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Texas "Loser Pays" Legislation Brings Significant Changes to Texas Civil Practice

By Amanda Y. Sirk, Esq.

ON MAY 30, 2011, THE TEXAS LEGISLATURE AND GOVERNOR Rick Perry enacted House Bill 274. The legislation is entitled "Reform of Certain Remedies and Procedures in Civil Actions and Family Law Matters" and took effect on September 1, 2011. The new law has significantly changed the legal framework for civil actions in Texas and provides a fee-shifting provision that gives the law its popular "Loser Pays" moniker. The "Loser Pays" law includes dismissing a case at an earlier phase in the litigation if it lacks any basis in law or fact; expediting cases with $100,000 or less in controversy; allowing interlocutory appeals with greater ease; encouraging settlement offers; and designating responsible third parties earlier during the course of litigation.

Motions to Dismiss and Attorneys' Fees

The new law instructs the Texas Supreme Court to expedite the dismissal of cases if there is "no basis in law or fact." The law specifically requires that Motions to Dismiss "be granted or denied within 45 days" of the Motion's filing. Additionally, if an action is dismissed under the new law, the court must "award costs and reasonable and necessary attorney's fees to the prevailing party." In so doing, the legislature has shifted Texas away from the default "American Rule" in which each side must bear its own attorneys' fees and expenses, and has moved toward the English "loser pays" approach.

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Pennsylvania's New 'Fair Share Act' Provides a More Equitable Distribution of Damages among Design Professional Defendants

By Megan E. Lehman, Esq.

ON JUNE 28, 2011 PENNSYLVANIA GOVERNOR TOM CORBETT signed into legislation a bill that significantly limits the potential liability of defendants in negligence cases by altering the Pennsylvania Courts' application of the legal theory known as 'joint and several liability.'

Previously, the Pennsylvania courts applied the theory of joint and several liability to those negligence actions which resulted in either death or injury to a person or property. Traditional joint and several liability provides that *all* defendants found liable in such an action may be *individually* liable for up to 100 percent of the total damages awarded to a plaintiff in the event that their co-defendants were unable to pay. As a result, plaintiffs were encouraged to join a multitude of parties ranging from deep-pocket companies to small-business owners that had little connection to the damages sustained by the plaintiff, simply because of their ability to pay for these damages.

The recently enacted law, known as the Pennsylvania "Fair Share Act" ("the Act"), provides that in negligence actions where multiple defendants are found at fault, the liability of each defendant is limited to its proportionate share of responsibility for the loss as attributed to it by a judge or jury. The new law applies to those cases involving design and construction professionals and will go far to prevent mass joinder of parties and inequitable distribution of damages because it mandates that any defendant found less than 60 percent liable can be required to pay only its own share of the damages determined by a fact finder.

The following example illustrates the changes under the Act. Plaintiff was awarded $100,000 in damages in a negligence action that involved four different defendant contractors. The jury found that Contractor A was 70% at fault, Contractor B was 15% at fault, Contractor C was 10% at fault and Contractor D was 5% at fault. Applying joint and several liability, *any of the four contractors* could be held individually responsible for the entire $100,000 damages award if the other three contractors fail to tender payment.

Under the Act, liability is "several," and not "joint" for any defendant found less than 60% at fault. In essence, each contractor could be held liable solely for its percentage of liability unless it were found 60% or more at fault. Under the Act, (and using the above example), Contractor B could be liable to the plaintiff for $15,000, Contractor C for $10,000, and Contractor D for $5,000, even if Contractor A were bankrupt and unable to pay. However, because Contractor A's liability exceeded 60%, it could be ultimately liable for 100% of the damages if the others could not pay.

Exceptions to the Fair Share Act

There are several key exceptions to the Act. Most importantly, the Act does not affect contractual indemnity provisions. Therefore, if a contract requires a subcontractor to indemnify a general contractor for injuries to third parties irrespective of fault, the contractor may still seek contribution from the subcontractor pursuant to the terms of their contract, regardless of which party is found more at fault by the judge or jury.

