2017 CLM & Business Insurance Construction Conference
October 9-11, 2017
San Diego, CA

# Interplay Between Design Professionals and Contractor on Construction Projects and Litigation

Contractors and design professionals have distinct positions on a construction project, separate training and background, and they are retained for different purposes, but their jobs are intertwined and so are the claims and litigation.

## I. Retention

The relationship between contractor, designer and owner can vary depending on how the project was developed. Based on the relationship, liability can attach differently to either the contactor or the designer. The first thing to look at when litigation arises is who employed whom, what was the scope of the employment (limited or broad) and which party was responsible for what part of the project. During constructions projects the lines get blurred all the time.

A developer can retain a contractor first, who then guides the developer about prospects and costs, and assists the developer in retaining a design professional, as necessary. An owner can also manage the construction of his/her own residence and retain sub-contractors directly as necessary. When an issue arises where a design professional is needed, that professional can be retained directly by the owner. In this situation, the design professional is hired for a specific task only. For example, a contractor bids on a remodel and realizes that he needs a civil or structural engineer for a portion of the project. He/she can retain the engineer or have the owner retain the engineer directly.

Many design-construction conflict issues relate back to who retained whom and when. For example, in cases where the contractor is bidding on a design built project, the same entity both designs and builds the project. There is a single point of responsibility, and it reduces the time for the project, as the design is commissioned while the project is on-going. This however, can be more difficult to the designer, because there is not much advanced planning. A sub-contractor can also bid on a project to include some shop drawings. This is typical for example with specialized sub-contractors like security alarm.

In other instances, the design professionals are retained long before the contactors. Building plans are developed and they are sent for bidding. The architects on those projects can take larger roles including, construction management, schedules and even budgets.

Value engineering is another point of conflict, where a contractor may start substituting materials that were provided by the designer, in order to reduce the cost of construction. The more the plans are changed the likelihood that the original designer can disclaim responsibility if the materials or the affected changes fail.

Lastly, fast track construction are projects where construction starts before the design is complete. The process of design and construction overlaps, adding speed but creating risk and possible confusion.

## II. Contracts

Contracts can protect contractors and design professionals from liability. They can impose a shorter statute of limitation, a requirement to mediate (as a pre-requisite before filing a lawsuit with the detriment that failing to do so will prevent the prevailing party for recovering attorney's fees). It can provide limitation on the defendant's scope of work, limitation of damages, indemnity, and it can disclaim warranties.

In analyzing the interplay between contractors and design professionals and in the process of trying to determine who hired whom and for what scope, counsel must look at the contracts of all parties involved.

Often, plaintiffs will attempt to impose duties that are not specifically enumerated. In *Bonadiman-McCain Inc. v. Snow* (1960) 183 Cal.App.3d 58, the owner argued that his architect did not give proper advice for the selection of the general contractor and engineer. The court held that this "did not fall within the duties ordinarily assumed upon an architect."

However, if contracts are vague or broad, they may expand the professional's duty to anything related to the matter in the contract. The same can happen when there is no contract, except that when there is no contract the professional may be better able to dispute its scope of work, than when there is a contract that a court decides to read more into it.

An example where a duty can be expanded is when design professionals or sub-contractor provide bids that include limited work only, to have the contractors seek clarification through RFIs or seek submittal reviews, which are later used to blame the professionals for responses to the RFIs or submittals. Sometimes however, the contractors make changes without asking the designer, or improperly implement changes that were approved.

Where there is a contract there is a risk that a court will insert expanded provisions, but when there is no contract there is absolutely no control over the extent of the professional's duty (which is defined by contract or law). *Carlton v. Terteza* (1993) 14 Cal.App.4th 745).

Other examples for limitations in the contract may include, a shorter statute of limitation or a statute of limitation that starts running from the date of substantial completion—even as to latent defects—and not from date of discovery. If a contractor was hired by an architect he/she may be able to benefit from the limitations of liability in the architect's contract and vice versa. Therefore contracts (and who employed whom) are tied together.

