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Newsletter

Supreme Court Clarifies Purpose of *Ferreira* Conference, Requires Full Compliance with Affidavit of Merit Statute's Legislatively Prescribed Time Frames

by Stephen Winkles

Fifteen years ago, the Legislature enacted the affidavit of merit statute[1] to curb what it saw as increasing, unnecessary and frivilous litigation against licensed professionals. In those 15 years, it is quite possible that the affidavit of merit statute has caused almost as many professional malpractice claims as it has dismissed. Over the past seven years, beginning with *Ferreira v. Rancocas Orthopedic Associates*,[2] courts have struggled to strike a balance between draconian enforcement of the statute and permitting attorneys a way out of potential malpractice claims for their failure to provide an affidavit of merit within the time required by the statute.

The affidavit of merit statute prescribes in relevant part:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

The statute is meant to weed out unsubstantiated claims by requiring plaintiffs to prove the defendant's conduct fell below acceptable standards.[3] The core purpose of the statute is "to require plaintiffs…to make a threshold showing that their claim is meritorious in order that meritless lawsuits readily could be identified at an early state of the litigation."[4] Because of this core purpose, the New Jersey courts have grappled with the idea that strict compliance with a short time lim-

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From the Co-Editor

by Gary Strong

The dog days of summer are upon us, with record-breaking heat. But before you know it the kids will be back in school, the playoffs will start for the Yankees, and, yes, a meaningful season will take place for the Knicks.

In the next few months, the likely passage of legislation refining, clarifying, and amending the Construction Lien Law will open up new issues for us as practitioners.

The articles submitted for this edition of the newsletter cover a potpourri of issues we as construction lawyers face on a regular basis. As the past year has shown, New Jersey courts are consistently being called on to make decisions that impact us as attorneys, as well as the clients we represent, making this periodical a must-read for members of the Construction Law Section. In the next few months, the likely passage of legislation refining, clarifying, and amending the Construction Lien Law will open up new issues for us as practitioners.

I would like to thank Joseph Hocking, Adrienne Isacoff, Bob Incollingo, and Harry McLellan for allowing me to serve as the co-editor of the summer edition. ■

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itation can result in the dismissal of an otherwise meritorious claim. The Supreme Court illustrated its uneasiness with the statute's time frame through its language in *Galik v. Clara Maas Med. Ctr.*[5] where it stated that "there is no legislative interest in barring meritorious claims brought in good faith." The Court fortified the perception of its uneasiness with the statute when the *Ferreira* decision quoted *Galik*, and then embraced the language of *Mayfield v. Cmty Med. Assocs., P.A.*,[6] finding that the statute's purpose "was not to create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims."

In *Ferreira,* a case involving a medical malpractice claim, the plaintiff obtained an affidavit of merit 10 days after the answer was filed, but because of a law office filing error, the affidavit of merit was not timely served. When the affidavit of merit was finally served on the defendant's counsel, a motion to dismiss was filed for failure to comply with the affidavit of merit statute. Refusing to dismiss the action, the Supreme Court reasoned that although the affidavit was provided outside the statutory time frame, it was provided before the motion to dismiss was filed. In such a situation, the defendants were precluded from filing the motion.

The *Ferreira* decision also set what many lower courts and attorneys believed to be new guidelines on when motions to dismiss are permitted due to failure to comply with the affidavit of merit statute. The Supreme Court's opinion tersely stated that the statute is "not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the affidavit of merit." In an attempt to temper the statute, the Court recognized equitable remedies that would avoid "'draconian results of an inflexible application of the statute'—extraordinary circumstances and substantial compliance."[7]

Concluding that the service and substance of affidavits of merit are essentially discovery-related issues, the *Ferreira* Court required that an accelerated case management conference be held within 90 days of the service of an answer in all malpractice actions. The Court provided little guidance on what constituted extraordinary circumstances or substantial compliance, and gave no explanation of the effect the failure to hold a *Ferreira* conference would have on the statute's time restrictions.

Addressing the threshold issue of whether a midwife is even subject to the statute, the Appellate Division held that a midwife is not a "licensed person," and is therefore not subject to the statute. On the second issue of whether a malpractice case may be dismissed for failing to serve the affidavit of merit, the Appellate Division held that the case should not be dismissed if a *Ferreira* conference had not been held. The Appellate Division explained that in *Ferreira,* the

After the issuance of the *Ferreira* decision, the courts from the trial level to the Appellate Division offered differing interpretations of the statute and the effect of *Ferreira*, leading to confusion at every turn, and an unusual level of uncertainty regarding the effect of an unusually straightforward statute.

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The two most conflicting published decisions dealing with the fallout of the *Ferreira* decision came in 2008 and 2009. In *Saunders v. Capital Health System*,[8] two different panels of the Appellate Division were presented with cases that contained similar issues. In deciding the *Saunders* and *Paragon* matters, the Appellate Division's panels returned starkly different opinions, with each opinion claiming to conform to the principles set forth in *Ferreira.*

Saunders, the first of the two cases, presented two issues to the court: 1) whether an affidavit of merit is required in a malpractice case brought against a midwife, and 2) whether a malpractice case may be dismissed for failure to serve an affidavit of merit if the trial court did not hold a *Ferreira* conference. Supreme Court held that "this case brings to mind the adage that an ounce of prevention is worth a pound of cure. Therefore, going forward, we will require case management conferences in the early stage of malpractice actions to ensure compliance with the discovery process, including the Affidavit of Merit statute and to remind the parties of the sanctions that will be imposed if they do not fulfill their obligations."[9]

In *Saunders*, the failure to serve an affidavit of merit was the result of law office error: The plaintiff possessed but failed to serve the affidavit of merit on the defendant, and realized it only after a motion to dismiss had been filed. After citing much of the language, the *Ferreira* Court utilized in criticizing the strict application of the statute's time frames, Judge Jack Lintner, author of the Appellate Division decision stated:

> Contrary to defendants' contention and the motion judge's decision, *Fer-*

> *reira* mandates a case management conference within ninety days of the filing of an answer in a professional malpractice case. Counsel's inadvertent failure to serve the Luciani Affidavit of Merit would have been discovered had the required case management conference been conducted.[10]

Judge Lintner added that "It would be unfair to expose an attorney to potential professional liability where the court did not schedule the required conference within ninety days of the defendant's answer."[11] In addition, the *Sanders* court found substantial compliance with the statute because the affidavit of merit was obtained within the statutory 120-day period.

The logic of the Appellate Division in *Paragon* took a different tack, placing the onus of compliance with the law squarely on the shoulders of the litigants. Paragon Contractors, Inc. sued Peachtree Condominium Association for unpaid fees. Thereafter, Peachtree sued Key Engineers, Inc. for "incomplete and defective design work in connection with the project." Key filed an answer along with a certification to change the track assignment to reflect that the claim brought against it was a "professional liability matter." The Civil Division office never changed the track assignment, and the court never held a *Ferreira* conference.

When Peachtree failed to file an affidavit of merit within 120 days, Key moved to dismiss. Before the motion's hearing date, but outside the statutory period, Peachtree served the affidavit of merit. At the motion, Peachtree's counsel argued that a legal assistant from the firm spoke with the case manager's office and was told "the affidavit of merit would need to be filed prior to a [*Ferreira* conference] and that if the affidavit of merit was not filed by the date of such conference, then one would be filed on the consent of parties." Peachtree's defenses were based on that representation, and the argument that failure to schedule a *Ferreira* conference tolled the time frames in the affidavit of merit statute.

The Appellate Division rejected Peachtree's defenses, finding no attempt at substantial compliance with the statute, and that "counsel's ceding of his own judgment about the requirements of the Affidavit of Merit statute to the clerk's office cannot form the basis for equitable relief from the consequences of his inertia."[12] Specifically targeting the question of a court's failure to hold a *Ferreira* conference, the Appellate Division reasoned that the *Ferreira* decision "neither imposed the early conference requirement as a means of altering or amending the statute, nor, in adopting this innovation, did the Court reveal any intention other than to continue to enforce and respect the 120 day deadline crafted by the legislature."[13] The *Paragon* court then directly criticized the *Saunders* decision, stating that "in our view, *Saunders* went too far when it implicitly held that the statutory deadline is tolled until the conference is scheduled."[14]

With these two conflicting cases causing even more confusion with the bar, the Supreme Court granted Paragon certification, intending to clarify the *Ferreira* decision and its effects. The result of the Supreme Court's decision in *Paragon*, is that the *Ferreira* matter has been overruled in part. The sole issue addressed by the Court was whether the failure to hold a conference pursuant to *Ferreira* tolls the filing period provided in the statute. Within the first paragraph, the Court forcefully answered: "the *Ferreira* conference was created to remind parties of the statutory obligations…it was never intended, nor could it have been, as an overlay on the statute that would effectively extend the legislatively prescribed filing period. Thus, it is not a tolling device."[15]

In rendering the clarification, the Court acknowledged the "confusion in the ranks over the scheduling of the *Ferreira* conference and the effect of its omission."[16] The *Ferreira* Court's attempt to assist the bar by creating and mandating the *Ferreira* conference was intended to "remind the parties of the sanctions that will be imposed if they do not fulfill their obligations."[17] The *Paragon* Court, however, emphasized that "it is equally true that parties are presumed to know the law and are obliged to follow it."[18]