The Act is not retroactive and applies only to those claims arising after June 28, 2011, the date of enactment. This also prohibits the Act from applying to negligence actions which involve injuries that occurred prior to June 28, 2011 and are currently pending or newly instituted.

Finally, the Act does not apply to damages awarded

for intentional misrepresentation, intentional torts, environmental crimes or liquor law violations.

Conclusion

The Fair Share Act will provide relief for design professionals that have minimal or no liability for the claims asserted. The Act shifts this risk to the plaintiff and permits recovery solely for a defendant's proportionate share of liability. Indeed, the Act is plainly intended as a disincentive to plaintiffs to force entities into litigation when they have little liability, but significant ability to pay.

While it is still too early to evaluate the full impact of the Act on Pennsylvania's business environment, it is anticipated that the Act will relieve unwarranted pressure on solvent businesses, including design professionals, to quickly settle frivolous lawsuits for fear of having to pay damages disproportionate to their fault.

Design Professionals' Gains in New Jersey's Economic Loss Doctrine

By Eric Cohen, Esq.

DONOVAN HATEM LLP SECURED A CRITICAL NEW JERSEY Appellate Division decision that explicitly exonerates design professionals from tort liability when sued by a third party with whom the design professional has no privity, as long as the third party has contractual avenues through which it may recover.

The decision stemmed from a construction project to build a high school and athletic field in Harrison, New Jersey (the "Project"). The Project Owner retained Plaintiff, a General Contractor to construct the Project. Owner also retained an Architect to design the project and a separate Construction Management team. The Architect then hired the Engineer, to perform subsurface investigations among other things. The Owner had a contract with each of the entities it retained and the Architect also had a written contract with the sub-consultant Engineer which incorporated by reference the Architect/ Owner contract.

The Project encountered numerous problems, including expensive delays. Among the General Contractor's claims was that it relied, to its detriment, upon the Engineer's reports and that the Engineer negligently performed its subsurface studies by concluding, among other things, that there were no hazardous soils at the Project. During construction, however, questionable materials were found resulting in Project delays and increased costs to the General Contractor. The General Contractor sued each of the above-referenced parties for breach of contract and negligence (among other claims not relevant to this article or the outcome of this case), seeking $14 million in damages.

The General Contractor eventually settled its claims against the project Owner and the Construction Management team. Its remaining claims were solely against the design professionals: the Architect and Engineer, neither of which was in privity with the General Contractor. Indeed, Design Professionals' contracts expressly precluded any other party from being a beneficiary to the Design Professionals' services. Nevertheless, the General Contractor remained confident in its legal position, relying heavily on the trial court's decision in *Conforti & Eisele, Inc. v. John C. Morris Associates*, 175 N.J. Super, 341 (Law Div. 1980), aff'd, 199 N.J. Super., 498, 500 (App Div. 1985). Unfortunately, *Conforti* is still frequently thought to be the banner case addressing the application of New Jersey's Economic Loss Doctrine. *Conforti* supports the conclusion that a contractor that sustains economic damages as result of a design professional's negligence can recover those economic damages. At first blush, it appeared that the General Contractor's opinion of his case's strength was justified.

Plaintiff believed that *Conforti* mirrored its allegations. Both cases involved a general contractor damaged by its reliance on a design professional with which it had no contract.

We disagreed. And, the Appellate Division concurred and in its recent Order affirmed the Trial Court's enforcement of the Economic Loss Doctrine as the basis for its dismissal of Plaintiff's claims against the Engineer. The Economic Loss Doctrine bars resort to tort theories of liability when the relationship between the parties is based on a contractual relationship, so long as the claims are not for personal injury or damage to property other than that which is the subject of the Project.

In affirming the trial level court's dismissal of all claims against the Design Professionals in our case, the Appellate Division refused to apply *Conforti* for two distinct and seemingly equally enforceable reasons. The first is based on contract law and the second relies on the contract theory and also incorporates principles of equity.