In addition to statute of limitation and scope of work, other contract limitations that can be useful may include for example, waiver of jury, limitation on damages to the contract amount (Court have held that in the most part this is not unconscionable) and choices of venue. Even choices of venue can be debilitating on parties when they need to litigate in a State or in a County that is not close to the defendant's principal place of business and other parties are compelled to arbitrate.

Ultimately, sorting these issues becomes challenging when there are many parties and different contracts. Some parties may have indemnity provisions while others do not hence, the question is who can benefit from what provision and whether there can be one venue for a lawsuit on the entire project or several venues.

### *A. Statute of Limitation*

An interplay between a contractor and design professional can result in different statutes of limitation. Each State has different statute of limitation terms implemented by statutes, but they all relate to the date of actual discovery of the defect or a date that the defect could have been discovered through the exercise of reasonable diligence. This "delayed discovery rule" permits lawsuits against contractors and design professionals to be filed many years after they have finished their work and is limited only by statutes of repose (California for example, has a 4 year statute of limitation for latent defects and a ten year statute of repose. *Code of Civil Procedure* Section 337.15). In *Brisbane Lodging, L.P. v. Webcor Builders, Inc. et. al,* 216 Cal.App.4th 1249 (2013) the construction contract executed by the parties included a clause which provided that all causes of action relating to the contract work would accrue from the date of substantial completion of the project. The trial court found on summary judgment and it was affirmed by the Court of Appeal that "this contract provision clearly and unambiguously abrogated the so-called delayed discovery rule, which would otherwise delay accrual of a cause of action for latent construction defects until the defects were, or could have been, discovered." The court concluded the clause was valid and enforceable, noting that the agreement "was one between sophisticated parties seeking to define the contours of their liability." *Brisbane* was extended to design professionals as well.

Yet, since the relationships in the construction setting are complicated, often we would have subcontractors who are without a contract and must rely on the party who hired them and their contract with the owner. The law is not clear whether those third parties will be able to enjoy the benefit of other parties' contractual limitations. Further, some of the contracts have contradictory language as to the particular limitations.

### *B. Indemnification*

#### 1. Equitable Indemnity

Equitable indemnity arises without a written agreement. It requires joint and several liability which gives rise to comparative indemnity based on comparative fault. A jointly liable defendant typically joins all other jointly liable defendants by way of indemnity cross-complaint, which results in "shotgun" indemnity cross-complaints. Based on the fact that a contractor and an architect worked on the same project they are almost always sued together. The most typical defect usually requires both design and construction since each side blames the other for the defect, the delay, the additional cost etc. In rare cases however, a design professional may be able to argue that the parties are not joint tortfeasors. This is if the contractor and the design professional tasks were completely different.

#### 2. Good Faith Settlement

This is a very important tool in construction defect cases so that a small player defendant will not have to wait until the main defendants are ready to settle in order to settle and save cost of defense. Under equitable indemnity provisions, a defendant may settle with the plaintiff and "bar" cross-complaints for indemnity using the procedure set forth in *California Code of Civil Procedure* §877.6. The Court must determine that settlement was in "good faith." This means it is not "out of the ballpark." *Tech-Built, Inc v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488. When the design professional and the contractor are joined in the same litigation they can each convince the owner that the other is more liable and try to settle first.

#### 3. Worker's Compensation Exceptions

A subcontractor's employee cannot sue subcontractor for injuries outside of a worker's compensation proceeding. Other jointly liable defendants (i.e. contractors or other subcontractors) cannot cross complain for equitable indemnity against employer of injured employee. However, express indemnity permits a jointly liable defendant to seek indemnity from the employer of an injured employee. A written indemnity agreement also prevents a good faith settlement bar.

