Legal Feature

Contractor Claims Against the Owner's Designer

by Peter Kutil, Esq. and Karl Silverberg, Esq.

Background

Can a contractor sue an engineer or other design professional directly for misrepresentations in the plans and specifications? There are 50 states in the Union and the District of Columbia and each jurisdiction that has addressed the question has their own rules and guidelines on this issue. Some states or jurisdictions allow suits based on a "foreseeability" standard, and some states do not permit such suits based on the "economic loss rule." This article will explain these concepts and discuss the common threads among the cases that have addressed this issue.

Law schools indoctrinate lawyers on the finer aspects of civil law and criminal law. With respect to civil lawsuits, there are two broad areas of the law, contract law and tort law. Contract law is based on obligations between contracting parties to an agreement. When parties are in direct contract, they are said to be in privity of contract. Tort law is based on social obligations between fellow citizens – such as the duties a licensed professional may owe to people that rely upon his or her services or representations. Because construction involves contracts and also the concepts of duty found in tort law – such as the law of negligent misrepresentation by a design professional – construction projects present unique facts and provide a legal battleground for these broad concepts of contract and tort law.

Historical Cases to Explain the Concepts

In the early 1900s it used to be that if a buyer had purchased a motor car from a dealer and the car caused a grave injury to the car owner, that the car owner could only sue the party who had sold him or her that car. The car manufacturer was not liable because the buyer did not have a direct contract with the manufacturer. Privity was lacking and a bar to any suit. In the late 1910s, the law recognized that this result was not fair and the courts broadened the possible group of plaintiffs that can sue the ultimate wrongdoer. Privity was no longer an absolute bar to a suit. The line of cases that followed, however, did not allow for a plaintiff to sue for purely economic damages. As a matter of policy, the courts distinguished between personal injury (or property) damages and so-called pure economic damages. If the car owner was delayed three hours due to the accident, these three hours in lost wages were not recoverable. This concept was given the moniker of the "economic loss rule." The economic loss rule, however, like many legal doctrines is not absolute.

The wrinkle comes into play when a professional's trade is one where the likely or foreseeable recipient is a third party and the likely damages are economic. If a public weigher certifies a weight, if an accountant prepares an audit and a financial statement, if an engineer prepares plans and drawings, there is a reasonable likelihood that an error may cause economic loss to a third party. If an engineer negligently prepares plans for an owner knowing the contractor will rely upon the plans, and the contractor incurs extra costs, even though purely economic damages, the contractor may be able to sue the engineer directly.

The history of the clash between the economic loss rule and the legal concepts of negligent misrepresentation dates to the 1922 case of Glanzer v. Shepard. The Glanzer decision was written by the renowned Judge Benjamin Cardozo, who sat on New York State's highest court and then as a Justice on the U.S. Supreme Court. The Glazner case involved the sale of beans. The seller purchased a certificate of weight from a public weigher. The buyer then paid the seller based on the public weigher's certificate. After the sale was complete, the buyer discovered that the public weigher's certificate overstated the weight of the beans. The buyer sued the public weigher for the amount the buyer overpaid due to the public weigher's mistaken weight certificate. The public weigher's defense was that there was no contract with the buyer because the seller paid for the weight certificate. Judge Cardozo found the public weigher liable for the buyer's damages. Judge

Carodzo said: "The [buyer's] use of the certificates was not an indirect or collateral consequence of the action of the weighers' [certificates, but rather] was the end and aim of the transaction. . . . [The public weighers] held themselves out to the public as skilled and careful in their calling."

In 1930, Judge Cardozo again faced a negligent misrepresentation case in Ultramares Corp. v. Touche, Niven & Co., a case involving accountants. In Ultramares, money was lent to a business based on an accountant's certified financial statement. The financial statement was not made for purposes of the particular loan transaction, but was made for purposes of the company's general financial dealings. The financial statement was inaccurate, the lender lost money and the lender sued the accountant directly. In this case Judge Cardozo did not hold the accountants liable. He said: "If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms [is] extreme." Distinguishing this case from the decision in Glazner involving the sale of beans, Judge Cardozo said that in Galzner, "[t]he bond was so close [between the public weigher and the buyer] as to approach that of privity [of contract]."

Current View Depends on the Jurisdiction

Since the 1930s, a stream of cases have struggled to fit claims by contractors against engineers and other design professionals into either the Glazner model or the Ultramares model.

A case representative of holding engineers liable to contractors is the 2000 Pennsylvania case of Borough of Lansdowne v. Sevenson Environmental Services. In this case, Army Corp of Engineers designed a project to clean up certain buildings in a local township contaminated by radiation. The contractor had to perform excavation and construction of retaining walls. During the construction of a shoring system for the excavation of the site to proceed, large amounts of grout filled and blocked access manholes and sewer lines owned by the local township. The contractor sued the project's engineer for failing adequately show the location of the local township's sewer lines which led to the infiltration of the grout. The engineer claimed that because there was no contract between the engineer and the contractor, that the contractor could not sue the engineer.

The U.S. District Court, interpreting Pennsylvania state law, found that the contractor could sue the engineer. The Court found that liability is warranted because the engineer "should reasonably foresee [that the contractor might be] harmed by his negligent provision of false information." Liability was warranted because the engineer supplied information to bidders who are relying on the engineer's guidance.

A representative case where the court did not find a design professional firm liable on very similar facts is the 1992 New York case of Williams & Sons Erectors, Inc. v. South Carolina Steel

Corp. In Williams, a public authority hired an architectural firm to prepare plans for a university building. The plans would be distributed to prospective bidders. Many problems occurred during the design phase and the authority's internal design review board found major defects. For example, the architect's design showed the project's roof was to be sloped; the structural plan failed to correspond and did not include such slope. The plans continued to be revised and notwithstanding internal reservations, the authority put the plans out for bid.

After contract award, the winning contractor and its steel fabricator determined that the structural steel fabrication could not go forward because the structural plan improperly coordinated with the architectural plans. Among these errors was the previously noted discrepancy between the architectural and structural plans with respect to the shape and slope of the project's roof. After construction began, the authority submitted an entirely new set of plans, and when more errors appeared, the authority issued a third set the following month. Further, during construction, the authority had to make 267 change orders because of plan errors that caused appellants to perform additional work.

The contractor sued the architectural firm for the contractor's damages resulting from the architectural firm's negligent misrepresentations as evidenced by the defective plans. The U.S. Court of Appeals, interpreting New York law, first stated the rule in New York. As New York law developed since Judge Cardozo's time, to maintain a claim for negligent misrepresentation requires a "bond between [the parties] so close as to be the functional equivalent of contractual privity." The Court found that because the architectural firm's actions were "directed to all prospective bidders, not simply to [the winning contractor]," that the relationship between the contractor and the architectural firm was too distant and not the functional equivalent of contractual privity, as required by New York law.

Summary

Whether a contractor can sue a design professional, when there is no direct contractual relationship between them, depends on the jurisdiction and the facts of particular case. The interaction or connection between the contractor and the designer, the foreseeability that a mistake by a designer will harm a particular contractor, the end and aim of the designer's work, all go into the mix of determining whether a contractor can sue an engineer or other design professional when there is no direct privity of contract between the contractor and designer.

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