statute of Limitations analysis will typically be performed by counsel. The Statute of Limitations will vary depending upon whether the claimant is a governmental agency or a private litigant, and also depending upon the type of relief sought. For instance, actions filed by the DOJ for damages are subject to a three year Statute of Limitations, and those seeking civil penalties by the DOJ must be commenced within five years. A private civil action under the FHA by an aggrieved person must be commenced no later than two years after the occurrence or the termination of an alleged discriminatory housing practice.

In this writer's experience, it is at least as common, if not more, for the claimant against the design professional to be the design professional's own client (i.e. the owner or developer). In that event, the Federal Courts have delivered some good news to the design community. Federal Courts have repeatedly determined that the FHA does not provide a right of contribution and/or indemnification. Essentially, the courts reason that a right to contribution and/or indemnity under a federal statute may arise in either one of two ways: (1) through the affirmative creation of a right of action by Congress; or (2) through the power of the Federal Courts to fashion a federal common law right of contribution and/or indemnity. Again and again the courts have found that neither requirement is met and therefore no right of contribution and/or indemnification is typically made available to owners and/or developers against their design professionals.

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The absence of a right of contribution or indemnity can be a powerful defense for the design professional who is faced with an accessibility claim brought by the owner or developer. The Federal Courts have ruled time and again that Congress failed to provide a contribution and indemnity remedy to permit owners and developers to assert joint and several liability against third parties like design professionals.

Of course, the design professional's client may seek to dress up their contribution and indemnity claim as a State Law claim for breach of contract or professional negligence. However, there has been good news for the design community on that front as well. In the Fourth Circuit for instance, in Equal Rights Center v. Archstone Smith Trust, 603 F.Supp.-2d 814 (D. Md. 2009), *aff'd,* Equal Rights Center v. Niles Bolton Assocs., 602 F.3d 597 (4th Cir.), *cert. denied,* Archstone Multifamily Series I Trust v. Niles Bolton Assocs., 131 S.Ct. 504 (2010), the court held that the owner's State Law claims for breach of contract and professional negligence may be wholly derivative of the owner's primary liability under the FHA and, therefore, constitute a de facto claim for indemnification. Consequently, the claims were barred since the statutory scheme does not provide for a right of contribution or indemnity.

In a recent decision handed down by the Supreme Court of the State of Nevada in Rolf Jensen & Assocs., Inc. v. The Eighth Judicial District Court of the State of Nevada & Mandalay Corp., et al., 282 P.3d 743 (2012), the design professional was the unhappy recipient of a claim brought by Mandalay following Mandalay's settlement of accessibility claims filed by the DOJ. Mandalay filed claims for breach of contract, and negligent misrepresentation. The design professional argued that the State Law claims essentially sought indemnity for ADA and FHA violations, and, as such, were pre-empted by Federal Law and barred. In other words, the design professional argued that permitting a party to seek indemnity for its own ADA and FHA violations would serve as an obstacle to the intent and purpose of Congress in enacting the statutes. The design professional cited to the Fourth Circuit Federal Court decision in the e Equal Rights Center case cited in the preceding paragraph.. The Nevada Supreme Court agreed, and held that all of Mandalay's State-based claims constituted obstacles to the objectives of the ADA and FHA and were therefore pre-empted by Federal Law, which did not allow for a right of contribution or indemnity. The claims against the design professional were dismissed.

The presence of potential defenses to claims by owners, developers, or even the DOJ are heartening, but, of course, the best claim is no claim at all.

Practice Points

The design professional would be well advised to insert contract language into the Owner/Architect Agreement that the owner acknowledges that the ADA and FHA requirements will be subject to various and possibly contradictory interpretations. While such a provision will not immunize the design professional from liability, it can be used in the defense against owner or developer claims. It announces FHA and ADA compliance as owner/developer risks. The design professional should never represent, warrant or guaranty that the project will comply with all interpretations of the FHA/ADA.

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The design professional may also wish to shift the obligation to ensure compliance with the FHA/ADA to a Code Consultant retained directly by the owner. While such a strategy may not absolve the design professional of any professional responsibility, it will serve to spread the risk of non-compliance. Of course, the design professional is always advised to maintain professional liability insurance, and to require that any Code Consultant retained by the owner do likewise.

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