Agreeing with the Engineer's reliance on *Saltiel v. GSI Consultants, Inc.,* 170 N.J. 297 (2002), holding that when a complaint sounds in tort (i.e., negligence), but the relationship between the parties is defined by the contract between them, contract principles will generally apply. Quoting Professors Prosser and Keaton on the law of torts, the Appellate Division held that the "recovery of intangible economic loss is generally determined by contract…and [t]ort liability does not arise for claims based on failing to do what a person has agreed to do." In other words, contract principles applied in this instance because the Engineer was sued for allegedly failing to properly perform the services it "agreed to do."

With *Saltiel* disposing of the General Contractor's negligence claim, the General Contractor/ Plaintiff was left with only its breach of contract action. However, since it had no contract with the Engineer it could not maintain its claim.

The Appellate Division also referred to the specific language and exclusions utilized by the Engineer in its contract which support the Court's conclusion and should be incorporated consistently into contracts among parties in similar circumstances. The two primary contract clauses are; (a) "Nothing contained in this Agreement or the Contractual Documents shall create a contractual relationship with a third party or create a cause of action in favor of thirds party against [design professional]"; and, more generally, (b) "the instant submission prepared by [design professional] is intended for use only by its recipient." As the situation permits it is prudent to limit the intended purpose of the submission so that it cannot be relied upon for bidding, or any other purpose outside of its intended use.

The equitable factor referenced in the Court's ruling takes a close look at *Conforti* and *People's Express Airlines, Inc. v. Consolidated Rail Corp.,* 100 N.J. 246 1985, which have long been cited by contractors to strong-arm significant settlements from design professionals. The recent Appellate Division Decision adopted the Engineer's position and seeks, with one exception, to preclude that outcome.

In *People's Express,* the Court permitted the Plaintiff to pursue claims sounding in contract to proceed as torts and permitted its recovery of economic losses caused by a leaking rail car which, in turn, required the evacuation of plaintiff's business premises. In this case, however, the Appellate Division realized that in both *Conforti* and *People's Express,* absent a sustainable claim against those defendants, the Plaintiffs would have been left without any remedy whatsoever, if they were not permitted to proceed in tort. The Plaintiff in *People's Express* had no contractual relationship with the owner of the faulty rail car and, absent its ability to pursue its claims against the rail car company, it would be left without any recourse.

Here, as in most cases involving construction and design, the General Contractor had a means of recovery through one of the defendants. In fact, not only did the General Contractor have a contract with the Owner to pursue, but it also had a change order procedure which it followed during the Project. As alluded above, the General Contractor actually achieved a healthy settlement with that party.

The impact of this ruling is significant. As long as a Plaintiff is not without any remedy at all, it can no longer pursue a design professional with whom it has no contract. New Jersey's Appellate Division has finally clarified its often misunderstood position on the Economic Loss Doctrine in a practical manner that helps the design professional community.

Nevada Supreme Court Strictly Enforces Certificate of Merit Statutes

By Sa'adiyah Masoud, Esq.

THE SUPREME COURT OF NEVADA ENTERED ITS RULING IN *OTAK Nevada, LLC v. Eighth Judicial District Court,* 127 Nev. Adv. Op. 53 (2011) granting extraordinary relief to the architect. In short, the court held that Nevada law mandates that any complaint filed against a design professional for professional malpractice, whether a complaint, cross claim or counterclaim, ***must*** be filed with a valid certificate of merit to maintain a professional liability claim. Any complaint lacking a certificate of merit cannot be amended and must be dismissed. In a corollary holding, the court held that, in multi-party litigation, each party asserting professional malpractice allegations must prepare a certificate of merit particularized to its claims, and cannot rely on any other party's certificate of merit.

