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CONSTRUCTION LEGAL EDGE

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Articles contained in this issue of the CLE:

The Ten Most Negotiated Construction Contract Clauses Between General Contractors And Subcontractors & The Principles That Courts Employ In Interpreting Contracts

1. The Ten Most Negotiated Contract Clauses

In my experience, the ten most negotiated construction contract provisions between general contractors and subcontractors are as follows:

(1) Acceptance of final payment as a waiver
(2) Additional insured
(3) Change orders
(4) Contingent payment
  a. Pay when paid
  b. Pay if paid
(5) Dispute resolution
(6) Incorporation by reference
(7) Indemnification
(8) Integration

(9) No damages for delay
(10) Waiver of lien and bond rights

Once negotiations are completed, and the contract as modified is signed, the contract controls the rights and liabilities of the parties to the written agreement. Although the goal of the parties to the contract is to set down their agreement in clear terms, sometimes a particular contract provision does not give the answer to specific problems that arise during the construction project. If a dispute arises relative to a particular contract clause, and the dollar amount is significant to one or both of the parties, these disputed terms often give rise to litigation.

2. Court Interpretation of Contracts

When a court is called upon to interpret the disputed terms in a construction contract, certain well-established principles are followed. When the parties set down the agreement in clear terms, as a general rule, the contract is interpreted according to those clear terms. If there are ambiguities, the courts generally resolve them against the party that drafted the contract. The courts tend to interpret contracts as a whole in order to give effect to all parts of the written agreement. Some other rules of contract interpretation are as follows:

A. Objective meaning of words is preferred over the subjective.
B. Handwritten terms control over typewritten.
C. More specific terms prevail over general terms.
D. Unless a contract provides for interpretation by the law of a particular state, the law where the contract was written controls.

Where parties to a contract have put their agreement in writing, the courts generally hold that the writing is the best evidence of the agreement. As such, all preliminary negotiations and oral agreements that preceded the execution of the agreement are generally superseded by the subsequent written contract. There are some exceptions, such as fraud, accident, or mistake.

3. Principal Goal of Contract Drafting

One of the principal goals of contract drafting is to provide direction to the parties if a particular circumstance, condition, or event occurs. Unfortunately, many contracts are not clear and, as a result, litigation or construction arbitration is often a by-product. So what is the solution? The answer is to take time to negotiate a fair and equitable contract and then memorialize it in a writing. The writing should be clear, fair, and have mutuality in its terms. Benjamin Franklin's adage "an ounce of prevention is worth a pound of cure" is worth heeding when negotiating construction contracts.

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Commonwealth Court Upholds Residential Sprinkler Provision Of Uniform Construction Code – May Increase Cost Of New Homes By $15,000

In an opinion that could have far-reaching effects on the cost of building residential homes in Pennsylvania, the Commonwealth Court of Pennsylvania recently rejected a request by the Pennsylvania Builders Association and individual residential builders to declare unconstitutional certain provisions of the 2009 Uniform Construction Code. In the case of PA Builders Ass'n v. Dept. of Labor and Industry, 2010 Pa. Commw. LEXIS 469 (Aug, 25, 2010), the Court held that the challenged provisions were properly adopted.

The Petitioners in that case claimed that certain amended provisions of the 2009 Code, especially the sprinkler requirements for newly-built single family homes, would have the effect of increasing the cost of an average newly constructed home by approximately $15,000. In addition, the 2009 UCC revised the International Energy Conservation Code eliminating certain energy conservation trade-offs. It was contended that the elimination of those trade-offs would make it almost impossible for a log home to satisfy the requirements of the UCC.

The Court's decision was based on its conclusion that it was not unconstitutional for the legislature to delegate to a private body the adoption of certain regulations. By rejecting the claim of unconstitutionality, those provisions remain intact. The Builders claimed that the changes to the Pennsylvania Construction Code should have been made by the General Assembly rather than by a nongovernmental agency known as the ICC. The ICC is the International Code Council.

It is not known as of the date of this writing whether the Pennsylvania Builder's Association or the individual homebuilders who were parties, will attempt to request an appeal to the Pennsylvania Supreme Court. Unless some action is taken by the legislature, the requirement for sprinkler systems in all new single-family homes built after January 1, 2011 will go into effect.

Under the Code as modified, no occupancy permit can be issued by any municipality unless a sprinkler system is included.

Although the builders estimate that it could cost as much as an additional $5,000 to $15,000 per home, the National Fire Protection Association apparently did a study which said the average cost nationwide for residential sprinkler systems is $1.60 per square foot.

If allowed to go into effect, Pennsylvania would be the first state to mandate sprinkler systems in all single-family dwellings.