As interesting as the holding in the case was that the decision came with an unusual admission that the Court's well-intended mandate turned into a source of confusion for lawyers and courts. The Court noted that "there apparently has been a lack of unanimity in our courts over that conclusion… lawyers also may have been unclear regarding the import of the failure to hold a *Ferreira* conference…"[19]

In concurrence, Justice Roberto Rivera-Soto issued an opinion remarkable for its scathing criticism of "those coddled few, who seek to excuse their basic inability to comply with a glaringly clear and straightforward legislative mandate, thrash wildly about, seeking to lay blame everywhere but where it properly belongs: in the hands of a non-complying lawyer."[20] The concurrence further advocated that the Court's decision go further and altogether jettison the idea of the *Ferreira* conference. While the Court declined to relieve the trial courts of the obligation to hold a *Ferreira* conference, it did at long last provide clarity that "lawyers and litigants should understand that, going forward, reliance on the scheduling of a *Ferreira* conference to avoid the strictures of the affidavit of merit statute is entirely unwarranted and will not serve to toll the statutory time frames."[21]

The *Paragon* decision will provide more certainty for those engaging in construction litigation that involves professional malpractice. Rather than waiting on the outcome of a *Ferreira* conference to

file motions to dismiss professional negligence claims, those representing licensed professionals now have the opportunity to discharge those claims that are not supported by an affidavit of merit. While this may be disheartening to those attorneys who do not comply with the statute, the overall result is that the intent of the statute will finally be enforced. ■

ENDNOTES

1. N.J.S.A. 2A:53A-26 to 29.
2. 178 N.J. 144, 836 A.2d 779 (2003).
3. *See, Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144 (2003).
4. *In re Petition of Hall,* 147 N.J. 379, 688 (1997) (*quoted in Alan J. Cornblatt, P.A. v. Barow,* 153 N.J. 218, 242, 708 A.2d 201 (1998), *modified in part by Ferreira, supra,* 178 N.J. at 154, 836 A.2d 779).
5. 167 N.J. 341, 359, 771 A.2d 1141 (2001).
6. 335 N.J. Super. 198, 209, 762 A.2d 237 (App. Div. 2000).
7. *Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 2001 WL 2553869 (NJ 2010) *quoting Ferreira*, 178 N.J. at 151.
8. 398 N.J. Super. 500 (App. Div. 2008) and *Paragon Contractors, Inc. v. Peachtree Condominium Association*, et al., 406 N.J. Super. 568 (App. Div. 2009).
9. *Saunders,* 398 N.J. Super. at 510, citing *Ferreira,* 178 N.J. at 147.
10. *Id.*
11. *Id.*
12. *Paragon,* 406 N.J. Super. at 579.
13. *Id.* at 582.
14. *Id.* at 583.
15. *Paragon*, 2010 WL 2553869, 1 (N.J. 2010).
16. *Id.*
17. *Id.* at 4.
18. *Id.*, *quoting Emanuel v. McNell*, 87 N. J.L. 499, 504 (E. & A. 1915).
19. *Id.*
20. *Id.* at 6.
21. *Id.* at 5.

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Message From the Co-Chairs

by Harry E. McLellan and Robert Incollingo

While our general membership rests in the summertime shade, your Construction Law Section officers have been hard at work planning an agenda for our 2010–2011 monthly meetings. This year we expect to capitalize on the New Jersey State Bar Association's elevation to approved continuing legal education (CLE) provider status by conducting programs that will offer credits to help satisfy our new licensing requirements in New Jersey, as well as CLE requirements for New York and Pennsylvania.

Some of the topics we hope to present include:

- New Jersey's Rehabilitation Subcode
- U.S. Department of Labor Occupational Safety and Health Administration update
- U.S. Army Corps of Engineers New Jersey projects update
- Affordable Housing (COAH) in the wake of the Red Tape Review Group
- Recovery and Reinvestment Act of 2009 one year later—federal contracts awarded and up for bid
- Department of Environmental Protection update—Pinelands, Highlands, beach replenishment and the future of special treatment
- National Association of Home Builders Green Building guidelines
- New Jersey schools
- Development authority update

We welcome your suggestions for additional programming ideas, and look forward to seeing you in the fall. Best wishes for a relaxing and safe summer. ■

Becoming a Reality

Changes to the 'New' Construction Lien Law

by Charles F. Kenny

It was 1994 or there about when the 'new' Construction Lien Law (CLL) was (finally) enacted after a multi-decade battle to get it on the books to replace the mostly useless and unused 'old' Mechanics Lien Law. Despite its 15-plus years in operation, I still think of the CLL as a 'new' phenomenon, which may simply mean that I have been practicing a long time (as if you couldn't tell by my allusion in the title of this article to a hit record by the Mamas and Papas). Nevertheless, barring any as yet unforeseen political wrangling and shenanigans, we are about to enter the second stage of the CLL's existence with the impending passage of legislation refining, clarifying, and yes, slightly amending, the CLL.

The genesis for the legislation was the New Jersey Law Revision Commission, a state agency I had never heard of a few years ago. The purpose of the commission is to simplify, clarify and modernize New Jersey statutes. It does so by conducting an ongoing review of the statutes to identify areas of the law that require revision. Apparently, when the CLL was enacted it was targeted for such a review in 10 years. Fortuitously, I learned of the commission's interest in the CLL in late 2007, very early in the process. And fortunately, they welcomed my input and involvement. More importantly, as co-chair of the section at the time, I was able to get word of the process out to all of you, and many provided invaluable comments and insight. It's fair to say that the changes, when they are implemented, will reflect the general consensus of the construction bar, something that does not often happen with legislation affecting our practice.

The bill enacting the law passed the full Assembly by unanimous vote in June. An identical version of the bill has been introduced in the Senate Commerce Committee, and should move through when they next meet in September.

What the bill contains requires a detailed reading, since many, but certainly not all, of the sections have been reworded, re-shaped, merged and/or dropped. The all-important definition section has been expanded and clarified. Nonetheless, it is my opinion that we basically have the same law without substantive changes, except in the area of residential construction, where the time period for filing has been sensibly extended to 120 days.

What the commission did was look at the now ample body of court decisions that have interpreted and ruled on the CLL, and then engraft the outcome of those decisions directly into the statute. For example, while the CLL's Section 10 was somewhat imprecise and vague concerning the "lien fund" concept, the commission clarified it following the precepts the Supreme Court set forth in *The Thomas Group, Inc. v. Wharton Senior Citizen Housing, Inc.*, 163 N.J. 507 (2000) and *Craft v. Stevenson Lumber Yard, Inc.*, 179 N.J. 56 (2004). For good measure, a definition of "lien fund," something sorely needed, was added.

Strangely enough, this method worked for two reasons. First, in the beginning, in the absence of case law dealing with the CLL, the courts often looked to a handbook prepared by seasoned construction practitioners who understood the purposes and philosophy of the CLL: Robert S. Peckar, Richard M. Baron and Edward M. Callahan Jr., *New Jersey's New Construction Lien Law: A Practical Guide to the New Law with Forms, in New Jersey Institute for Continuing Legal Education, The New Construction Lien Law* (1994). Second, as stated previously, many members of the section guided the commission and kept it from straying into areas that would make sense on paper but not in actual practice. In sum, a good effort emerged as a result of the commission's managed and controlled input, and generally sound court decisions.

We look forward to the enactment of these changes, and can reflect on what was a collegial and cooperative process, utilizing the talents and experiences of the construction bar and the resources of the section. Certainly, John M. Cannel and Marna L. Brown, respectively the executive director and counsel of the commission, performed an outstanding job, and were most accommodating in their willingness to seek us out and listen to our comments. Perhaps we should urge them to undertake a review of the Municipal Mechanics Lien Law. In its third century of use, it could use some serious updating.

HIGHLIGHTS OF THE PROPOSED REVISIONS

Clarification of Residential Construction Issues

a. **Definitions (2A:44A-2):** The terms "dwelling," "real property development," "residential construction," "residential unit," and "community association" are defined for the first time. Revision of terms "residential construction contract" and "residential purchase agreement" further clarify the definition of residential construction.

b. **Entitlement to lien claim (2A:44A-3):** The proposed revision, which affects both residential and nonresidential property, distinguishes liens for work and services provided as part of the common elements or common areas of a property development from those for work to individual units. The concept of filing a lien for common element or common area work/services upon the community association is introduced. Clarification is provided regarding the circumstances under which a landlord may be subject to a lien for improvements made by a tenant. The content of Section 2A:44A-19 is incorporated into this section, and 2A:44A-19 is deleted.

c. **Perfecting residential construction lien claims and arbitration of claims (2A:44A-20 & 2A:44A-21):** The notice of unpaid balance (NUB) has changed to reflect changes to the lien claim form (*see* Section 2A:44A-8 below.) The time frame for lodging for record the NUB is extended to 60 days; the time frame for filing residential lien claims is extended to 120 days. Section 2A:44A-21 now modifies the arbitrator's role, adding provisions that seek to avoid the problems associated with multiple, inconsistent arbitrations. *See* 2A:44A-6 for distinction between "filing" and "lodging for record."