#### 4. Contractual Indemnity

There are several forms of indemnity agreement (active/passive, specific/general). In the past courts have found 3 types of indemnity agreements, type 1, type 2 and type 3. Type 1 is the most broad while type 3 is the most limited. Type 1 indemnity agreement example would be "subcontractor agrees to indemnify contractor from any and all claims, liability, and damages, except those arising from the sole negligence or willful misconduct of contractor." Type 2 is slightly less restrictive. It typically looks like: "subcontractor agrees to indemnify contractor from any and all claims, liability and damages arising from the performance of services." It would cover the general contractors "passive negligence." Type 3 is the most limited. This provision typically uses the following language: "subcontractor agrees to indemnify contractor from any and all claims, liability and damages caused by subcontractor's negligent acts, errors or omissions."

Courts analyzing these provisions typically look at the express language. If it does not specifically state that something will be indemnified, then the court will assume it is not being indemnified. Indemnity provisions are to be strictly construed against the indemnitee. *Rossmoor Sanitation, Inc. v. Pylon* 13 Cal.3d 622. *California Civil Code* §2778 provides that the indemnitee defends the indemnitor after a demand is made upon the indemnitor, and that any judgment against the indemnitee is conclusive on the indemnitor if the indemnitor failed to defend. In view thereof, if the subcontractor refuses to accept the defense pursuant to an indemnity agreement, it assumes the risk of any judgment imposed against the indemnitee, if it is found that indemnification was owing.

*California Civil Code* §§2782-2784 contains certain limitations on indemnity in construction contracts. For example, section 2782(a) states that there can be no indemnity for the sole negligence or willful misconduct of the indemnitee, indemnitee's agents, servants or independent contractors who are directly responsible to such indemnitee, or for defects in design furnished by designers. Section 2872(b) prohibits an express indemnity of a public agency for the public agency's active negligence.

The same Code provides that if a builder or contractor tenders to a subcontractor, the subcontractor is entitled to defend the suit with counsel of its choice or pay, within 30 days upon receipt of an invoice, no more than a reasonable allocated share of the builders/contractor's defense fees and costs. Also, a subcontractor owes no defense or indemnity to the builder/contractor unless it receives a written tender of the claim including information provide to the builder/contractor by the claimants. Per Code, if the subcontractor fails to timely or adequately pay an allocated share upon tender of invoices the builder/contractor: (1) has the right to pursue a claim for compensatory and consequential damages; (2) may recover interest on defense and indemnity costs from date incurred; (3) may recover reasonable attorney's fees and costs to recover said amounts. The Code also discusses allocation among subcontractors. The California Code only applies to residential construction contracts.

This year California passed SB 496 which amends California Civil Code section 2782.8 and states that indemnity agreements must be limited to the negligence, recklessness or willful misconduct of the indemnitee (i.e. no more Type I indemnity with design professionals). The amendment also provides that "in no event shall the cost to defend charged to the design professional exceed the design professional's proportionate percentage of fault", with a limited opportunity for reallocation in the event another defendant is judgment proof.

*Crawford v Weathershield Mfg. Inc.* (2008) 44 Cal.4th 541 was an important case for indemnity agreements and it changed the insurance industry. Therein the court held that the duty to defend requires an immediate defense. Even if the indemnity contract requires a finding of fault, the duty to defend was triggered upon demand. Subsequently, *UDC-Universal Development, L.P. v. CH2M Hill* 2010 DJDAR 794 expended Crawford to design professionals and found a duty to defend under an indemnity agreement following Crawford. The court held that the design professional was obligated to defend the developer even though CH2M Hill was found by a jury not to be negligent. This was based on the language in their agreement that CH2M Hill would "defend any suit, action or demand brought against Developer of Owner on any claim or demand covered herein" to the extent it arose out of or was in any way connected with any negligent act or omission by CH2M Hill.

Going back to who retained whom and what are the employment relationships, an architect can claim to be an agent of the owner and to seek indemnity that was agreed upon by a contractor to the owner and any of its agents. Therefore, in analyzing indemnity counsel must look at all parties' contracts.

