Blueprint

for Design Professionals

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Welcome to our Spring 2014 edition of Blueprint For Design Professionals. This issue addresses concerns the design professional should consider when asked to become involved in a restarted project. Also, in this issue, is a primer on the types of claims raised against design professionals when a lawsuit is filed. 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 Blue DBlue@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.

The Pitfalls of Restarting Projects

By Thomas Gambardella

"...If, however, the design professional is new to the project, it is necessary to contact the previous design team...."

In light of the recent modest economic recovery, a number of construction projects that were halted due to various economic factors, such as lack of financing, have recently begun to resume. Experienced design professionals know that seamless transition of a stalled project back to an active construction schedule does not often happen.

The Pitfalls of Restarting Projects

Theories of Liability Against Architects And Engineers

By Steve Wraith

Statutory Overview

In the last several decades there has been a marked increase in the frequency of claims against architects and engineers. The threat of litigation can be a major distraction for design professionals. Architects and engineers must appreciate the boundaries of professional liability.

The typical construction lawsuit can cost a design professional firm hundreds of thousands of dollars to resolve. Even small firms performing routine work are not safe from large claims.

Theories of Liability Against Architects & Engineers

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Restarting a project may involve working with a different owner, contractor or design team, and having to contend with new project priorities and limitations, expired or expiring permits and licenses, product and pricing changes, among other things. What can a design professional do in order to navigate the pitfalls of restarting projects? Regardless of the design professional's discipline and role, early assessment of the existing project, communication with the parties involved, understanding the old expectations for the project and setting realistic new expectations for the restart of the project, as well as proper contractual protections will help reduce the risk of possible claims down the line.

Addressing the Issues That Arose Before the Project Was Halted

A design professional whose fees for prior work on the project were not fully paid would do well to ensure that their client brings their account current prior to commencing work on the restarted project. Delay in collecting unpaid fees may result in loss of lien rights and expired statutes of limitations. Furthermore, the client's failure to pay outstanding fees may be indicative of other risks on the project, such as continuing shortages in financing.

To the extent the design professional was privy to the issues that caused the project to stall, resolution of these issues should be discussed with the client. If, however, the design professional is new to the project, it is necessary to contact the previous design team to identify their past problems and concerns and discuss them relative to restarting project, as well as to protect the new design team from a prior design professional's possible liability claims, e.g., for copyright infringement. A good way to contact the prior design firm is by letter sent by certified mail, return receipt requested. The content of the letter may be as follows: "We have been retained to provide design services for the XYZ project. We understand that your firm previously provided services on the project. Our work on the project may include reliance on your work. We would appreciate an opportunity to discuss any concerns you may have with respect to the project and regarding your work."

Assessment of the Client, Team, Site and Possible Changes in Environment

Frequently, multiple years pass before a project may restart. The project may have a new owner or the previous owner may have changed the scope of the project and their priorities. A number of owners and developers restarting projects are now interested in "green" construction, or they may be scaling down on the scope of the initial project, or their plans for the project may have changed. All such changes must be documented in the design professional's contract. While the owner of the project may be reluctant to pay for the design services that were completed or largely completed before the project was halted, it is important for the design professional to make it clear to the owner that the project documents must be reviewed for code changes, product changes, and pricing changes, new cost estimates may need to be obtained, and schedules and budgets will need to be adjusted. Such review protects not only the design professional but also the owner from possible delays, cost overruns and liability claims later on. Such review may even help the owner avoid expending the time and effort on a project that has become impractical.

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For instance, the owner may have planned to develop and then subdivide a plot of land, and recent zoning changes may now prohibit the exact subdivision that was planned. Contractual duties must be re-established, with adjustments for changed expectations, budget and schedule. It is also appropriate to terminate any previous contracts to ensure that prior contractual provisions do not control in the changed circumstances of the restarting project.

The composition of the design and construction teams on the project may or may not be the same as before the project was halted. The parties' availability, financing and technical qualifications must be confirmed at this stage. With respect to the parties new to the project, key project documents must be transferred to get these parties up to speed and to obtain accurate time and cost estimates from them as early as possible. Again, the contracts for the outgoing design team members should be terminated, and the duties of the new team members should be confirmed in writing.

The design professional should visit the project site to assess for any site changes, and to determine in what condition the site was left when construction halted. Was the site exposed to the elements or subjected to vandalism? If so, some of the prior construction may need to be demolished, and work re-done, which is another aspect that the design professional should communicate to the owner of the project. The design professional should also be cognizant of the changes in the neighborhood that may impact the project; from change in adjoining landowners from whom easements may need to be secured to recent developments such as construction of a commercial building with similar purpose in the area. These concerns should also be communicated to the owner, and the changed conditions of the site must be documented.