Nevada is one of eleven states that have enacted a certificate of merit statute requiring a plaintiff who intends to sue a design professional for professional malpractice to consult with a third-party design professional prior to commencing an action, and secure an opinion that the defendant professional has breached the standard of care. Nevada has two statutes to this effect – NRS 40.6884, *et seq.* (residential projects) and NRS 11.258, *et seq.* (non-residential projects), both of which require potential plaintiffs to first secure a certificate of merit. Until the *OTAK Nevada* decision, lower courts in Nevada had been reluctant to strictly enforce these statutes; such strict compliance is now required.

In *OTAK Nevada*, a deceased motorist's family and a surviving passenger brought wrongful death and personal injury actions against entities involved in the construction of street improvements alleging a construction defect. The general contractor, in turn, filed a third-party complaint against the architect, but initially failed to attach a certificate of merit when it served its complaint. It attempted to "cure" its omission before the architect could file a responsive pleading by amending its third-party complaint to append a certificate of merit. The architect then moved to dismiss the general contractor's action on the grounds that the certificate of merit was not filed concurrently with the original third-party complaint. The trial court allowed the general contractor's amendment and denied the architect's motion. Shortly thereafter, the other defendants filed cross claims against the architect relying on the general contractor's certificate of merit. The trial court allowed those pleadings as well.

The architect successfully appealed the denial of its motion to the Nevada Supreme Court through a Writ of Mandamus. In its decision, the court held that a complaint filed without a valid certificate of merit is *void ab initio* ("to be treated invalid from the outset"), has no legal effect and cannot be cured by amendment. While a party can file a new complaint with a valid certificate of merit, if any statutes of limitation have run in the interim, those claims cannot be revived. The court held further that each party filing a complaint, cross claim and/or counterclaim which alleges professional liability must file its own, valid certificate of merit.

This is a very favorable decision for design professionals providing services in Nevada and will certainly prove to be a significant burden to many plaintiffs seeking to bring meritless claims against architects and engineers.

New Jersey Appellate Court Limits Liability Based upon Reasonable Contractual Provision

By Jacqueline J. Rompre, Esq.

A NEW JERSEY APPELLATE COURT RECENTLY UPHELD the decision of a New Jersey superior court enforcing a limitation of liability clause in a contract for environmental consulting services. The claim in *VMD Associates, LLC and Atlantic Delta Corporation at Montgomery, Inc. v. Melick—Tully and Associates, P.C.*, 2011 WL 3503160 (N.J. App. 2011) arose out of a contract between Melick-Tully and Associates, P.C. ("MTA") and a real estate developer (the "Developer") pursuant to which MTA provided a remediation plan for an environmentally contaminated property in Somerville, New Jersey (the "Property").

Over the course of approximately six months, MTA sent the Developer five contracts, each of which contained a limitation of liability clause limiting MTA's damages in professional negligence actions to $25,000. Although the Developer did not sign any of the contracts, it failed to object to the terms contained in them, and paid MTA $19,826.35 in fees pursuant to the schedule set forth in those same documents.

MTA issued a report estimating that remediation of the Property would cost between $13,000 and $17,000. After receiving MTA's report, the Developer purchased the Property, but never performed remediation. Five years later, when the Developer attempted to sell the Property, it was unable to do so because tests revealed that the cost to remediate the environmental issues could exceed $100,000. After the sale failed, the Developer sued MTA for professional negligence, alleging damages of $2 million. The New Jersey superior court granted summary judgment in favor of MTA and limited any damages to $25,000 pursuant to the limitation of liability clause in the contracts. The Developer appealed the judgment alleging that the clause was unconscionable, violated public policy, there was an inequality of bargaining power, and that the contracts were not enforceable because they were unsigned.

Specifically, the Developer alleged that the limitation of liability clause was unconscionable because it provided inadequate economic incentive for MTA to diligently perform its work. The appellate court disagreed finding that the clause, which limited MTA's liability to twenty-five percent *more* than the total contract price, provided sufficient economic incentive. The court noted further that inadequate economic incentive to perform diligently in the face of a limitation of liability clause exists when the limitation imposed is far less than the compensation anticipated under the contract. The court contrasted the MTA contract with an earlier case in which it had invalidated an unconscionable limitation of liability clause because the limitation was equivalent to half the payment the party received for its services. In this instance, however, MTA's contractual exposure was greater than the fee it actually received.

