Contract Is King: Assessing Commercial Design Professionals' Liability for Flawed Plans, Inspections

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Recent decisions made in the Las Vegas CityCenter complex litigation confirm that "contract is king" in assessing commercial design professionals' liability for faulty plans and inspections.

The main dispute in the litigation involves the alleged defective construction of Harmon Tower. During construction of the tower certain construction defects were discovered on the 23rd floor of the structure. Specifically, it was discovered that certain structural elements were nonconforming due to the alleged incorrect installation of structural steel. As a consequence of the discovery, it was agreed that the construction of the top 20 floors of the structure (the condominium units) would be deleted and the building would be topped out at 27 stories.

Remedial efforts were attempted but soon the relationship between the owner and the contractor deteriorated and litigation ensued. The owner (MGM) filed suit against the general contractor (Perini Building) for breach of contract and construction defects and Perini Building counter-sued for amounts owed. Inevitably, the structural steel subcontractors were joined to the litigation on claims of breach of contract, construction defects and indemnity.

The structural steel subcontractors brought claims against the structural engineers, *Halcrow*, and the third-party structural inspectors, Converse, for negligence, gross negligence, misrepresentation, indemnity and contribution. In response to the claims the design professionals moved the trial court to dismiss the claims. The trial court denied both motions for dismissal in *Halcrow, Inc. v. Eighth Judicial District Court*, 129 Nev. Adv. Op. No. 42 (June 27, 2013), and *Converse Professional Group v. Eighth Judicial District Court,* 129 Nev. Adv. Op. 70 (Oct. 3, 2013). Both orders denying dismissal were addressed on writ of mandamus by the Nevada Supreme Court, which overturned both of them.

Combined, the two decisions make it clear that design professionals (which include third-party inspectors are immune from subcontractor claims absent specific contractual provisions to the contrary).

In addressing the structural engineer's writ in *Halcrow*, the court confirmed its holding in *Terracon Consultants Western, Inc. v. Mandala Resort Group*, 125 Nev. 66, 206 P.3d 81 (2009), which bars professional negligence claims for economic loss against design professionals in the commercial context. The structural steel subcontractors however characterized their claims as misrepresentation claims based upon Halcrow's failed inspections and failure to make required field modifications to its design rather than negligent design claims. The

structural steel subcontractors argued that an exception to the economic loss doctrine should be allowed for misrepresentation because the misrepresentation was made directly to them and allowing such claims would not lead to "unlimited liability."

The *Halcrow* court rejected the subcontractor's argument. Although the court agreed that an exception to the economic loss rule would be proper where "there is a significant risk that 'the law would not exert significant financial pressures to avoid such negligence,' " the court also found a commercial construction project did not pose such a risk. Instead the court reasoned that in the commercial construction context, "contract law was better suited" to handle the risks against negligence. Commercial construction transactions involve a "highly interconnected network of contracts" that delineate each party's risks and liabilities in case of negligence, which in turn " 'exert significant financial pressures to avoid such negligence,' " the court wrote citing *Terracon*. Finally, the court explained that disallowing the negligent misrepresentation exception to the economic loss doctrine in the commercial construction context would require those involved in commercial construction projects that are not in privity with one another, but are involved in the "network of interrelated contracts" to rely upon that "network" to ensure that all parties involved in complex commercial projects have a remedy should negligence occur.

In "plain speak," the court suggested that subcontractors must contractually assure that the risk of loss related to design professionals be borne by their general contractor, that the general contractor assure that the risk of loss related to design professionals be borne by the owner and that the owner assure contractually that the design professional be solely responsible to all parties on the project for loss resulting from their actions or inactions.

The court's "network of interrelated contracts" concept may be theoretically sound, however practically it doesn't apply. Most design professional/owner contracts limit the design professional's liability particularly with regard to third parties. Likewise owner/contractor agreements limit, if not exonerate, the owner from any harm to the contractors and its subcontractors caused by acts and omissions of the design professionals. Contrary to the court's theory, the "network of interrelated contracts" provides no safety net for those who rely on the work of the design professionals.

The message sent by the *Halcrow* decision is clear: "Contract is king." General contractors and subcontractors be advised that if you are not afforded protection from design professional negligence in your agreements then you bear the risk of loss from their actions and inaction. Contractors must expend more effort and resources in negotiating their agreement. Prior to executing any agreement, they should require copies of all contracts included in the "interrelated network" and should understand how risk is apportioned in the "interrelated network." Only by understanding how such risk is contractually apportioned in this "network" can contractors and subcontractors understand, assess and address their risk in accepting the work.