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Why An Understanding Of Copyright Law Is Vital for Architects

Most architects attempt to protect their work product and intellectual property through contract. The general practice in the industry is for the architect to retain ownership in the plans and specifications he prepares. *See* U.S. Copyright Office, *Report of the Register of Copyrights: Copyright in Works of Architecture* (1988). The American Institute of Architects ("AIA") provides standard form agreements that satisfy this standard, and which are designed to ensure that the architect retains ownership in his plans and designs as against both the owner and the contractor(s) involved in a project. *See* AIA Document B141-1997, Owner-Architect Agreement ¶ 1.3.2 (regarding owners); AIA Document A201-1997, General Conditions of the Contract for Construction ¶ 1.6.1 (regarding contractors).

As a general matter, where an architect employs the standard form language supplied in the AIA agreements, that language will suffice to protect his interests in his work product and bar a subsequent owner or contractor from using those plans if the architect is replaced on a particular project. However, in certain cases, the AIA language has been found ineffective to prevent the owner from utilizing an architect's drawings and plans outside of the original, contracted project. In addition, contractual rights are limited in that they cannot be applied against individuals or entities who are not a party to the contract. Conventional tort remedies are also frequently inapplicable. *See, e.g.*, BRUNER & O'CONNOR ON CONSTRUCTION LAW § 17:85 (collecting cases). In such situations, an architect must rely on copyright law as his sole source of protection. The federal copyright statute protects both architectural drawings and the finished architectural work itself. 17 U.S.C. §102(a)(5) and (8).

In the arena of copyright, it is considered to be "hornbook law" that facts and ideas themselves are not copyrightable; only the expression of ideas is. However, exactly where the line is drawn between an idea, on the one hand, and its expression, on the other, is a subject far too detailed for the hornbook to cover. Indeed, that "endlessly baffling" question has bedeviled the federal courts since Judge Learned Hand's famous discussion of abstractions in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). *See Sparaco v. Lawler, Matusky, Skelly, Engineers, LLP*, 303 F.3d 460, 469 (2d Cir. 2002). As Judge Hand put it, "[n]obody has ever fixed that boundary, and nobody ever can." *Nichols*, 45 F.2d at 121. The courts, especially in the past decade, have struggled with the Sisyphusian task of attempting to determine where to draw the line between idea and expression for architectural drawings. As Judge Hand predicted, what has emerged is not a definitive answer, but certain clear guideposts that are critical for architects, and indeed all designers, to be aware of when entering into a project.

The use of common design features in a particular drawing or plan does not constitute copyright infringement. *See Sturdza v. Utd. Arab Emirates*, 281 F.3d 1287, 1297 (D.C. Cir. 2002) ("In and of themselves, domes, wind-towers, parapets, and arches represent ideas, not expression); *Attia v. Soc'y of N.Y. Hosp.*, 201 F.3d 50, 55 (2d Cir. 1999) ("generalized notions of where to place functional elements" are uncopyrightable ideas); *CSM Investors, Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1310 (D. Minn. 1994) ("the use of standard structural elements and the concept of a one-story office showroom are not copyrightable").

However, it is not the case that technical drawings can achieve copyright protection only where they are sufficiently complete and advanced to support actual construction. *See, e.g.*, *Sparaco*, 303 F.3d at 469. Instead, a sufficiently unique *design* employing particular features will be protected by the Copyright Act. The courts that have considered the issue have recognized that the entire set of drawings and plans must be considered as a whole, "because protectable expression may arise through the ways in which artists combine even unprotectible elements." *Sturdza*, 281 F.3d at 1296; *Sparaco*, 303 F.3d at 467. Thus, for example, the particular arrangement of the unprotectible elements discussed in *CSM Investors* was found to be "sufficiently original to be afforded copyright protection." In addition, the more specific a particular plan or set of drawings is, the more likely it will be amenable to copyright protection. *See Sparaco*, 303 F.3d at 468.

Thus, in order to protect their work product, and in addition to the types of contractual protections afforded by the AIA form agreements, architects must be cognizant of the interaction of copyright law with their profession. In particular, the more specific and detailed the plans they create are, the more likely the architect is to be protected in the event of future infringement by a contractor or rival architect. To the extent that the architect has a particular idea or vision for a project, that vision should be captured in as detailed a plan or drawing as possible, and should be marked with an appropriate copyright notice including the "©" symbol, the author, and the date the drawing was completed. To the extent that a design expresses the manner in which to capitalize on an idea, copyright law will provide protection.

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Open And Obvious Doctrine Does Not Protect Contractors From Liability In Ohio

The Court of Appeals of Ohio, Seventh Appellate District, recently held that an independent contractor may not use the open-and-obvious doctrine to avoid liability. In ***Wakefield v. John Russell Construction Co.*** 2010-Ohio-1294, 09-JE-19 (OHCA7), a pedestrian crossed through a construction area to enter a building. A contractor had excavated a trench around the building and when the pedestrian attempted to step over the trench, she lost her balance and fell. She sustained an injury to her left arm and required two surgeries.

The pedestrian claimed that the contractor was negligent per se for failing to follow a City ordinance to protect the trench. The subject city statute required all openings and obstructions to be "carefully guarded, protected or barricaded at all times" and further required excavation to be protected by backfill, steel plates, or through other methods acceptable to the City Engineer. The pedestrian further claimed that the edge of the trench that gave way when she stepped on it was a dangerous condition and was not open and obvious.