## III. Different Defense Strategies

### *A. Affidavit of Merit (AOM)*

This is something that is unique to design professionals. Eleven states require that when a complaint is filed against a design professional, an affidavit or certificate of an expert must be filed simultaneously (or within a short period thereafter) stating that in the opinion of the expert the defendant design professional failed to meet the standard of care for the design professional services that are the subject of the complaint. *Ariz. Rev. St.* §§ 12.2601 and 12.2602 (2004); *Cal. Civ. Proc.* § 411.35; *Colo. Rev. St.* § 13-20-602(1)(a); *Ga. Code Ann.* § 9-11-9.1(a) (2002); *Md. Conn. Ann. Cts. & Jud. Proc.* § 3-2C-02(2003); *Minn. Stat.* § 544.42 subds. 1 and 2 (2003); *Nev. Rev. Stat.* Ann. § 40.6884 (LEXIS 2004), *N.J.S.A.* 2A:53A-26-2A:53A-29 (West 2004); *Or. Rev. Stat. Ann.* § 31.300 (2003); *Pa. R. Civ. P.* § 1042.1-1042.8 et seq. (2003); *Tex. Civ. Pra. & Rem. Code. Ann.* § 150.001-.002 (Vernon 2004). The Affidavit of Merit (AOM) is not an expert report and is not more than a few pages where a design professional, who is not party to the action, states that based upon his review of the documents to date there is a good faith basis to assert claim. This document, although not large in size or price (usually it can cost between $500.00-$1000.00) has led a substantial body of case law.

In New Jersey, the failure to timely provide a compliant Affidavit of Merit pursuant to the statutory requirement "shall be deemed a failure to state a cause of action" the New Jersey Supreme Court deemed this to mean dismissal with prejudice is warranted. *N.J.S.A.* 2A:53A-29; *Alan J. Cornblatt, P.A. v. Barow,* 153 N.J. 218 (1998). The overall purpose of AOM Statute is "to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of the litigation."*Id*.

Although most of the certificate of merit statutes address negligence on the part of the professional, many causes of action may be based on the breach of the professional's duty of care even if the claim is not technically pleaded as negligence. For example if a contract states that a design professional will provide services in accordance with the standard of care applicable to similar design professionals performing like services in the geographic region of the project, the professional's breach of that standard is the same as professional negligence. Regardless of the label applied to the cause of action in the pleading, "if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care for that specific profession," then an affidavit of merit is necessary. *Id*. at 340; *Nuveen Municipal Trust v. WithumSmith+Brown, P.C.,* 2009 WL 3246139 (D.N.J. Oct. 7, 1999); *Diocese of Metuchen v. Prisco & Edwards AIA,* 374 N.J. Super. 409, 416 (App. Div. 2005). This is also consistent with the comments of the New Jersey Court Rules, where the Honorable Sylvia Pressler notes that "[S]imply pleading the cause as a breach of contract will not avoid the affidavit requirement if the breach is based on asserted deviation." PRESSLER, Current N.J. Court Rules, Comment R.4:5-8[5.3] (Gann).

Dismissal with prejudice is sometimes mandated which underscores the importance of what some people call a technical requirement to commence an action against a design professional. While some states like New Jersey require a dismissal with prejudice other states have other statutory penalties less onerous than dismissal with prejudice. Texas requires dismissal for the failure to file an AOM and allows the dismissal to be with prejudice at the court's discretion. *Tex Civ. Prac. & Rem. Code* § 150.002(e). Nevada and Colorado also require dismissal of an action for failure to file an AOM but do not state whether the dismissal may be with prejudice. *Nev. Rev. Stat.* §§11.259 *(*pertaining to nonresidential construction claims) *40.6885* (pertaining to residential construction claims); *Colo. Rev. Stat. Ann.* § 13-20-602(4). Likewise, South Carolina provides for dismissal for failure to state a claim if a claimant does not file an AOM or files a defective affidavit and fails to cure the defect within 30 days. *S.C. Code Ann.* § 15-36-100(E)-(F), but it does not expound upon whether the dismissal may be with prejudice. Oregon also provides dismissal for failing to comply with its AOM statute but does not state whether or not it is dismissed with or without prejudice. *Or. Rev. Stat. Ann.* § 31.300. A federal district court interpreting the Oregon AOM statute found that it did not mandate dismissal with prejudice. *Mastec N. Am., Inc. v. Coos Cnty.,* 2006 WL 188928 (D. Or. July 6, 2006). Arizona and Maryland both provide for dismissal without prejudice for the failure to file an AOM. *Ariz. Rev. Stat. Ann.* § 12-2602; *Md. Code. Ann. Cts. & Jud. Proc.* § 3-2C-02.