Changes to Mechanics of Filing; Lodging for Record; Serving Lien Claim Form; Amendment of Claim; Form of Bond Added

a. **Definitions (2A:44A-2):** The definition of "filing" is modified, making a distinction for purposes of enforcement of the lien claim between parties within the construction chain with notice of the claim and third parties outside the construction chain without notice of the claim.

b. **Filing of claim (2A:44A-6):** A distinction between "filing" and "lodging for record" for purposes of enforceability of the lien is now part of this section. The time frames for the filing of residential construction claims and NUBs are extended. See Section 2A:44A-21.

c. **Service of claim (2A:44A-7):** Service by commercial courier is now included. A lien claim may now be served on a community association, and if so served need not be served on individual unit owners. Lien claim forms are to be marked "received for filing" or similar stamp indicating date and time received by county clerks.

d. **Form of claim (2A:44A-8):** The claim form is simplified and clarified in accordance with practical concerns.

e. **Amendment of claim (2A:44A-11):** The circumstances when a lien claim may be amended are now illustrated; amendment is not permissible to cure a violation of Section 2A:44A-15.

f. **Form of bond (2A:44A-31.1):** This new section provides a form of bond to be used in order to discharge the construction lien.

Changes to the Calculation and Distribution of Lien Fund

a. **Definitions (2A:44A-2):** The terms "lien claim" and "lien fund" are defined for the first time.

b. **Calculation of the lien fund (2A:44A-10) and creation of a new Section 2A:44A-9.1:** All references to the calculation of the lien fund in section 2A:44A-10 are excised and incorporated into new Section 2A:44A-9.1. Section 2A:44A-10 now focuses entirely on attachment of the lien and priority of first recorded interests affecting property. *See also* 2A:44A-22. New 2A:44A-9.1 adopts recent court determinations, better explaining the relationship between the lien claim and the lien fund.

c. **Payment of lien claims and distribution of proceeds (2A:44A-23):** This proposed new section is a blend of the current Sections 2A:44A-23 and 2A:44A-28, attempting to set forth the process by which lien claims are paid out pro rata from the lien fund. Current Section 2A:44A-28 is deleted.

Changes to Enforcement and Discharge of Liens

a. **Suit to enforce lien claim (2A:44A-24):** This new section makes clear the process by which a lien claim may be enforced. As a result, Sections 2A:44A-25 (writs of execution); 2A:44A-26 (special writs of execution); 2A:44A-28 (proceeds of sale and distribution) and 2A:44A-29 (surplus funds) are modified or eliminated. The section pertaining to joinder (2A:44A-16) is merged with this section.

b. **Discharging the lien claim of record (2A:44A- 30 and 2A:44A-33):** These sections are revised to: (i) include a summary proceeding for discharging a lien claim; (ii) impose consequences for not canceling or discharging a *lis pendens* upon the discharge of the claim; and (iii) enable an owner to obtain a discharge of a lien claim that has been fully paid and satisfied, and the county clerk to discharge a fully paid and satisfied lien claim upon receipt of the owner's submission of the appropriate affidavit. ■

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Understanding the Surety's Perspective

by David C. Dreifuss

As those involved with construction projects know, construction projects have become increasingly complex. There are many people and entities who are generally involved with any large construction project. These include the owner; sometimes funding sources; one or more prime contractors; sometimes dozens (and possibly more) subcontractors and/or suppliers; manufacturers; architects and often their consulting engineers; as well as one or more sureties. Of all of these participants, some practitioners believe the most frequently misunderstood is the surety, which has provided performance and/or payment bonds on behalf of one or more participants.

This article will attempt to briefly explain the surety's perspective in the hope that it will foster more frequent cooperation between the other participants in the construction process and sureties.

Since most sureties also issue insurance policies, are owned directly or indirectly by an entity that provides insurance coverage and/or owns other companies that provide insurance coverage, many judges, lawyers, owners and others involved in the construction process view the surety as "the insurance company." However, there are fundamental differences between suretyship and insurance protection. Perhaps the most fundamental difference is that, with insurance coverage the insured generally purchases coverage for its own protection. In other words, if someone is hurt or has otherwise been damaged by the insured in connection with a covered occurrence, the insurance policy is generally available to provide protection for that insured.

In contrast, suretyship involves the principal[1] or entity purchasing the bond providing certain specific protection for a third party or parties. For example, a performance bond is issued for the benefit of the obligee. If the surety's principal is a general or prime contractor, the obligee would usually be the owner and the performance bond would be issued for its benefit. If the principal is a subcontractor, the performance bond would generally be for the benefit of the general contractor. Likewise, the payment bond is for the benefit of third parties, namely the subcontractors and/or suppliers[2] that have provided labor and/or materials in connection with the project.

This distinction is critical to an understanding of suretyship, especially because the principal may well dispute the claim or claims of the third parties. As a result, the surety may frequently be provided with conflicting positions, and even conflicting interpretations of the relevant documentation. Given the vast number of documents that often relate to a dispute in connection with a major construction project, the surety may well be placed in the unenviable position of attempting to determine as quickly as possible the accuracy of the positions asserted by the obligee and/or principal, which positions are sometimes diametrically opposed to one another.

Another difference between an insurer and a surety is that the insurer, absent fraud or some other impropriety by its insured, is not entitled to be reimbursed by the insured for its losses. In contrast, a surety is entitled to be indemnified and/or exonerated by its principal and, frequently, by one or more owners and/or affiliates of its principal. A surety's indemnification rights are a critical element of the underwriting and fees charged for issuance of the bonds. The standard practice is for the indemnitors to execute indemnification agreements for the benefit of the surety.

Frequently, when a surety is placed on notice of a performance or payment bond claim, it contacts its principal in order to determine the principal's position with respect to the claim. A surety possesses all the defenses of its principal,[3] and may have other defenses as well. Especially where a claim is disputed by the principal, it is likely the surety will conduct an investigation in order to determine who is correct, as between the obligee or claimant on the one hand and the principal on the other hand, and/or whether other defenses may exist. The investigation may also include compilation of information and documentation that would enable the surety to decide, if it were to respond in a positive manner to the claim, how is the best manner in

which it should proceed.

Such an investigation may be unnecessary when the claim, on its face, does not appear meritorious, such as where a performance bond claimant has failed to adhere to the procedures set forth in the performance bond, a payment bond claimant has asserted its claim untimely or some other clear defense appears appropriate. In those instances, the surety may conduct an investigation regarding whether other possible defenses exist, or may just rely upon the clear defense.

While some sureties have employed engineers, architects or others with construction expertise who can perform an investigation and/or assist or supervise an investigation, more frequently the surety retains consultants to perform the investigation. The scope and composition of the investigation may vary depending upon the complexity of the project and/or issues involved, and the clarity of the available documentation, the extent of cooperation provided by other project participants, as well as a variety of other factors. Sureties often carefully consider the opinions of the consultants, as well as of their counsel if there are legal issues for which counsel has been retained.

One frequent question that arises among construction practitioners is why a surety would undertake completion and/or tender a completion contractor if its principal disputes its termination and contends that it was wrongfully terminated. The answer usually lies in one or more factors, as follows: 1) the surety's obligations to the obligee; 2) the opinions of the surety's representative(s) as a result of the surety's investigation; and/or 3) sureties can often complete a project for less money than can a public owner and, perhaps, a private owner. Regarding the third factor, a public owner can only solicit bids in accordance with the public procurement laws, whereas a surety can solicit bids and then negotiate with the bidders. Sureties can frequently solicit prices that can be significantly less than the cost would be if it did not undertake completion and left it to the public owner to complete.

Another potential benefit from the surety undertaking completion is that it can frequently ratify the subcontracts and/or purchase orders as between the principal and its subcontractors and/or suppliers. In that manner, many of those subcontractors may already be familiar with the project site, may have already mobilized, and may be able to proceed far more efficiently and expeditiously than new subcontractors retained by a new contractor to complete the project.

In addition, the principal's subcontractors and/or suppliers frequently provided pricing at the start of and/or early in the completion of the project, as opposed to after a performance bond claim has been asserted. As a result, those prices may be far more favorable than pricing obtained after the performance bond claim has been addressed. These benefits from ratification, which the indemnity agreements generally enable the sureties to accomplish, often enable sureties to obtain more favorable pricing than can private owners and/or public owners.

Depending upon a variety of factors, such as whether any surety defenses exist, where the investigation is inconclusive or indicates that the principal was properly terminated, many sureties will consider undertaking completion pursuant to a reservation of its rights, as well as the principal's rights, because of the cost savings attributable to the foregoing factors. In those situations, if the principal ultimately prevails, the surety should be able to recover all of its losses. The surety may decide to not reserve its rights if it can negotiate concessions and/or the investigation suggests that further pursuit of the claims may not be worthwhile.

Notwithstanding a reservation of rights, it is generally in the obligee's best interest for the surety to undertake completion because, unless otherwise negotiated, any cost to complete in excess of the remaining contract funds and retainage will, at least initially, be borne by the surety. Especially in light of current budgetary problems that public entities are experiencing, a tender or completion by the surety may be the difference between the project being completed within a reasonable time and the project remaining incomplete for a relatively lengthy period of time.

Another issue that frequently arises is where the obligee contends, in order to support its position that the termination of the principal was proper, that the principal performed extensive defective work. Generally, any owner asserting this position to a surety will need to explain why it paid the contractor for the defective work (if that occurred). Many obligees do not understand that 'overpayment' (*i.e.* payment for work that was not performed and/or was not performed in accordance with the contract documents) is at least a partial defense available to the surety. Especially where an obligee contends that an extensive amount of defective work exists, the surety will direct its consultants to investigate 'overpayment' as part of their investigation. Stated differently, overpayment is either a breach by the obligee in paying for work not performed or not performed in accordance with the contract or, as some courts have recognized, an improper depletion of the surety's collateral, namely the contract funds.

