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Performance Specifications: Who Has What Duty Concerning Design and Successful Performance of Completed Work?(Plus Insurance Coverage for Defective Work)

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General contractor, when constructing an addition to a school building, complied with the architect's plans that included installation of an epoxy terrazzo floor. The floor installation was subcontracted to a firm that specialized in floor installation—including terrazzo floors. That firm obtained the epoxy resin needed for the floor from a supplier of such resin. After the floor was installed, an oily substance began oozing to the surface through tiny pores in the terrazzo. When the problem could not be remedied the flooring was replaced with a cement-based terrazzo floor. The school sued the general contractor and floor subcontractor. The subcontractor in turn brought a third-party action against the resin supplier.

In the matter of *Calcasieu Parish School Board v. Lewing Construction Co, Inc.*, 931 So. 2d 492 (La.App.3 Cir. 5/31/06), the appellate court affirmed a trial court decision assessing liability for a defective floor with the exception that the appellate court found that the prime contractor had no liability for the floor because he was entitled to rely upon the architect and on his subcontractor that actually installed the floor.

The trial court found liability against the architect, contractor, subcontractor, and resin supplier. The oily substance came to the surface of the floor as a result of water vapor intrusion from below the concrete slab. The fault the court found with the architect was that it was the first time he had ever specified the use of terrazzo flooring and that in specifying only that terrazzo be installed in conformity with national standards, he failed to investigate what those standards were or whether they were obtainable in Louisiana where the project was being built.

With regard to the general contractor, the court found that he took particular care with the job since it understood there could be water vapor transmission problems if the flooring was not properly installed. Nevertheless, the court found fault with the contractor for not learning the standards of terrazzo flooring and not investigating what standards would be appropriate for installing floors on this project. The general contractor relied upon its subcontractor to ascertain the standards and apply the appropriate standards and install the flooring in a manner to eliminate water vapor transmission.

According to the trial judge, the subcontractor knew or should have known the applicable industry standards, but it relied upon its resin supplier to select the method for testing the water vapor transmission through the concrete slab, and that supplier used a method that was not trustworthy.

In assigning percentage responsibility for the damages, the trial court concluded that between the general contractor and flooring subcontractor, the subcontractor had greater responsibility and knowledge to inform and advise the contractor about what the requirements were for the proper installation of the floor. The court assigned 80% responsibility to the subcontractor (to be shared equally with the resin manufacturer) and 20% to the contractor and architect to be shared equally.

On appeal, the appellate court found that the trial court error in finding the general contractor at fault in connection with the failure of the floor since no evidence had been presented at trial to suggest that the work performed by the contractor did not meet the architect's plans and specifications. The architect

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himself testified that the concrete slab had been poured in conformity with his plans and specifications. An expert witness on high performance flooring testified that he knew of nothing the contractor could have done prior to installing the floor to prevent its failure.

With regard to the subcontractor (floor installer) liability, the appellate court affirmed the trial court decision that he had not exercised the standard of care because it failed to perform a manufacturer's recommended calcium chloride test to determine the vapor transmission rate. The court was persuaded by testify that the "terrazzo installer should have known more about the specifications than anyone else on the job, that the installer should have been aware of the tests, and that the installer should have done more tests and made further inquiries."

After eliminating the contractor's liability the appellate court reapportioned the liability between the architect, subcontractor and resin manufacturer – assigning 20% fault to the architect for failure to using performance specifications without further investigating the requirements of an epoxy terrazzo floor before writing the specifications. The balance of liability was correctly assigned equally between the subcontractor and resin manufacturer.

Insurance Coverage Available for the Subcontractor's Liability

An interesting aspect of this case involves the question of whether a general liability insurance policy covered the subcontractor's liability for the defective installation of the flooring. The carrier argued that the policy excluded coverage for claims arising out of the quality of the work. This is commonly known as the exclusion for property damage to "your work."

The court concluded that the exclusion did not apply and that there was indeed coverage for the subcontractor's loss because "the failure of the floor was covered under the "Products-Completed Operations" coverage. The court stated that the policy purported to provide coverage for "products-completed operations hazard" but at the same time purported in other language to exclude coverage for that. In addition to finding coverage, the court held that the carrier was required to pay the subcontractor's attorneys fees for having failed to defend the subcontractor.

Comment: Several aspects of this decision are particularly noteworthy for how the court assessed liability. Since the architect wrote a performance specification that did not set forth any design details, the normal assumption would be that the contractor takes on all responsibility for determining the appropriate design details to satisfy the performance standard. This is one benefit that an architect typically gets by writing performance benefits. Performance specifications are often encouraged as a way to obtain wider competition by allowing different manufacturers, suppliers and contractors who may have alternative designs (and even patented designs) to compete equally so long as they commit to meeting the specified performance requirements via the design they submit. Since the architect should be entitled to rely upon the legal obligation of the contractor to meet the performance specifications, I find the reasoning of this court imposing liability on the architect in this case somewhat strained.

As second curious aspect of this case is the very brief analysis of insurance coverage. In this case, there is no evidence that any property was damaged as a result in the defective installation of the flooring, and the parties to the litigation did not argue otherwise. Nevertheless, the court found that insufficiency of the type of terrazzo used was itself the "property damage" and that the cost to tear it out and replace it would be covered under "Products-Completed Operations" coverage. What this analysis fails to appreciate is that the flooring was not installed as a "product" but was instead installed as the essential services of the



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contractor's "work." If more courts go in the direction of this one by interpreting the "product's completed operations hazard" as was done here, it may be necessary for insurance carriers to revise their policy language to avoid this reading and interpretation of the policy.

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