### *B. Agency and Privity*

Another interplay between designers and contractors is to figure out who was the agent of whom. Was the designer hired by the contractor or vice versa? By the owner? Did the owner have a construction manager? Understanding the relationships between these parties will assist in untangling the various duties among them including, whether there is privity between the parties to make certain claims, whether there was notice for purpose of triggering the statute of limitation, and whether the parties are joint tortfeasors.

California Civil Code § 2332 states that: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." For example, when an architect hires a mechanical engineer and bills for his services, the mechanical engineer is deemed to be the agent of the architect. However, if the mechanical engineer is hired directly by the owner then the architect may not be responsible for his mistakes. The same analysis is made with respect to the contractor and sub-contractors.

Iowa recently dealt with the long established common law doctrine that without privity, a subcontractor cannot be sued for breach of warranty. See, *Village at White Birch Town Homeowners Assn. v. Goodman Assocs., Inc*., (2012) 824 N.W.2d 561. This is notwithstanding that Iowa Supreme Court previously extended the implied warranty of workmanlike construction to subsequent purchasers (*Speight v. Walters Dev. Co.*, (2008) 744 N.W.2d 108, 115) and it extended an implied warranty of habitability to include a subcontractor's performance when the builder was judgment-proof. *Minton v. Richards Group of Chicago* (1983) 116 Ill. App. 3d 852, 452 N.E.2d 835. However, a "builder-vendor" has been defined as a person who is in the business of building or seller hence, the warranty did not extend to the sub-contractor who had no privity of contract.

Louisiana also confirmed that common law principal that without privity of contract no contractual duty lies against an engineer. However the court noted that general tort theories may apply. *Greater Lafourche Port Comm'n v. James Constr. Group, L.L.C.* (2012) 104 So. 3d 84.

Therein the court held that a design professional is the agent of an owner when the architect/engineer acts as the owner's supervisor on a project; however, a design professional, as far as the preparation of plans is concerned, acts as an independent contractor and is not in privity of contract with the contractor. Therefore, he cannot be sued for breach of contract by the contractor. Yet, due to his agency relationship with the owner, a design professional may be subject to an action in tort, even in the absence of any privity of contract. Such an action arises only when there is a breach of a duty owed independently of the contract between the owner and designer. He knows for example, that other third party relies on his plans.

In Massachusetts, the Supreme Court recently affirmed a long standing common law theory that a claim in tort may result from a contractual duty and therefore, an architect can be liable for construction defects and injuries at the job site. See, *LeBlanc v. Logan Hilton Joint Venture* (2012) 974 N.E.2d 34 wherein the architect was alleged to have failed to satisfy a contractual obligation to report construction deficiencies to owner and therefore, could be held liable for contribution to owner and the contractors with liability for death of a worker. The duty arises out of the contract but failure to perform it, causes a tort.

### *C. Economic Loss Doctrine*

Generally, design professionals and contractors can be held liable for acts of professional negligence. The economic loss doctrine has been applied to construction cases where courts have held economic loss doctrine shields a defendant, who provide services in the commercial property development or improvement process, from negligence-based claims for purely financial losses.