In that regard, one obligee's attorney recently contended that overpayment is not a defense in New Jersey because it is not addressed in the New Jersey Public Works Bond Act.[4] His position was that, in light of the *Gloucester City Board of Education* case,[5] since the statute does not indicate that overpayment is a defense, this

means it is not a defense.

In the author's opinion, the *Gloucester City Board of Education* case was wrongly decided, in that the statute does not preclude or prohibit performance bonds from containing other conditions not expressly set forth in the statute and not inconsistent with the substance thereof; it is the public owners that generally establish the requisite bond form in the plans and specifications for the project; and the additional requirements were not only not inconsistent with the statute but are contained in the more widely used American Institute of Architects (AIA) performance bond forms.

However, in any event, the court, in that case, did not address what are considered 'surety defenses' but rather only whether the surety could establish preconditions for the filing of a performance bond claim not set forth in the statute. As a result, in the author's view, the case is irrelevant regarding the issue of the surety's defenses other than where the surety contends that its bond form must be enforced notwithstanding it being inconsistent with the statute. For example, the statute does not set forth a limitations period for claims to be asserted pursuant to a performance bond, but that does not mean these claims can be asserted forever.[6]

As to principals, many of them execute indemnification agreements, but either do not read or do not understand them. When a principal experiences financial problems and/or is terminated with respect to a project, frequently the surety has not been informed of the underlying facts. Cooperation by the principal can often help the surety expedite its review and analysis of the situation, and that cooperation, combined with efforts by the principal to help save money, can often inure to the principal's benefit.

In light of the indemnification obligations of the principal pursuant to the indemnity agreement[7] and/or at common law,[8] the less the surety's losses, the less the amount of the claim for indemnification. Furthermore, many contractors are not aware of the requirements of New Jersey's Trust Fund Act,[9] of which the surety is a beneficiary.[10] Where a principal has violated the Trust Fund Act, those individuals controlling the funds can have personal liability,[11] and that liability may well not be dischargeable in bankruptcy.[12] Bottom line, it is generally far better for the principal and the indemnitors to fully cooperate with the surety, assist the surety's efforts to minimize its losses and assist the surety with respect to affirmative recoveries than to fight or refuse to cooperate with the surety as many frequently do.

As indicated initially, this is merely a brief introduction to a topic, which, unless the economy, and in particular the construction industry, improves soon, may become of increasing importance. ■

ENDNOTES

1. The principal is the entity or person on whose behalf the bond or bonds has/have been issued.
2. Some payment bond forms may include as claimants others, such as the principal's employees, who worked on the project in question.
3. The surety may also possess other defenses, generally considered surety defenses, which include failure to adhere to the bond's requirements and others.
4. N.J.S.A. 2A:44-143 *et seq*.
5. *Gloucester City Brd. of Ed. v. American Arbitration Assoc.*, 333 N.J. Super. 511 (App. Div. 2000).
6. In fact, in an unpublished opinion, the Appellate Division has ruled that the performance bond surety "would be subject to suit for the same period of time and under the same condition as its principal." *Eastern Concrete Materials v. Colonial Surety Co.*, 2009 WL 3430237 (App. Div. 2009).
7. *See, e.g., International Fidelity Ins. Co. v. Jones*, 294 N.J. Super. 1 (App. Div. 1996); *U.S. Fid. & Guar. Co. v. Davis*, 32 N.J. Super. 115 (App. Div. 1954); *Andre Construction Assoc., Inc. v. Catel, Inc.*, 293 N.J. Super. 452 (Law Div. 1996); *Tennant v. U.S. Fid. & Guar. Co.*, 17 F.2d 38 (3rd Cir. 1927).
8. *See, e.g.,* 23 Williston on Contracts Sec. 61:59 (4th Ed.) and cases cited therein.
9. N.J.S.A. 2A:44-148.
10. *Montefusco Excavating & Contracting Co., Inc. v. County of Middlesex*, 82 N.J. 519 (1980); *Key Agency v. Continental Casualty Co.*, 31 N.J. 98 (1959).
11. *See Reliance Ins. Co. v. Lott Group, Inc.,* 370 N.J. Super. 563 (App. Div. 2004) and cases cited therein.
12. *See* 3 Bruner & O'Connor Construction Law §8:45 and footnotes thereto. The United States District Court for the District of New Jersey and United States Bankruptcy Court for the District of New Jersey both so ruled in an unpublished opinion in *In re. Falcone*.

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Appellate Division Enters Judgment for Contractor on Homeowner's CFA Claim for Poor Workmanship

by Donald P. Jacobs

When something goes wrong with a home improvement project, the homeowner may try to obtain an award of treble damages and attorneys' fees under the New Jersey Consumer Fraud Act (CFA).[1]

A recent unpublished Appellate Division decision confirms, however, that in the typical construction dispute arising from a home improvement contract, there is no viable CFA claim based on allegedly poor workmanship. Rather, the homeowner's recovery, if any, is limited to traditional damages for breach of contract.

THE TRIAL COURT JUDGMENT

In *Dream Builders v. Estate of Todd Paton*,[2] the defendant homeowners hired the plaintiff to construct a first-floor extension and second-floor addition to their home. The parties' contract set the price at $139,200, with installment payments to be made according to an attached schedule. Disputes arose after a significant amount of the work was done, and after the defendants made 12 installment payments totaling $130,500. When the defendants refused to make the final two payments (totaling $8,700), and refused to pay an additional $15,000 in change orders, the contractor sued for breach of contract.[3]

In their counterclaim, the defendants asserted a number of claims, including alleged violation of the CFA. One of the defendants testified that numerous problems existed after the plaintiff stopped working on the project. The defendants' construction and engineering expert testified that most of those problems were due to poor workmanship.[4]

For example, the defendants' expert opined that the siding and trim appeared not to be secured in a workmanlike manner; that one of the windows was the wrong size; that the staircase was "misframed;" and that some of the walls needed "minor spackling and painting." This testimony was in contrast to the opinion of the plaintiff's architectural expert, who testified that the plaintiff's work complied with the plans supplied by the defendants, and that many of the delays, change orders and extra costs were the result of problems with the plans themselves.[5]

At trial, the defendants also claimed various regulatory violations, which they had not alleged in the counterclaim. Specifically, the defendants claimed the plaintiff failed to display its registration number on the contract, most invoices and change orders;[6] failed to display the Division of Consumer Affairs' toll-free number on its documents;[7] and failed to reduce certain change orders to writing.[8]

The jury found the homeowners breached their contract with the plaintiff, and awarded the plaintiff $8,700 for the breach. On the counterclaim, the jury found the plaintiff also breached the contract, and that the plaintiff violated the CFA. The jury found the defendants' "ascertainable loss for plaintiff's violation of the [CFA]" was $15,000. It rejected the defendants' claims for unjust enrichment, intentional and negligent infliction of emotional distress, and fraud in the inducement. In response to a specific interrogatory—"What amount of money… will fairly and reasonably compensate defendants/counterclaimants?" —the jury answered $60,000.[9]

The trial judge granted the defendants' motion for counsel fees and costs under the CFA, awarding the defendants the entire amount they sought. The final judgment was entered in favor of the defendants in the amount of $161,964.63, comprised of the following: $51,300 ($60,000-$8,700) in contract damages; $45,000 ($15,000 times three) in CFA damages; and $65,664.63 in counsel fees and costs. The judge thereafter denied the plaintiff's motion for judgment notwithstanding the verdict or a new trial.[10]

THE APPEAL

The plaintiff's trial counsel had not moved to dismiss the CFA claim under Rule 4:37-2(b), and had not sought judgment in the plaintiff's favor pursuant to Rule 4:40-1. The denial of the plaintiff's judgment notwithstanding verdict motion was therefore unassailable on appeal. Nevertheless, the plaintiff's appellate counsel argued the allegations of the complaint and the proofs at trial did not support a CFA claim, and that the defendants' ultimate theory of recovery under the

CFA rested upon alleged regulatory violations that were not pled at all. The plaintiff asked the Appellate Division to exercise its original jurisdiction under Rule 2:10-5, and enter judgment on the CFA claim in favor of the plaintiff.[11]

The Appellate Division agreed to this request: "[B]ecause our review of the record firmly convinces us of the insufficiency of defendants' proofs regarding their CFA claim, we have chosen to exercise our original jurisdiction.... [W]e enter judgment in favor of plaintiff on defendants' CFA claim."[12]

Although the defendants did not prevail on their CFA claim, they were still entitled to an award of attorneys' fees "because they proved regulatory violations in defense of plaintiff's affirmative claim.[13] This was so even though it was "quite clear that defendants suffered no damages as a result of plaintiff's failure to adhere to these requirements."[14] The court remanded the matter for consideration of a counsel fee award "commensurate with the limited success defendants achieved on their CFA claim, and in accordance with other applicable precedent."[15]

Finally, the Appellate Division concluded that the judge's jury instructions with respect to the competing breach of contract claims did not constitute plain error. Nor did the court agree with plaintiff's appellate counsel that the jury's verdict on the contract claims was so inconsistent as to require reversal. The court, therefore, affirmed the portion of the judgment that awarded the defendants $51,300 for breach of contract.[16]

WHY THERE IS NO VIABLE CFA CLAIM FOR POOR WORKMANSHIP ALONE

In reversing the CFA award in favor of the defendants and entering judgment in the contractor's favor on that claim, the Appellate Division reinforced the well-settled principle that not every breach of contract gives rise to a claim for consumer fraud. The Appellate Division stated:

> This was essentially a contractual dispute. As we have noted, "A breach of warranty or breach of contract is not *per se* unfair or unconscionable and does not alone violate the Consumer Fraud Act."[17]

In fact, our courts have long held that if treble damages, attorneys' fees and costs are to be awarded in addition to remedial damages for breach of contract, there must be "substantial aggravating circumstances."[18] This standard applies to construction contracts as well as to other contracts, and it is a tough standard to meet.