As discussed, evaluation of the applicable codes, statutes, rules and regulations should be updated at this time, and the design professional should assess their impact on the schedule, project budget and the design fee. Design professionals' services oftentimes include liaising with federal, state and municipal agencies for the purposes of securing required permits and approvals. These permits and approvals involve their own schedules, and some may have expired and may need to be re-applied for. Again, any changes must be communicated to the owner and documented in the design professional's contract.

Contractual Protections

Design professionals should rely on advice of experienced counsel in preparation of their contract for a restarting project. Such contract is different from an average project contract in that it must document the various changes to the site, regulatory environment, and other issues outside of the parties' control, and should disclaim the design professional's liability for these changes. In addition, the contract needs to provide for the design professional's right to rely on the work and the information supplied by others, including the former design team, especially when the design professional does not have an opportunity to review their work. This provision is important given that the design professional may be held liable for the work of others absent a contractual disclaimer when they place their final seal of approval on the construction set of project documents. Furthermore, the contract should include a disclaimer of the design professional's responsibility for prior work product of other parties.

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The ownership of intellectual property rights should be investigated. The prior design team may still own the copyright for their design. If the owner of the project has changed, the copyright may belong to the former owner. It is important to remember that contested use of copyrighted material may involve not only incorporation into project documents, but also use in later presentations to a prospective client, display on the firm's website, etc. While many designers believe that fair use may be a successful defense, design professionals' use of copyrighted material is typically done for commercial purposes. When courts assess whether a certain use of copyrighted material constitutes fair use, several factors are considered, including the purpose and character of the use, the nature of copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market. When the copyrighted work is used for the purposes of financial gain, this factor weighs heavily against the finding of fair use.

In practice, most copyright disputes are resolved before they arise. The best practice is to secure the copyright owner's permission for the use of the material. Another option is to include in the design professional's contract the owner's express representation that the owner has the rights and licenses required to proceed with the project, including the right to the work product of the prior design team. The contract should also require the owner to indemnify the new design team against copyright disputes by previous design professionals. Design credit may still need to be provided to the original designer.

Finally, the limitations of liability and indemnity language must be negotiated, with specific delineation of duties between the owner, the design professional and other parties. Again, it may be appropriate to amend or terminate the previous contract to ensure that the earlier provisions no longer control. The design professional should also check with their insurance company to confirm that they have coverage for the restarting project: frequently, abandoned projects are excluded from coverage, and coverage will need to be reinstated when the project resumes.

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Spotlight on A&E Claims

As part of the Navigators commitment to hire technically skilled professionals in order to provide unparalleled service, we are pleased to announce the recent expansion of the Architects & Engineers Professional Liability claims department to include Roseanne DeBellis (203-905-6698). Based in our Stamford, CT office, Roseanne began her career in private practice, defending design professionals against errors and omission claims arising out of complex construction projects. Admitted to practice law in both New York and Connecticut, she has also held senior claims management positions at HCC and Beazley Insurance Company where she specialized in high exposure claims involving architects, engineers and other design professionals.

We believe that handling a claim is the moment of truth between an insurer and a policy holder, and we want you to rest assured that we will be there with not only the knowledge, but the desire to resolve claims expeditiously and fairly. We are thrilled to have someone with Roseanne's experience and reputation and ask you to help us welcome her to your Navigators A&E team.

Architects & Engineers Industry Survey

Navigators is interested in obtaining more information about the challenges and risks your firm is facing in today's marketplace. SmartRisk, a risk and practice management consultancy firm has developed a brief survey that includes 10 questions, check-box responses that can be completed in just a few minutes. Please take a few moments to complete this survey. When the results are finalized we will share them with you.

http://surveys.benchmarkemail.com//Survey/Start?id=355761&s=52922

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Design professionals should understand the legal basis for claims that may apply to them and the likely sources of this liability in order to avoid or minimize an environment that fosters claims. The following is intended to generally outline the primary legal theories asserted against architects and engineers. It is not an exhaustive treatise on the subjects discussed herein. Statutes and case law vary from jurisdiction to jurisdiction. You should consult with a licensed attorney in your jurisdiction for legal advice

Theories of Liability

Negligence

Negligence is broadly defined as a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. The elements of a cause of action for negligence are (1) defendant owed a legal duty to the plaintiff; (2) the defendant breached the duty; and (3) the breach proximately caused the plaintiff's injury.

Generally defined, an architect or engineer has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent architect or engineer acting in the same or similar circumstances at the time of the service in question. Failure to exercise such skill, care and learning constitutes a breach of the standard of care and is negligence.

The general rule is that architects and engineers do not and cannot ensure and guarantee a satisfactory result. An engineer is responsible for unsatisfactory results only if his lack of professional knowledge, skill or his negligent failure to exercise it is a proximate cause of such result. Thus, an engineer should not be liable for an honest error of judgment if the engineer exercised reasonable care and skill within the standard of care.