A judicially created doctrine, this doctrine shields a party from tort liability when damages are purely economic and without accompanying personal injury or property damage. The economic loss doctrine has its origins in product liability cases where it arose from product liability cases where the "injury" is limited to the product itself. *East River Steamship Corporation v. Transamerica Delaval, Inc.,* 476 U.S. 858 (1986); see also Nevada (the economic loss rule, absent any exceptions, "bars unintentional tort actions when the plaintiff seeks to recover 'purely economic losses.'" The rule's purpose, is "to shield defendants from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable [and] marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others.'")

The courts seem particularly divided as to whether, like some other professionals, design professionals are excluded from the protection of the economic loss rule. Some states exclude design professionals from the rule. *Eastern Steel Constructors, Inc. v. City of Salem,* 549 S.E.2d 266, 275 (W. Va.2001) ("a design professional . . . owes a duty of care to a contractor, who has been employed by the same project owner . . . and who has relied upon the design professional's work product in carrying out his or her obligations to the owner . . ."); *Moransais*

*v. Heathman,* 744 So. 2d 973, 983 84 (Fla. 1999) (economic loss rule does not bar a claim for professional negligence against a professional engineer); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* 463 S.E.2d 85, 88 89 (S.C.1995) (like lawyers and accountants, design professionals not protected from tort claims by economic loss rule where there is "special relationship" with injured party).

In other states, however, the rule protects the design professional. *Blahd v. Richard B. Smith, Inc.,* 108 P.3d 996, 1001-02 (Idaho 2005) (court recognized existence of a "special relationship" exception and a "unique circumstances" exception but did not apply them to geotechnical engineer); *BRW, Inc. v. Dufficy & Sons, Inc.,* 99 P.3d 66, 72-73 (Colo. 2004) (no exception to rule for claim against an engineer by subcontractor who relied upon allegedly defective specifications where a "network of interrelated contracts" was involved); *SME Indus., Inc. v. Thompson, Ventuleltt, Stainback and Associates, Inc.,* 28 P.3d 669, 680-82 (Utah 2001) (negligence claim of contractor or subcontractor against design professional rejected); *City Express, Inc. v. Express Partners,* 959 P.2d 836, 840 (Haw. 1998) (owner who contracted with architect could not assert claim against the architect in negligence); *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.,* 679 N.E.2d 1197, 1200-02 (Ill. 1997) (negligent misrepresentation claim is not permitted against an engineer because an engineer's plans and drawings were "incidental to a tangible product"); *Terracon Consultants v. Mandalay Resort Group, et al,* 206 P.3d 81 (Nev. 2009). *Berschauer/Phillips Contr. Co. v. Seattle School Dist. No. 1,* 881 P.2d 986 (1994); *Horizon Group of New England, Inc. v. New Jersey Schools Construction Corp.,* 2011 WL 3687451 (App.Div.2011).

The economic loss Rule is frequently invoked by the courts but varies significantly from state to state. The rule may have a great impact upon the ultimate success of parties to litigation, the scope of any recovery, and determinations of insurance coverage. Thus, a careful review and analysis of the rule of law as it can be a useful tool to dismiss, at minimum, the negligence claims which can start small at the beginning of a case but then morph into an extremely high exposure claim.

Further, this theory can defer in its application between the contractor and the design professional. For example, where one party has a contract and the other does not, the contracting party may on the one hand have limitation it can benefit from. On the other hand however, the party that does not have a contract cannot be sued for breach of warranty or failed expectations. Nor are there attorney's fees provisions. Therefore, the damages sought from one party (a contractor) may be very different from damages sought from another party (an architect).

### *D. Completed and Accepted Doctrine*

This theory of defense looks at when the owner accepted the product. It can be used by both contractors and architects, but the completed timing of their respective work may be different. The defense is that the owner has accepted the work and its quality. This defense was explained in the California case of *Neiman v. Leo Daly Co.*, 210 Cal. App. 4th 962 (2012) wherein the architect established that its work (design of the stairs) was completed and accepted by the owner (a college). The alleged defect (lack of light strips) was patent as a matter of law. The architect's plans and specifications called for contrast marking stripes to be placed on the stairs at the main stage. The absence of stripes on the stairs was obvious and apparent to any

reasonably observant person and a reasonable inspection would have disclosed that defect. Therefore, plaintiff who tripped from walking down the stairs had no claim. The rationale for this doctrine is that an owner has a duty to inspect the work and ascertain its safety, and thus the owner's acceptance of the work shifts liability for its safety to the owner, provided that a reasonable inspection would disclose the defect. This doctrine applies to patent defects, but it also applies to latent defects that were discovered after completion. Once they are discovered, the applicable statute of limitation is 4 years from completion and not from discovery. See e.g., *Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1467.