In one case, for example, a new truck broke down on the date of delivery and repeatedly thereafter, and the seller disowned the problem by refusing to make repairs. Although a jury found this conduct violated the CFA, the Appellate Division held that the CFA claim should not have been submitted to the jury in the first place. The court found the determinative question to be "whether the recalcitrance of [the seller] in failing to honor its warranty and its intransigent and shoddy attitude toward plaintiff transcends the threshold of an 'unconscionable commercial practice.'"[19] The court concluded, as a matter of law, that it did not, notwithstanding the clear breaches of contract.[20]

The decision in *Dream Builders* should thus serve as a yellow flag for attorneys considering whether to assert a CFA claim with regard to problems that arose under a home improvement contract. For a claim of poor workmanship to justify a CFA claim, there must be much more than a breach of contract or a breach of warranty. If there are no substantial aggravating circumstances, the contractor's counsel should be able to obtain dismissal of the CFA claim, either on a motion to dismiss for failure to state a claim on which relief can be granted or on a motion for summary judgment. ■

ENDNOTES

1. N.J.S.A. 56:8-1 to -184.
2. No. A-0493-08T3 (App. Div. May 14, 2010).
3. *Id.*, slip op. at 3.
4. *Id.* at 4.
5. *Id.*
6. *Id.* at 10; *see* N.J.A.C. 13:45A-17.11(d)(2).
7. *Dream Builders*, slip op. at 10; *see* N.J.A.C. 13:45A-17.11(f).
8. *Dream Builders*, slip op. at 10; *see* N.J.A.C. 13:45A-16.2(a)(12).
9. *Id.* at 4-5.
10. *Id.* at 5.
11. *Id.* at 2, 5-7.
12. *Id.* at 13.
13. *Id.* (*citing Scibek v. Longette*, 339 N.J. Super. 72, 86 (App. Div. 2001) and *Branigan v. Level on the Level, Inc.*, 326 N.J. Super. 24, 30-31 (App. Div. 1999).
14. *Dream Builders*, slip op. at 10.
15. *Id.* at 14.
16. *Id.* at 14-17.
17. *Id.* at 12 (*quoting Palmucci v. Brunswick Corp.*, 311 N.J. Super. 607, 616 (App. Div. 1998) (*citing Gennari v. Weichert Co. Realtors*, 288 N.J. Super. 504, 533 (App. Div. 1996), *aff'd*, 148 N.J. 582 (1997)). The Court also cited *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 25 (App. Div. 1985).
18. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18 (1994). *See also Gennari v. Weichert Co. Realtors*, *supra* n.17, 288 N.J. Super. at 533 ("Our courts have made it plain that a simple breach of warranty or breach of contract is not per se unconscionable and does not alone violate the Act").
19. *D'Ercole Sales, Inc. v. Fruehauf Corp.*, *supra* n.17, 206 N.J. Super. at 28.
20. *Id.* at 31.

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The Affidavit of Merit Statute and the Entire Controversy Doctrine are Perfect Together in Highland Lakes

by William L. Ryan

What began as a second look at a perceived loophole in the affidavit of merit statute,[1] culminated in a declaration by the New Jersey Supreme Court that the entire controversy doctrine is not just alive but it is actually doing quite well.

The affidavit of merit statute has been the subject of substantial litigation and appellate review since its enactment 15 years ago. One of the most recent disputes involved how, if at all, the act applied to third-party claims for contribution and indemnification against design professionals. In *Highland Lakes Country Club & Cmty. Ass'n. v. Nicastro*,[2] the New Jersey Supreme Court took the opportunity to weigh in, for the first time, on the application of the act in such circumstances.

In *Highland Lakes*, the plaintiff country club sued the Nicastros seeking to resolve a dispute over the boundary lines separating the parties' property. The Nicastros retained Suburban Consulting Engineers, Inc. (SCE) and Martin Sikorski, P.L.S. to perform engineering services, including preparation of a survey, in connection with the construction of their new residence. The plaintiff did not assert any direct claims against SCE, but did allege that it had been damaged by an alleged discrepancy between the SCE survey and a prior subdivision plot "sketch" prepared by another professional land surveyor.

The Nicastros filed a third-party complaint against SCE alleging they retained SCE to prepare the survey and relied upon SCE's work. The Nicastros did not assert affirmative claims of professional negligence but, rather, sought indemnification and contribution from SCE. The Nicastros did not file an affidavit of merit, and SCE moved to dismiss the third-party complaint on that basis.

The trial court denied SCE's motion, relying in large part upon the Appellate Division's holding in *The Diocese of Metuchen v. Prisco & Edwards, AIA*.[3] In *Prisco*, the defendant architect filed a third-party complaint against an engineering firm for contribution and indemnification related to alleged construction defects in the renovation of a former high school into a corporate business center. The architect filed a motion seeking a declaration from the trial court that it was not required to comply with the act with respect to its third-party complaint against the engineer.

The Appellate Division, in *Prisco,* affirmed the trial court's determination that, in this context, it was unnecessary to require the architect to file and serve an affidavit of merit. As a result, the engineering firm was required to participate in litigation without an affidavit being filed by either the plaintiff owner (which did not assert direct claims against the engineer) or by the architect third-party plaintiff who sought contribution and indemnification from the engineering firm.

In keeping with the Appellate Division's reasoning in *Prisco*, the trial court in *Highland* determined that the Nicastros should not be forced, through service of an affidavit of merit, to make Highland Lake's case for it should they continue to defend upon the ground of the boundary line shown is accurate.

On appeal, the Appellate Division affirmed the trial court's decision and concurred that the application of the act in these circumstances would be inconsistent with its overall purposes.[4] The Appellate Division determined that, since Highland Lakes did not yet produce "evidence" to establish an error by SCE, no independent claim of professional negligence had yet "accrued." According to the Appellate Division, if and when Highland Lakes produced "evidence" of SCE's errors, the Nicastros' claim for professional negligence would accrue and "a different analysis may be required." The Appellate Division, however, did not expound on what that analysis entailed.

The Supreme Court affirmed the Appellate Division for substantially the same reasons expressed in the trial court's opinion. Interestingly, however, the Supreme Court expressly rejected SCE's argument that the Nicastros should defer any claim against it until the conclusion of the action with Highland Lakes, on the grounds that "it ignores the

entire controversy doctrine." The Supreme Court determined the policies underlying the entire controversy doctrine, such as avoidance of waste, efficiency and reduction of delays, fairness to parties and the avoidance of piecemeal decisions, supported the Nicastros joining SCE in the litigation despite the fact that the Niacstros' claims against SCE had not technically "accrued."

The Court, while acknowledging in a footnote that the entire controversy doctrine no longer mandated party joinder, nevertheless pronounced that it has "remained faithful to the doctrine's overarching principles."The Supreme Court concluded that the "perceived procedural advantage" of forcing the Nicastros to defer its claims against SCE ran "afoul of all of the salutary effects the entire controversy doctrine is designed to advance…."

In the wake of the Supreme Court's decision in *Highland Lakes*, the construction litigator is now faced with added threshold decisions. First, it may be argued that any party with a potential claim against a design professional may now be *required* to assert the claim by way of a third-party complaint, under the entire controversy doctrine, even if the party's intention is to dispute the plaintiff's allegations implicating the design professional's work. Second, the Supreme Court's affirmation of the lower courts' decisions strongly suggests that there may come a point in discovery where there exists sufficient "evidence" to trigger the requirements of the act.

The lack of guidelines and direction on what such evidence must consist of, given the ramifications of non-compliance with the act, is potentially problematic.

It may be an appropriate time for the Legislature to consider revisiting the act's provisions to address these significant, albeit relatively nuanced, issues. The Legislature may consider looking to Pennsylvania's analog of the act for guidance. Pa. R.C.P. 1042.3(c)(2) provides that a defendant or additional defendant who has joined a licensed professional as a third-party defendant or asserted a cross-claim against the licensed professional need not file a certificate of merit unless the claims are based on acts of negligence unrelated to the acts of negligence that are the basis for the claim against the joining or cross-claiming party. A similar amendment to the act could reduce costly and time-consuming satellite litigation of these issues (not to mention attorneys' anxiety levels). ■

ENDNOTES

1. N.J.S.A. 2A:53A-26 to 29.
2. 201 N.J. 123 (2009).
3. 374 N.J. Super. 409 (App. Div. 2005).
4. *Highland Lakes Country Club & Cmty Ass'n v. Nicastro*, 406 N.J. Super. 145 (App. Div. 2009).

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Mediation

A Win-Win for All Parties

by Jennifer Horn

The costs of dispute resolution have always factored prominently in a construction client's business decision-making process. However, in today's economy, where finding work and, just as importantly, getting your client paid for it is more challenging than ever, the need to resolve business disputes quickly and efficiently is critical. Mediation, a non-binding but often required condition precedent to arbitration or litigation in some construction contracts, is an advantageous process for many reasons. Even if your contract does not provide for mandatory mediation in advance of other forms of dispute resolution, there are compelling advantages to engaging in this non-binding process.