The court also held that the clause did not violate public policy because it was not a disfavored "exculpatory clause" which would otherwise relieve a party from *any* liability for its own negligent or wrongful acts in the professional service context. The court found that the $25,000 limitation was not low enough to be equated to an exculpatory clause. Moreover, the clause did not violate New Jersey public policy favoring remediation of contaminated sites because MTA did not cause the contamination, did not own the property and, therefore, was not the party legally responsible for remediation.

That none of the contracts had been executed by the Developer was of no moment to the court because the Developer had manifested its acceptance by receiving and returning the contracts five times without objection. Similarly, there was no disparity in bargaining power because the Developer's president was a sophisticated businessman represented by legal counsel during the contract negotiations.

Finally, the court rejected the Developer's argument that it was inequitable for the Developer to shoulder the costs of the remediation and, purportedly, MTA's alleged negligence, because MTA was a better position to insure itself and, in fact, was covered under a $2,000,000 professional liability policy.

The lesson to be learned from this decision is that New Jersey courts will uphold parties' negotiated contractual terms as long as those terms are reasonable and reflect the tenor of the parties' negotiations and the scope of work to be provided.

Texas "Loser Pays" Legislation Brings Significant Changes *continued from page 1…*

Rules to Expedite Civil Actions

The new law instructs the Texas Supreme Court to "adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions." The law specifically requires that civil actions in which the amount in controversy is $100,000 or less be handled on an expedited basis.

Interlocutory Appeals

The new law increases the availability of appeals of non-final orders at the trial court level. Previously, interlocutory appeals were available only when all of the parties agreed, a hurdle that has been removed under the new framework. Instead, interlocutory appeals are now available when (a) courts face "controlling questions of law to which there is a substantial ground for difference of opinion," and (b) the resolution of such an appeal "may materially advance the ultimate termination of the litigation."

Settlement Offers and Litigation Costs

Perhaps most significantly, the new law modifies the award of litigation costs following a rejected offer of settlement that is greater than the resulting verdict at trial. Since 2003, when Texas enacted earlier iterations of tort reform legislation, a defendant who makes a reasonable offer of settlement is entitled to recover litigation costs if the offer is rejected and the plaintiff fails to recover at least eighty percent of the rejected offer amount. Such awards, however, were capped at fifty percent of the claimant's economic damages.

By contrast, the new law does away with the fifty percent cap and allows recovery of litigation costs limited only by the claimant's net recovery. The new law makes clear that this provision applies "to any party," to equalize the risks faced by both parties. Further, the law allows prevailing parties to recover reasonable deposition costs when calculating litigation costs in addition to reasonable attorney's fees, court costs, and reasonable fees for two or fewer expert witnesses.

Responsible Third Parties

Previously, a defendant was entitled to designate a responsible third party well beyond the expiration of the statute of limitations. Pursuant to the new law, a defendant who "fail[s] to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure" is barred from later identifying such a party as a responsible third party. This new provision enables the courts to effectively enforce the statutes of limitations and repose which are currently subject to this procedural loophole.

Implications of the "Loser Pays" Law

The new law should streamline and rein in the delays and expenses of civil litigation. Further, the law should benefit design professionals in its potential to curb frivolous lawsuits. Although the ultimate impact of the law remains uncertain, the "Loser Pays" law will nevertheless serve as an important case study for other jurisdictions considering such reforms.

About Donovan Hatem

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The Professional Practices Group at Donovan Hatem includes more than 40 attorneys who provide highly-specialized counsel to architects, engineers, and construction managers. Our experienced trial lawyers represent design professionals in jury and non-jury cases in the northeast and nationwide, and at mediations, arbitrations, and other dispute resolution forums. In addition to professional liability claims defense, Donovan Hatem's scope of construction law expertise encompasses risk management, contract review, and general business matters.

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