### *E. Design or Construction? Green Building*

Often there is an interplay during a project where it is unclear where design ends and construction begins. Often contractors are involved in pre-construction planning and provide consultation. Green building is one of those examples. It is environmentally focused design and construction. Certification of green building meets criteria within six credit categories: (1) sustainable sites; (2) water efficiency; (3) energy & atmosphere; (4) materials & resources; (5) indoor environmental quality; and (6) innovation in design. Some of these categories relate to design and others to construction. When a dispute arises, typically due to increased costs, questionable construction quality or construction delays, the construction team and the design team point the finger at each other.

One of the considerations in a green building project is the distance of the material supply source to the project site. If a local manufacturer and supplier do not have the necessary specified materials, it may not be an option to secure the materials from non-local suppliers without risking the loss of points or certification. Material supply holdups are common in disputes involving construction delays, and by making the supply location-dependent, the risk of delay is increased. Are those issues design related (lack of planning?) or construction (since contractors use the material). Delay sometimes comes from a lack of appropriate planning for, and understanding of, the steps required to complete a green project. In particular, commissioning of the building—thorough testing of the heating, ventilating, and air-conditioning systems, and the plumbing and electrical systems, among others—is a prerequisite for most sustainable designs and can be complicated and time consuming. If the contractor is not familiar with the required testing standards and has not adequately addressed the testing in the schedule, a delay may be inevitable.

Although the specific risks and impacts of green building vary, the best approach to mitigating all of these risks is to allocate them clearly and appropriately in advance of a dispute. For example, if the project is slated to be LEED-certified at any level, it requires the participation of the general contractor, several subcontractors, and a LEED design consultant.

## IV. Insurance

Contractors and design professionals have different policies. A contractor typically has a form of commercial general liability (CGL) policy that is based on occurrence. If the damage is on-going then it can trigger coverage on several policies, so there can be a lot more insurance available. Further, there can be additional insured among the parties, so one party (contractor) may be an additional insured on several other policies (owner, sub-contractor).

Design professionals are insured by errors & omissions (E&O) policies. The claims must occur and be reported during the policy period so there are no multiple policies at play. Moreover, the claim has to be related to professional services. Finally, there are no additional insured on E&O policies.

Carriers become entangled in defending design professionals because there is more ease in triggering coverage, compared to contractors who are also typically sued in the same lawsuits. Further, since contractors and design professional have different policies their coverage may also vary. Often, one side may find itself the only insured party, or the party having the most coverage. Therefore, while the initial claim may have little to do with that particular professional, once insurance coverage becomes an issue the focus of the lawsuit may turn against the insured professional.

Still further, as opposed to contractors' CGL policies, many professional liability E&O policies have depleting limits. The more the design professional spends on the defense of the claim the less funds it will have available for settlement. This creates a higher settlement incentive to the design professional since it does not want to run out of coverage. It also makes policy limit demands more likely and trickier to analyze.

Lastly, in E&O cases there are no additional insureds so the design professional needs to come up with other creative theories to make claims against the co-defendants. This may also prove problematic the other way around, where claims are sought against the design professional. Owners (or others) with strong bargaining power may seek indemnity from the design professional in the parties' contract, as an alternative to seeking additional insured coverage (since additional insured coverage is not available). Additional insured coverage, if it was available, would have been more favorable to the name insured (the design professional) since the alternative indemnity claims may not be covered by insurance and may become a burden on the name insured.