MEDIATING CONSTRUCTION DISPUTES: CRAFTING THE PROCESS TO YOUR BEST ADVANTAGE

Much has been written about the advantages of mediation in the context of general legal disputes; however, for the construction practitioner whose niche practice necessarily involves special technical issues and demands knowledge of industry terms, practices, and procedures, mediation offers a particularly effective avenue of dispute resolution. The relative autonomy of the parties allows for creative problem solving and cost-effective resolutions that often preserves, rather than further severs, important business relationships (a frequent side effect of litigation and/or arbitration, which, by its nature, tends to be protracted, costly, and emotionally draining). In addition, mediation is generally more expeditious than litigation and/or arbitration—and the parties have the freedom to select a knowledgeable construction practitioner to preside over the dispute.

Even when resolution eludes the parties, important information can be gained through the mediation process that guides the parties' actions going forward. However, in order to achieve the best results for your client, careful thought must be given to how to structure your mediation to your client's best advantage. The level of strategic control a practitioner exercises over the following seemingly innocuous factors can greatly enhance or diminish a practitioner's chances of a positive result.

CONTROL OVER PROCESS

The beauty of mediation is most apparent when practitioners best tailor the process itself to the specific construction problem at issue. Unlike binding litigation and arbitration, all parties retain innate control over the actual mediation process. Construction practitioners are limited only by their own creativity and problem-solving abilities.

Timing is critical, and, like other aspects of mediation, the parties retain full control over the timing of the actual session(s). For instance, consider the value of intermittent mediation, with elapsed periods of time between sessions for large claims involving multiple parties and parts. Regardless of the size of your claim, would a continuous, intense period of mediation, sometimes lasting over a period of days, with all parties present and invested, be more beneficial? Is it better to take a wait-and-see approach, reserving your right to engage in future sessions, but not deciding until you can ascertain firsthand the effectiveness of the process? Finally, is your situation best suited to a mediation scheduled before a complaint or demand for arbitration is filed or well after formal discovery is underway?

Contrast these options with the process of litigation (that can last years) or arbitration (also protracted). With mediation, control over the timing and resolution of the dispute can be better managed.

CONTROL OVER PLACE

The location or place of the mediation is a critical, but often overlooked aspect of mediation. Again, all parties maintain control over this basic decision that sometimes profoundly impacts the outcome of the mediation event. Consider the claimant who seeks recovery for apparent issues, such as the level of floor deflection in a residential structure or finish work that is open and obvious. Pictures often cannot do justice to the experience of witnessing firsthand the subject of the claim and impact. On the other hand, if your work has been covered during the course of construction, or if obvious, observable problems exist, participating in

mediation on site may not be beneficial or convenient.

CONTROL OVER THE SELECTION OF MEDIATOR

In mediation, as opposed to litigation, all parties have control over the identity of the mediator who will guide the process. In litigation, control over this critical aspect is lacking, and many contractors have horror stories of the unfortunate judicial assignment in which complicated or technical construction issues were resolved by a judge (or jurors!) who possessed little or no construction experience or frame of reference. In these cases, valuable time is spent simply teaching these decision makers basic vocabulary and/or terms of art in the industry. In mediation, on the other hand, parties can select their own mediator, who could be an architect, engineer, experienced construction attorney or retired judge. Time is saved when these sophisticated professionals can quickly grasp the problem and react appropriately.

CONTROL OVER THE PRODUCTION AND PRESENTATION OF DOCUMENTS

In litigation or arbitration, the parties are required to adhere to specific document production and 'discovery' guidelines. With mediation, the parties maintain valuable control over the production and presentation of information. Often parties will agree to an exchange of information, even PowerPoint presentations, in advance. This exchange of information, unencumbered by technical court or arbitration rules, many times provides a new level of understanding of the opposing parties' arguments and exposes the strengths and/or weaknesses of your case. This knowledge can inform and guide the ultimate outcome in your case.

CONTROL OVER OUTCOME

With a judge or arbitrator, a contractor has no control over the binding outcome of dispute resolution. Appealing unfortunate or inaccurate rulings is expensive, and in many instances unsuccessful. With mediation, in contrast, the parties retain absolute control over the outcome of the dispute. Again, the scope and content of any mediation is limited only by the imaginations and will of the parties. For instance, resolution can include creative aspects, such as apologies, agreements related to future work, or payment in the form of specific performance. Manageable plans for payment in installments over time are common outcomes of mediations, and are not possible when litigation and/or arbitration is undertaken. With a creative solution, all parties benefit, and the chances of maintaining and/or repairing the business relationship is improved.

MEDIATION—A WIN-WIN

Because of the technical nature of many construction-related issues, mediation is uniquely suited to the resolution of such disputes. Even when mediation fails, parties and practitioners learn potentially invaluable information through the mediation process that can guide their actions going forward. Hearing the opposing side's position, seeing the demeanor of potential witnesses, and reviewing critical documents that one might have not seen before, empowers both the construction attorney and client.

When used properly and successfully, mediation can be a valuable means for the parties and their counsel to maintain creative control over the dispute resolution process and, importantly, the outcome of events. Therefore, even if your contract does not provide for mandatory mediation in advance of other forms of dispute resolution, there are compelling advantages to engaging in this non-binding process, not the least of which is control over the means by which you resolve your dispute. ■

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Practical Tips for Construction Contractors to Avoid Losing a Public Works Contract to a Material Defect

by Thomas O. Johnston

Construction contractors who perform public works projects devote a significant amount of time, money and resources compiling bid documents to satisfy the numerous mandates placed on them by the advertised bid package. While public works projects may be subject to any number of statutes, each bid solicitation has unique requirements that are driven by the public body's needs and preferences. It is imperative that contractor bidders be vigilant in reviewing and complying with all bid specifications so as not to invite a disqualification of a bid based on a purported 'material defect,' notwithstanding that the bid is the lowest price.

Moreover, a contractor should be ready to challenge defective bids submitted by a competitor, lest the contractor risk unfairly losing the contract. The purpose of this article is to provide a brief update on recent case law regarding material defects in bids, and to offer practical tips to bidders and their counsel to prevent a purported material defect from interfering with obtaining a public works contract.

MATERIAL DEFECTS

Numerous statutes govern public procurement for public works projects, depending on the type of public body.[1] While these statutes are distinct, they were enacted to protect the public interest by promoting fair, uninhibited competition and "guarding against 'favoritism, improvidence, extravagance and corruption.'"[2]

Following a bid advertisement and opening for a public works contract, the contract must be awarded to the "lowest responsible bidder."[3] A contractor may be disqualified as the lowest responsible bidder if there is a material defect in its bid. The courts favor strict compliance with public-bidding guidelines, but are willing to waive immaterial defects.[4] To determine whether a bidding error constitutes a material defect, courts assess two factors:

> There must, therefore, be applied two criteria in determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity–first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.[5]

New Jersey courts have issued inconsistent opinions regarding the materiality of bid defects.[6] Recent decisions illustrate the complexity of deciding whether a defect is material. In *Rencor Inc. v. North Hudson Sewerage Authority*,[7] two bidders, Rencor and Creamer, submitted bids for a construction project to the North Hudson Sewerage Authority (NHSA) that involved removing and transferring light poles.[8] The NHSA required bidding documents to name all subcontractors and their qualifications. Creamer apparently failed to meet this requirement by not disclosing an electrical subcontractor, because it intended to remove and transfer the light poles without an electrical contractor.[9] The court held that Creamer's error was an immaterial defect, refusing to "reject Creamer's bid because it applied its creativity and proposed to accomplish the objective fully in a way that rendered one of the specified details unnecessary."[10]

The case in *Nova Crete, Inc. v. City of Elizabeth*[11] serves as a reminder that there are limits to "creative bidding" when the nonconformity risks an inefficient and costly project. Nova Crete submitted a bid containing a consent of surety. However, the consent of surety "conditioned the obligation to issue the performance bonds upon a 'request by' Nova Crete."[12] The court was not as receptive to this "creativity" as it was in *Rencor*, and ruled that the surety's conditional language constituted a material defect.[13] Specifically, the court expressed concern over the surety's language, which was a "virtual invitation to further litigation," particularly over the precise nature of a proper "request."[14] Bidders should be attuned to important differences in the public bidding laws. For

example, the Local Public Contract Law mandates rejection of bids missing certain specified items, such as a bid guarantee and addendum acknowledgement. The Public School Contracts Law, on the other hand, does not mandate rejection of such bids.[15]

PRACTICAL TIPS TO GUARD AGAINST MATERIAL DEFECTS

The value in a bidder carefully reviewing the requirements in a bid package is self-evident, as it is best to avoid in the first place a material defect controversy about that contractor's bid. But to the extent the requirements in the bid package are vague or ambiguous, bidders should immediately notify, in writing, the public body or its representative about the ambiguity. A bidder who fails to question the specifications within three days of the bid opening may be precluded from challenging the contract award after the bid opening.[16]

Immediately prior to submitting the bid, a bidder should carefully review the bid package checklist to ensure that all documents are included in the bid submission. At the bid opening, the high bidders should inspect the documents submitted by the lower-priced bidders and compare those bid documents with the bid package checklist. The low bidder should also inspect the next highest bidder's documents in case that bidder brings a challenge against the low bid.