Breach of Contract

To recover for breach of contract, the plaintiff must show (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach. For a breach of contract claim, there must be an enforceable contract. A contract exists when the parties are in agreement on the various terms and obligations, provided that the terms and obligations are supported by consideration or something of value. Typically, consideration consists of monetary payments. A written contract memorializes the parties' agreement, and absent fraud or ambiguities, the parties' rights and obligations will be enforced according to the writing.

A breach of contract occurs when a party fails to perform according to the contract and does not have a legal excuse for doing so. Compensatory damages are awarded for the economic harm caused by the other party's breach. Types of damages that may also be created and awarded as a result of a breach of contract are recovery of attorneys' fees to the prevailing party and liquidated damages.

Breach of Warranty

Express warranties regarding the quality of architectural and engineering services to be performed may appear in the contract. These warranties usually contain clauses concerning compliance with local codes, rules and regulations, and state and federal laws.

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An architect or engineer can certainly give an express warranty as to their work, but should excise any other clauses, as the architect or engineer never possesses the control over the outcome of construction to be able to deliver on such an assurances.

In some jurisdictions, the doctrine of an implied warranty has been established. In those jurisdictions, the courts have held that because architects and engineers represent themselves to be competent in the preparation of plans and specifications necessary to the construction of suitable structures, including but not limited to the knowledge of and compliance with applicable building codes, where they failed to use reasonable care to produce a satisfactory structure in compliance therewith, they may be sued for breach of an implied contract term.

Who can sue an architect or engineer based on these theories?

Owners

Owners may sue their architect or engineer for breach of contract. The owner must establish that it was in privity of contract with the architect or engineer. A party can establish privity by proving there was either a direct contractual relationship or by establishing that the owner is a third-party beneficiary under the contract. Direct privity is established by proof that the plaintiff and the design professional were parties to the enforceable contract and had obligated themselves under it.

While generally only parties to the contract have the right to sue for breach, an exception exists when the non-party to the contract is able to establish that the contract was made for its benefit and that the contracting parties intended that the non-party benefit by the contract. In such a case, the party becomes a third-party beneficiary also entitled to sue for breach of contract.

Such a claim may include, for example, an owner claiming third-party beneficiary status on an architect's contract with engineering consultants. Another example is an owner asserting third-party beneficiary status on an architect's contract with the contractor on a design/build project. Usually, this type of claim fails and can be eliminated by including language in the agreement that "nothing contained in this agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the owner or architect."

An owner may also sue an architect or engineer for negligence. Historically, courts have not permitted such tort-based actions when solely economic losses are alleged. Thus, if an architect or engineer's client is suing for economic loss from the contract, then the client will be allowed to sue for breach of contract but not for negligence. The exception to the historical precedent is where the basis of the suit is personal injury or property damage; there a negligence claim is usually allowed notwithstanding the parties' contract. Note that the historical precedent banning tort-based claims when a contract exists has been significantly eroded in some jurisdictions.

An owner may also sue for breach of warranty of any express warranties given by an architect or engineer concerning its services.

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Contractors

Contractors usually file claims against architects and engineers when the contractor contends that the plans and specifications supplied are inadequate or defective. The contractor will seek to recover directly from the architect or engineer rather than from the owner with whom the contractor had an agreement.

Generally, courts have ruled that contractors may not maintain a suit for breach of contract against non-parties to the contract. Because contractors typically do not have contracts with architects and engineers, the courts have generally precluded such claims.

The third-party beneficiary theory discussed above may be available to contractors to sue an architect or engineer. The contractor must show that the contract between the owner and design professional or the contract between the architect and engineering consultants was made for the contractor's benefit and that the contracting parties intended the contractor benefit by it.

Generally, a contractor cannot sue a design professional for economic losses utilizing the negligence theory. Economic losses are generally described as damages other than personal injuries or damage to property. The typical claim by a contractor against an architect or engineer is for economic losses, which the courts have mostly rejected. Be warned, there are states that have permitted claims by contractors premised on a theory that the construction documents are representations made by the design team to the contractor and, therefore, the inability to construct a building as drawn represents a viable cause of action as an intentional or negligent misrepresentation by the design team.

Third Parties

A third party may sue a design professional claiming negligence to recover for personal injury or injury to property. Design professionals owe a duty of care to members of the public and other innocent third parties and may be held liable if the injury is proximately caused by the architect or engineer's professional negligence. Thus, design professionals may be sued by third parties claiming negligence for personal injury or death and for property damage.

Third parties may also assert claims for purely economic loss, but generally those damages cannot be recovered in negligence unless the economic loss is accompanied by some personal injury or property damage.

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