



CONTRACT CONCERNS

Choice of Law Provision Incorporating Law of One State into Contract for Performance of Design Services in another State Does Not Incorporate the Statute Of Limitations

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In *Van Eekeren Family, LLC v. Carter & Burgess, Inc.*, 2009 WL 541265 (W.D. Ky, 2009 slip opinion), the primary basis for the complaint by the project owner, Land O'Frost, was that the architect should have told the owner that the area in Kentucky where the owner was considering building its facility was in the New Madrid Seismic Zone, the most seismically active region in the United States east of the Rocky Mountains. The heightened structural requirements related to anticipated seismic activity increased project costs beyond initial estimates. The owner asserts the A/E should have advised it about this so it could have decided differently about the state in which to locate its new facility.

The contract between the A/E and owner made the A/E "responsible for instituting design changes if the project would exceed the \$28,000,000 budget by more than \$500,000, and for reviewing the proposed locations for the food processing facility." The owner claimed that in addition to increased costs due to seismic design issues, the A/E 's design was substandard as evidenced by the fact that a total of 547 requests for information (RFIs) were submitted by contractors during the pre-bid and construction process, which it claims was far in excess of the number of RFIs customarily anticipated for a project of the same size and complexity.

The complaint by the owner was filed more than one year after the certificate of occupancy was issued. As explained above, the court concluded that the one year Kentucky statute of limitations was applicable. The parties were free to negotiate in their contract the date on which the statute would begin to run. Having lost that argument, the owner next argued the one-year statute should apply only to the single count in the complaint that specifically alleged negligent performance of professional services. The plaintiff argued that the statute should not apply to the other counts of the complaint such as breach of contract, misrepresentation, and the contractual indemnity provision.

In applying the one-year statute to all counts of the complaint, the court said that all allegations in the complaint arise from the defendant's professional services. "The fact of the matter is that Plaintiff's distinction between errors in design and a failure to timely disclose information is without relevant difference." The court also found that the claims for breach of contract and indemnification are "based on the very same acts and omissions that underlie Plaintiff's professional negligence claim."

"Furthermore," says the court, "the indemnity clause specifically provides that Carter & Burgess indemnifies the owner 'from and against claims, damages, losses, and expenses... arising out of or resulting from the performance of the work and services called for... to the extent caused by the negligent acts or omissions of the architect.'" The fact that this indemnity obligation was limited to "negligent" performance was therefore considered significant.

With regard to whether the one-year statute of limitations for professional malpractice claims was applicable to the breach of contract count, the court concluded that "Plaintiff's argument that 'breaches of contract which are independent of any standard of care issues... should not be subject to the professional liability standard' is untenable." The court explains that "Kentucky courts have held that it is the existence of a professional performing a task and not the nature of the task itself that brings a claim within" [the professional malpractice statute of limitations.]

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Comment: In four short pages, the court has provided an excellent decision with a wealth of significant points from which we should take note and learn important lessons.

- 1) To make the statute of limitations from the other state apply to the project, the court states that the contract would have to specifically state that intent.
- 2) The decision demonstrates the importance of making contractual indemnification obligations conditioned upon "negligence" rather than just all acts, errors and omissions. It must be noted that this is the consistent message of insurance carriers to their insured design professionals. If the architect had agreed to indemnify the owner for damages caused by anything other than negligence, it would create an uninsurable liability since the policy covers only negligence.
- 3) It is valuable to specify a date certain for when the statute of limitations (and statute of repose) will begin to run. Courts look favorably upon such provisions that have been mutually agreed upon.
- 4) Design firms should rethink the provisions of some of the standard form contracts that require them to redesign a project because the cost estimate is exceeded. Unless the estimate is exceeded due to negligent performance of services by the design professional, why should the DP accept such an uninsurable risk of the cost of re-performing services that were performed consistent with the standard of care? Particularly with the unpredictability of construction costs in this economy (and the fear that there may be huge inflation in the not too distant future) there could be a lot of firms redesigning projects when the reason for the cost escalation was beyond their control or responsibility. It is recommended that these clauses be revised to state that the design firm will only revise the drawings or redesign the project for no additional fee when it was the negligence of the design firm that caused the cost estimate to be exceeded.
- 5) The court's explanation that all counts in this complaint arise out of allegations of professional malpractice no matter how they are titled is exactly right. In contrast, consider decisions recently reported in the Construction Risk.com Report where courts in other states have been confused on this issue and consequently held that a certificate of merit is needed only for the negligence count of a complaint but not the breach of contract count.

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