If the apparent low bidder failed to submit a mandated form, submitted a defective form, or otherwise submitted a nonconforming bid, the losing bidder must decide whether to challenge the apparent low bid. The losing bidder should consider multiple factors, including whether there are other lower-priced responsible bids; whether the contract value warrants expending resources to challenge a bid; and whether the challenging bidder's bid has defects. If the high bidder decides to challenge the low bid, it should notify, in writing, the public body as soon as possible. Because the public body frequently refers bid challenges to its counsel, the challenger should include any supporting statutory and case citations. The challenger should also immediately request copies of the apparent low bid documents to help prosecute the challenge.

If the public body is not willing to immediately provide copies of the bid documents, the challenger can direct a request for the documents to the public body's custodian of records under the Open Public Records Act,[17] which mandates production of a copy of the bid documents within seven business days.

A low bidder involved in a challenge should respond as soon as possible, and provide supporting statutory and case law citations. The low bidder is at an advantage, as many public bodies are not inclined to spend more money for the contract by disqualifying the low bid. The low bidder may also request the challenger's bid documents, since pointing out a material defect in the challenger's bid documents may diminish the challenger's interests in pursuing the challenge.

Should the public body deny the challenge, the challenger may wish to bring suit in the superior court. Because losing bidders are precluded from recovering damages for an erroneously awarded bid to another contractor, even if the challenger ultimately prevails, the challenger should proceed expeditiously in a summary action under Rule 4:67.1.[18]

In sum, it is imperative that a bidder for a public works contract be vigilant in reviewing the bid package so as not to invite a material defect dispute over its bid. Moreover, the high bidder should carefully inspect the lower bidder's documents to preserve an opportunity to be awarded a contract upon a successful challenge. By exercising diligence, a contractor can avoid losing a public works contract to a material defect. ■

ENDNOTES

1. *See e.g.* N.J.S.A. 40A:11-1 *et seq.* (Local Public Contracts Law); N.J.S.A. 18A:18A-1 *et seq*. (Public School Contracts Law); N.J.S.A. 52:32-1 *et seq*. (State Building Contracts); N.J.S.A. 27:23-1 *et seq*. (State Turnpike Authority); N.J.S.A. 52:18A-78.1 *et seq*. (Sports and Exposition Authority).
2. *CFG Health*, 2010 N.J. Super. LEXIS 80, at *9, (*quoting Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 N.J. 307, 313 (1994)).
3. *See e.g.*, N.J.S.A. 40A:11-4 and N.J.S.A. 18A: 18A-4.
4. *Meadowbrook Carting*, 138 N.J. at 314.
5. *River Vale v. R.J. Constr. Co.*, 127 N.J. Super. 207, 216 (Law Div. 1974); *see also Meadowbrook Carting Co., Inc.*, 138 N.J. at 390.
6. Robert S. Peckar, *New Jersey Practice,* Construction Law, Vol 41, p. 130 (1998).
7. No. A-1425-06, 2007 N.J. Super. Unpub. LEXIS 833 (App. Div. May 15, 2007).
8. *Id.* at *2.
9. *Id.*
10. *Id.* at *11.
11. No. A-3550-08, 2010 N.J. Super. Unpub. LEXIS 101 (App. Div. Jan. 15, 2010).
12. *Id.*
13. *See Id.*
14. *Id.* at *14; *see also In re Jasper Seating Co., Inc.*, 406 N.J. Super. 213 (App. Div. 2009) (bid for furniture contract rejected for material defect because specification required a fixed price for the contract term, while bid contemplated possible escalating prices mid-term.)
15. *See Lighton Indus. v. North Hanover Twp. Bd. of Educ.*, No. A-1238-09, 2010 N.J. Super. Unpub. LEXIS 660 (App. Div. March 29, 2010) (a bid that would not have complied with

the scope of work listing requirement for subcontracts under the Local Public Contracts Law not rejected because the contract was governed by the Public School Contract Law, which lacks that mandate.).

16. *See* N.J.S.A. 40A:11-13; N.J.S.A. 18A:18A-15(e).
17. N.J.S.A. 47:1A-5i.
18. *See Delta Chemical Corporation v. Ocean County Utilities Authority*, *250* N.J. Super. 395, 400 (App. Div. 1991)(monetary damages not permissible in a successful challenge to a public contract award.)

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The 2007 AIA 201 and AGC Contract Forms

by Deborah I. Hollander

The American Institute of Architects (AIA) drafts standard forms of contracts to be used in construction projects, including contracts to be used between owners and contractors, known as the AIA 201 form. These forms are typically used as the general conditions or boilerplate terms. AIA 's forms, particularly the forms for contracts between the owner and the contractor, have been established as an industry standard. The AIA has recently revised all of its basic forms, resulting in the promulgation of a revised 2007 AIA 201 form (the basic form between an owner and a contractor). The construction trade, through the Association of General Contractors (AGC) promulgates its own contract forms, the ConsensusDOCS set.

The ConsensusDOCS and the new AIA documents both introduce four major innovations over past versions by their respective organizations. They both: 1) allow the parties to appoint a neutral to make a preliminary ruling, on disagreements in the course of construction, 2) require quick payment from the general contractor to subcontractors; 3) allow the parties to elect between arbitration and litigation, instead of mandating arbitration, as in previous documents, and 4) provide optional side agreements designed to govern electronic communications and the use of electronic drawings and building information modeling systems.

The AGC and the AIA present differing visions of how a construction project operates. The AIA conceives the owner as continuing to pay the architect for significant duties once construction begins. The architect serves an intermediary role between the owner and the contractor during the course of construction by carrying out site visits, reviewing applications for payments, certifying completion of the project and administering the contract. The architect will weigh in on contract interpretation, choice of superintendent, change order pricing, termination of the contractor and determining when the project is complete.

In contrast, it is the AGC's overall philosophy that the parties can be trusted and have the obligation to deal with each other in a fair manner, without extensive administration by the architect/engineer, and without onerous and complex contract provisions. The AGC declares:

> Relationship of the Parties: The Owner and the Contractor agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing.

The ConsensusDOCS 200 stresses direct communications between the owner and the contractor on such issues as change order applications and requests for corrective work. In addition, the AGC contract rejects the use of contract language to shift risk between parties.

An example of the different approaches can be seen in how they treat what happens when the plans have subtle errors or do not match the physical realities of the site and existing structures.

The AIA, particularly the 2007 revisions, emphasize the notices and steps that a contractor takes at the very beginning of the project. A frequent tension on construction projects is disputes relating to allegedly incomplete plans and specifications, or plans and specifications that are inconsistent with each other or with the physical site. The 2007 AIA shifts the risk of inconsistent architectural plans to the contractor; unless the contractor promptly reviews and detects the flaws at the beginning of the applicable phase of work, the contractor is disentitled to claims asserted later for additional costs or time based upon inconsistencies that the contractor would have discovered if they had properly conducted their initial review. This approach presumes the contractor should be able to more thoroughly review plans than the project designer, and presumes any discrepancy will become a claim.

The ConsensusDOCS 200 similarly requires the contractor to review the contract documents and visible field conditions before starting work. However, the ConsensusDOCS specifies that the contractor does not have an affirmative duty to detect defects or inconsistencies in the design documents and is not liable, unless the contractor knowingly fails to report any problems. Thus, the contractor is not responsible for a design mistake, but is responsible if it failed to communicate a detected problem.

	2007 AIA 201	CONSENSUS DOCUMENTS	NEW JERSEY PROMPT PAYMENT ACT
Amount of time from when general contractor receives payment and when it must pay its direct subcontractors and suppliers	7 days	ConsensusDOCS–Subcontractor form entitles subcontractors to be paid within 7 days of general contractor receiving payment	10 calendar days
Interest due to subcontractors on monies that are not paid promptly	None stated, Prompt Payment Act interest rate applies	Statutory rate	Award of prejudgment interest at the prime rate plus 1% from the date a delinquent payment is due until judgment is entered

The different philosophies of the 2007 AIA 201 and the Consensus DOCS result in different terms on the information the owner must provide to contractors. The AIA, particularly the 2007 revisions, allows the owner to shift difficulties inherent in its property to the contractor by controlling the information given to the contractor. The owner has the general duty to furnish surveys describing physical characteristics, legal limitations and utility locations of the site of the project and a legal description of the site. However, the owner only must provide full information upon a receipt of a written request from the contractor. Even then, the owner must only provide limited information already in the owner's control.

The 2007 AIA 201 documents limits the contractor's right to demand the owner provide evidence of financing. The contractor must demand this information before commencing work, and thereafter only when the contractor identifies in writing "reasonable concerns" regarding the owner's ability to pay. In contrast, under the ConsensusDOCS, the owner and its architect must provide thorough and complete design and engineering, and environmental information. The owner is also required to provide certain information, regardless of whether it is listed as a contract document, including surveys, environmental studies and legal descriptions. The AGC ConsensusDOCS requires the owner to provide assurances it has sufficient funds to pay for the contract, as a pre-condition to starting work and to provide material updates, as necessary.

SUBCONTRACTOR PAYMENT OBLIGATIONS UNDER THE 2007 AIA 201 FORM, THE AGC AND THE NEW JERSEY PROMPT PAYMENT ACT

New Jersey's Prompt Payment Act statutorily requires contractors to pay funds down to subcontractors with minimal delay. However, the act's specific terms are default terms; they are read into contracts that are silent regarding when payment is to be transmitted down to subcontractors and whether interest accrues on unpaid amounts, but only if those contracts do not themselves address such terms. The table above compares the standard provisions of the 2007 AIA 201, the AGC ConsensusDOCS and the New Jersey Prompt Payment Act.

