Trends in Florida Design Professional Claims Webinar

Presentation by D. Spencer Mallard, Esq.* and Jeremy W. Harris, Esq.

*Board Certified in Construction Law By The Florida Bar

LYDECKER LLP

NEW YORK | NEW JERSEY | PENNSYLVANIA | FLORIDA | CALIFORNIA

Handling claims in Florida state-wide.

sm@lydecker.com

jharris@lydecker.com

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COMMON CLAIMS AND CAUSES OF ACTION INOVLVING DESIGN PROFESSIONALS

CAUSES OF ACTION:

1. **Breach of Contract**
2. **Professional Negligence**
3. **Contribution/Equitable Contribution/Common Law Indemnity**
4. **Violation of Building Code**
5. **Contractual Indemnity**
6. **Contractual Indemnity for Public Agency Projects**

Breach of Contract

1. To recover for breach of contract, the plaintiff must establish:
   a. The formation of a contract between the plaintiff and the defendant,
   b. A material breach of the contract, and
   c. Resulting damages.
2. Frequently relevant contract terms
   a. Responsibility for review/approval of submittals and shop drawings
   b. Scope of construction administration services
   c. Indemnity obligations
   d. Requirements for Owner's contract with contractor

Professional Negligence & The Standard of Care

1. Under common law in Florida, "Professionals rendering professional services are to perform such services in accordance with the standard of care used by similar professions in the community under similar circumstances." *Trikon Sunrise Assocs., LLC v. Brice Bldg. Co.* 41 So.3d 315 (Fla. 4th DCA 2010).
2. However, "if the professional contracts to perform duties beyond those required by ordinary standards of care, the quality of that performance must comport with the contractual terms."

Contribution, Equitable Contribution and Common Law Indemnity

1. Contribution
   a. Fla. Stat. §768.31 provides for a right of contribution among tortfeasors who has paid more than its pro rata share of common liability.
2. Equitable Contribution
   a. Accrues after the plaintiff has incurred an obligation.
   b. No contemporaneous claims for contribution.
3. Common Law Indemnity
   a. Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other.
   b. The party seeking indemnity must allege: (1) special relationship between the two parties that gives rise to the liability of the would-be indemnitee; (2) indemnitee is wholly without fault; (3) indemnitor is wholly at fault; and (4) indemnitee is liable only because of vicarious, constructive, derivative, or technical liability for the acts of the indemnitor.
4. These are generally regarded as catch-all theories

Florida Building Code Violation: Florida Statute § 553.84

1. Any person or party damaged as a result of a violation of the Florida Building Code, has a cause of action against the person or party who committed the violation.
2. However this does not apply if:
   a. The person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans,
   b. If the construction project passes all required inspections under the code, and
   c. If there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections.
   d. Exception: if the party knew or should have known the condition violating the building code existed
3. **Material code violation**-defined by statute and by the FBC as one which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.

Contractual Indemnity

1. Limitation on indemnification for construction contracts pursuant to Florida Statute § 725.06
   a. Any portion of a contract for indemnity by one party for another party's negligence is enforceable, however, the indemnity provision must:
      i. Have a monetary limitation on the indemnification that bears a reasonable relationship to the contract, and
      ii. Be a part of the contract specifications or bid documents.
2. An indemnity provision incident to a contract, the main purpose of which is not indemnification, must be construed strictly in favor of the indemnitor.
3. Fla. Stat. § 725.06(2) and (3) limits contractual indemnity related to public agency's projects to liabilities, damages, losses and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party. This means no indemnity by one party for another party's negligence in public agency projects (like roadways).

Defenses to Claims Against Design Professionals

* Lack of Duty (Contractual or Common Law)
  * Typical AIA based language does not make design professional responsible for means/methods of construction. However, basic construction administration can give rise to liability for personal injuries. *See e.g. Parliament Towers v. Parliament House*, 377 So.2d 976 (Fla. 4th DCA 1979).
  * Contractors and even some subcontractors have a potential claim against design professionals for design defects. *See e.g. AR Moyer v. Graham*, 285 So.2d 397 (Fla. 1973). However, this type of claim has been limited where professional had no control over work and had no direct interaction between parties. See e.g. *McElvy v. Alrington*, 582 So.2d 47 (Fla. 2nd DCA 1991).
  * Economic loss rule no longer viable absent product liability. *See Tiara Condo Ass'n Inc. v. Marsh & McLennan*, 110 So.3d 399 (Fla. 2013).

* Failure to Establish Violation of Standard of Care Specific to Professional
  * Examples: design omissions/inconsistencies, inspection oversights, lack of community evidence/testimony, lack of appropriate standard of care testimony

Contractual Limitations of Liability for Design Firms

* Many design contracts have caps on designer's liability equal to the amount of services rendered or other small amount relative to exposure.
* Courts narrowly construe such provisions, but will enforce them if they are clear and unambiguous. *See e.g. Eller v. Galapagos*, 493 So.2d 1061 (Fla. 3d DCA 1986).
* These provisions can be avoided if professional performed service outside contract to serve as basis for professional negligence claim.
* Does not apply to non-parties to the contract, such as condominium associations or in personal injury matters.

Pre-Suit Requirements: Florida Statute Chapter 558

1. Florida Law is Now Settled that Chapter 558 Process is a "suit" under standard ISO language in commercial general liability policies. *Altman v. Crum & Forster*, 232 So.3d 273.
2. Chapter 558 requires a property owner to provide written notice of specific defects to potential defendants prior to filing suit.
    a. Notice must be served 60 days before suit for projects with less than 20 owners and 120 days for projects with more than 20 owners.
    b. Notice can require documents to be provided within 30 days.
3. Process allows for inspections, testing, exchange of expert reports and offers to resolve through repair or payment.
4. All expert reports exchanged are privileged for purposes of litigation and recent statute changes allow for claim of privilege to other materials.
5. Virtually no enforcement for compliance with specific timeframes.