The contractor asserted the "open-and-obvious" defense. The open-and-obvious doctrine provides that a property owner "owes no duty to people who enter their premises where there is an open and obvious danger." The Ohio Supreme Court has addressed the open and obvious

defense numerous times and has held that a property owner owes no duty to warn invitees of open and obvious dangers on their property. *Simmers v. Bentley Constr. Co.*, 64 Ohio St. 3d 642, 644, 597 N.E.2d 504 (1992). An open and obvious danger is one that an invitee may reasonably be expected to discover, but one does not necessarily have to see the hazard for it to be open and obvious. The fact that the condition itself is so obvious is what absolves the property owner from taking any further action to protect the plaintiff. *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088.

However, an independent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of the land from the duty to warn those entering the property concerning open and obvious dangers on the property. *Simmers v. Bentley Construction Co.*, 64 Ohio St. 3d 642, 597 N.E. 2d 504 (1992).

When an independent contractor is involved, the issue of whether the danger is open and obvious is an issue that may be considered in the comparative negligence analysis to determine the degree of liability. An independent contractor may not use the open and obvious defense to avoid liability.

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Walking A Fine Line: An Employer's Right To Review Its Employees' Electronic Messages

The increased use of text messaging and email by employees has risen dramatically, with no end in sight. In the workplace, text messages and emails may be sent by employees using employer-issued computers, blackberries and cell phones. But what happens when an employee uses these employer-issued devices for personal messages? Does an employer have any right to access and read those messages? When does an employer cross over the line between controlling the use of employer-issued electronic devices and the privacy rights of its employees?

Several recent court decisions have highlighted the fundamental need for employers to have clearly worded policies addressing employee use of work-issued electronic devices. For example, the City of Ontario, CA police department found itself in litigation when it reviewed personal text messages sent to and from a City-issued pager. The police department distributed pagers to its officers so they could quickly respond to emergencies. The City's contract with its service provider set a monthly limit on the number of characters sent or received - - if employees went over this limit, they were charged a fee. One of the officers went significantly over the limit, and the police department elected to examine whether the overage was due to work-related text messages or personal text messages. When the police department obtained a transcript of the officer's messages, it discovered that many of them were sexually explicit, and were sent while the officer was on duty. Because this conduct violated the police department's policies, the officer was disciplined, and later initiated a lawsuit against the department.

The United States Supreme Court held that the officer did not have a right to privacy in this situation. The police department had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work related expenses, and that the City was not paying for excessive personal communications. Furthermore, the search was reasonable in scope, and not overly intrusive. Finally, and importantly, the Court noted that the City had a policy in place that allowed the City to monitor and log all network activity (including text messages), and that employees should have no expectation of privacy or confidentiality when using those resources. Although this decision involved a public employer, the ramifications and lessons learned extend to private employers.

By contrast, the New Jersey Supreme Court ruled in favor of an employee who sent and received email messages on an employer-issued laptop computer. The employee routinely exchanged email messages with her attorney. The employee, however, used a personal, password-protected internet email account. The employee later filed an employment discrimination lawsuit against her employer, and the employer attempted to obtain the emails because they were sent and received on the company-issued computer.

The Court held that the employee had a reasonable expectation of privacy in her private, password protected internet email account, and the act of sending and receiving emails via a company laptop did not eliminate the attorney-client privilege that protected them. The employer had a policy in place that allowed the company to review any messages sent on its media systems - - however, the policy also permitted "occasional personal use" of email. The Court noted that the policy's email provision was not clear because it did not address personal email accounts, as opposed to work email accounts. The Court stated that it was proper for companies to adopt lawful policies relating to computer use, but in this situation, the public policy interest underlying the attorney-client privilege trumped any policy that the employer might have to access personal, password protected email accounts on the company's email system.

These decisions are instructive for employers. Most importantly, employers should have clearly worded policies related to the use of employer-issued electronic devices and computers. At a minimum, the policy should contain:

- Specific definitions of the work devices and messages that are covered by the policy - - for example, work-issued computers, blackberries and cell phones;
- A provision addressing whether an employee is permitted to use work devices for personal use; and the extent to which that use is allowed;
- A provision informing employees that the employer may monitor and log all work devices and accounts;
- A provision informing employees that the employer may access and search work devices and accounts, and that employees have no expectation of confidentiality or privacy in messages sent over those devices;
- A provision allowing for disciplinary action if the policy is violated; and
- A form for employees to sign acknowledging receipt of the policy.

Significantly, if an employer conducts a search of its employees' devices or accounts, the search must be motivated by a legitimate, work-related purpose. Unfocused fishing expeditions for undefined information may not survive an employee's challenge and will expose the employer to litigation. Any search should be kept reasonable in scope and may not be any more intrusive than necessary. If there is any question about the purpose and scope of the search, the employer should consult with legal counsel prior to any action. Having clearly defined policies and procedures will define the line between personal and private use of work-issued devices and minimize the employer's exposure to litigation.

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