INSURANCE, INDEMNIFICATION AND WAIVER OF SUBROGATION CLAIMS

One of the most important features of the AIA contract set is the cross-insuring and waiver of subrogation provisions. These provisions allocate the costs of buying various types of insurance for risks connected to the project (liability, workers compensation, builder's risk). The insurance will cover the interests of everyone. In lieu of suing each other, the parties will rely on the insurance payments to cover damages and liabilities. The parties then waive claims against each other to the extent that they were, or would have been, covered by the insurance purchased.

The ConsensusDOCS are intended to prevent one party from shifting its risks to the other, including the risks a party may create by its own negligence. It therefore limits cross-insurance requirements. As a practical matter, the parties may be creating gaps in insurance and rendering themselves vulnerable to the possibility that the insurance companies may, themselves, ultimately bring suit against the contracting parties to recover losses. In effect, the AGC ConsensusDOCS 200 fails to shift risk to the insurers, even though parties generally buy insurance for the very purpose of paying insurers to shoulder the risk. Therefore, the insurance, particularly the cross-insuring provisions and waiver of subrogation provisions of the ConsensusDOCS 200, represent a major downgrade compared against the AIA scheme.

On the other hand, the ConsensusDOCS builders risk provisions are superior to those of the AIA. They require extremely broad cov-

erage and explicitly include a requirement to cover collapse and other losses caused by defective workmanship and design. The policy is required to extend to the full cost of replacement at the time of loss, and there is an express waiver of subrogation in favor of the contractor, subcontractor and the architect/engineer.

CONCLUSION

Neither form is perfect. The AIA contracts are clearly more pro-owner (and pro-architect) than those promoted by the building contractors. Experienced construction counsel may well wish to graft some provisions from one form onto the other (particularly with respect to the insurance and subrogation waivers). Ultimately, what is most important is that the parties carefully negotiate a detailed listing of the scope of work and payment obligations. A good faith and clear understanding on those terms, and a commitment to making a project work, augurs well for a successful project on either form. ■

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The Duty of Design Professionals and the Privity Defense

by Andrew J. Carlowicz Jr. and Richard W. Gaeckle

A construction project being completed well beyond schedule and significantly beyond budget is not an unusual situation. Various contractors complaints of delays, disruptions, extended general conditions and economic damages occurring as a result with allegations of errors and omissions, lack of coordination, improper administration, and general professional negligence, are directed at the design professionals. Litigation ensues with a contractor taking the plaintiff's seat and the design professional sharing the defendant's position with many others. While discussing the potential liability and exposure with counsel, the design professional's response may be something along these lines: "But we didn't even have a contract with them!" Of course, what the design professional is alluding to is a defense based on the absence of contractual privity with the plaintiff-contractor. Unfortunately, the fruit of this defense had spoiled long ago.

The privity defense, and its application to architects and engineers, has been considered by our courts in personal injury settings for nearly a half century. Following the abandonment of the "completed and accepted rule" of *Miller v. Davis & Averill, Inc.*,[1] courts increasingly disfavored the privity defense, where a bodily injury had been sustained as a result of the negligence of a design professional. Beginning with the seminal case of *Trotten v. Gruzen*,[2] the clear direction taken by our courts held architects and engineers potentially liable for personal injuries caused by the design professionals, negligence notwithstanding a lack of privity with the injured third party. However, the question of whether a design professional could be answerable in tort to a contractor who sustained purely economic damages in the absence of contract privity remained expressly unanswered until the decision in *Conforti & Eisele, Inc., v. John C. Morris Associates*.[3] In protracted litigation involving the design and construction of the New Jersey College of Medicine & Dentistry, plaintiff Conforti & Eisel, general contractor for the project, sought recovery from various design professionals under a theory of professional negligence in coordinating project drawings. All design professionals eventually settled with the plaintiff except John C. Morris Associates, a mechanical engineering sub-consultant. Morris had challenged the propriety of a professional negligence suit by a general contractor where there was no contractual privity between Conforti & Eisel and John C. Morris Associates. The engineer's motion to dismiss raised this discrete issue, which at the time was one of first impression in New Jersey.

Recognizing that architects and engineers could be held liable for personal injuries to third persons in the absence of privity, the court questioned the logic of denying a contractor relief based on such a privity defense where the contractor suffers damages, albeit in the nature of purely economic losses. In rationalizing a rule against the privity defense, the court reasoned:

> [t]o deny this plaintiff his day in court would, in effect, be condoning a design professional's right to do his job negligently but with impunity as far as innocent third parties who suffer economic loss.
>
> Public policy dictates that this should not be the law. Design professionals, as have other professionals, should be held to a higher standard.

In adopting an adequate test for determining liability, the *Conforti & Eisel* court turned to the federal jurisdiction and the case of *United States v. Rogers and Rogers*.[4] In *Rogers and Rogers*, an architect was sued by a contractor who had sustained economic damages. In determining liability, the district court established the following test, which was embraced by the *Conforti & Eisel* court:

1. The extent to which the transaction was intended to affect the plaintiff
2. The foreseeability of harm to the plaintiff
3. The degree of certainty that the plaintiff suffered injury
4. The closeness of the connection between the defendant's conduct and the injury suffered
5. The moral blame attached to the defendant's conduct and
6. The policy of preventing future harm

While the court recognized that the result of its ruling would impose additional exposure on

design professionals, it maintained that "extending liability for economic injury is the next logical step." The Appellate Division affirmed substantially for the reasons stated by the trial court.

The *Conforti & Eisel* decision has been left unmolested for more than two decades, although at least one court has appeared to suggest *in dictum* that the privity exception is limited to public construction projects.[5] Regardless of whether one subscribes to the existence of an independent duty owed by a design professional to third parties despite the lack of contractual privity, the duty owed by a design professional to third parties is not without limitation. While *Conforti & Eisel* stands for the proposition that a design professional *may* be liable to a third party in the absence of privity, the court does not address the extent of a design professional's duty to such a third party. Arguably, *Sykes v. Propane Power Corp.*[6] is informative in this regard.

In *Sykes*, the defendant engineer was retained to assist in the preparation of drawings relating to a chemical processing plant in response to an administrative intervention by the Department of Environmental Protection. As a condition for the continued operation of the plant, the Department of Environmental Protection required the plant comply with certain waste management regulations. Consistent with these directives, the engineer investigated and took photographs of the processing system; prepared process flow diagrams, topographic plots and tank location drawings; and prepared an engineering plan that included titles such as "Explosion and Disaster Plan," "Serious Injury Plan," and "Safety Standards and Policies" under the general heading of "Risk Analysis." Shortly after the plans were completed and submitted to the owner, an employee was killed when a chemical distillation unit in the plant exploded.

A wrongful death suit against the engineer followed, alleging that the engineer had breached a duty of care to the employee by sealing documents that reflected an unsafe and negligently developed chemical processing system. The plaintiff pointed to the risk analysis section of the engineering plan, which referred to explosions, injuries and safety standards and policies. Summary judgment was ultimately granted in favor of the engineer, based on the finding the engineer was hired solely for the purpose of preparing documents in response to the Department of Environmental Protection order, and had not been engaged as a safety engineer.

In affirming the ruling of the trial court, the Appellate Division explained:

> Although all engineers have a professional obligation to see that the work they do is accurate and in conformance with accepted standards of care, the duty to foresee and prevent a particular risk of harm from materializing *should be commensurate with the degree of responsibility which the engineer has agreed to undertake* [emphasis added].

The rule announced by the *Sykes* court has since been adopted into the New Jersey model civil jury charge for architects and engineers.

Although the *Sykes* court did not discuss privity issues between the engineer and the deceased employee, the same factors embraced by the *Conforti & Eisel* court in establishing liability in the absence of privity were evident in the reasoning for the *Sykes* decision: the forseeability of harm, the relationship between the parties, the nature of the risk, and the policy of preventing future harm. Moreover, while one can distinguish *Sykes* by noting it was a personal injury case, it is important to remember that the duty owed to injured workers was an underlying rationale relied upon by the court in *Conforti & Eisel*. In that regard, perhaps this duty should be narrowed further. Attention is directed to the engineer's site safety statute found at N.J.S.A. 2A:29B-1, which seems to reign in the duty owed by a professional.

In short, current law supports the proposition that a contractor may maintain an action for negligence against a design professional for purely economic damages, even in the absence of contractual privity. However, the design professional's duty to such a contractor must be tempered against the overall degree of responsibility the design professional has agreed to undertake per his or her contract. ■

ENDNOTES

1. 137 N.J.L. 671 (E. & A. 1948).
2. 52 N.J. 202 (1968).
3. 175 N.J. Super. 341 (Law Div. 1980) *aff'd* 199 N.J. Super. 498 (App. Div. 1985).
4. 161 F. Supp. 132 (S.D. Cal. 1958).
5. *See Morie Energy Management v. Badame*, 241 *N.J.Super.* 572 (App. Div. 1990) (explaining *Conforti & Eisel* as holding that a "contractor awarded a public contract may maintain a tort action for damages resulting from the negligence of a professional who has prepared plans for the contracting agency").
6. 224 N.J. Super. 686 (App. Div. 1988).

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