STATUTES OF LIMITATION AND REPOSE

1. **Statute of Limitations: Florida Statute Section 95.11(3)(c)**
   a. Four-Year Statute of Limitations for Construction Claims
   b. New statute revision makes date of TCO the likely running date unless there is a more obvious trigger beforehand
2. **Statute of Repose**
   a. New statute revision makes date of TCO the likely running date unless there is a more obvious trigger beforehand
   b. New Definition of When Statute Begins To Run based on earliest of several dates that will likely be date of TCO
   c. Statute is retroactive, but there is savings period until July 1, 2024
   d. One-year extension for Pass Through Claims remains

RECOVERABLE DAMAGES

1. **Measure of Damages**
   a. Reasonable cost of construction, or
   b. Difference in value
   c. Liquidated damages provisions
   d. Personal injury claims (past/future economic and non-economic)
2. **Negligent Misrepresentation and Benefit of the Bargain Damages**- plaintiffs can theoretically recovery the benefit of the lost bargain
3. **First Cost Rule**
   a. If an item was left out of the original design, the Owner is responsible for the cost of such item as if it was incorporated into the original design
   b. However, the Design Professional can be held liable for the difference in cost to install such item at a later time as opposed to installing during original construction
   c. Design Professionals may also be held liable for consequential damages.

Limitations on Liability for Individual Design Professionals

1. Licensed Professional are generally not shielded from liability even though he/she practices under a business entity
2. Safe Harbor for employees or agents of a design company is provided by Florida Statute 558.0035 if the contract carefully constructed.
3. Contract must contain the following provisions:
    1. Contract must be made between the business entity and claimant for the provision of professional services to the business entity;
    2. Contract must **not name an individual** to perform design services as a party to the contract;
    3. Contract must including a prominent statement (IN UPPERCASE FONT THAT IS AT LEAST 5 POINT SIZES LARGER THAT OTHER TEXT) that an individual employee or agent may not be held individually liable for negligence.
    4. Contract must include a provision that require the business entity to maintain professional liability insurance required under the contract; and
    5. Contract must provide that any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

Joint and Several Liability Abolished in Tort, Perhaps Alive in Non-Tort

1. The Florida Legislature abolished the doctrine of joint and several liability on April 26, 2006 with passing the current version of §768.81 requiring apportionment of fault.
2. There is not a similar statute pertaining to contract or statutory claims, including defense cost claims.
3. The 30-year-old Substantial Factor Test has not been Rejected by Florida Courts and allows for joint/several-type liability if liability cannot be accurately apportioned between parties.

Apportionment of Fault to Non-Parties in Tort Claims

1. *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993) and *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996)
   a. In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty.
   b. The defendant must identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented.
   c. The defendant has the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict.
2. Inclusion of the *Fabre* defendant in the verdict form
   a. Once a party meets these pleading and proof requirements, a jury instruction should be given regarding the apportionment of fault and the nonparty should be included in the appropriate section of the verdict form.

Attorneys' Fees, Costs and Pre-Judgment Interest

1. Attorneys' Fees are Not Recoverable Absent Contractual Requirement, Statutory Authorization or by Operation of Proposal for Settlement/Offer of Judgment.
   a. Statutes Authorizing Fees: § 501.211 and § 57.105
   b. Neither statute applies often and requires fraud by party or frivolous claim
2. Florida Statute §768.79 provides the vehicle for offers and demands for judgment entitling a party to reasonable costs incurred from the date the offer was served.
   a. A defendant is entitled to recover attorney's fees and costs if the judgment is no liability or if the plaintiff's judgment is at least 25 percent less than such offer.
   b. A plaintiff is entitled to recover attorney's fees and costs if the judgment is at least 25 percent greater than such offer.
   c. A joint proposal for settlement, such as in the situation from one defendant to multiple plaintiffs, requires apportionment of the amount and terms offered to each plaintiff.
3. Costs are awarded to the prevailing party and can include expert costs.
4. Appellate courts in Florida are split on whether pre-judgment interest starts at completion or upon expenditure of out of pocket costs.
5. Courts can and have held that a case can end in a tie, with neither side prevailing and no one being entitled to attorney's fees. *Wells Fargo Bank, N.A. v. Moccia*, 258 So. 3d 469 (Fla. 4th DCA 2018).

Defense Based Issues

1. Extra Contractual Exposure
   a. Liability for damages sustained by an insured as the result of an insurer's breach of its duty to defend.
   b. *Coblentz* agreements permit an insured to enter into a negotiated settlement agreement or consent judgment with a third party where an insurer "refuses to handle" the defense of its insured. Estoppel cannot be used to create or extend coverage that does not otherwise exist
   c. Estoppel cannot be used to create or extend coverage that does not otherwise exist
2. Right to Select Counsel
   a. Florida Statute Section 627.426(2)
      i. Reservation of rights letter may trigger mutually agreeable counsel.
      ii. An insured can only invoke this statute when a "coverage defense" asserted.

QUESTIONS

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sm@lydecker.com

jharris@lydecker.com

Direct: 305-415-6398 (Routes to All Offices)

Main Office: 1221 Brickell Avenue, 19th Floor
Miami, Florida 33131