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QUARTERLY
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JEFFERSON
SOCIETY, INC.

# Monticello

## Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

## Upcoming Events

**• DBIA Design-Build Conf & Expo, Las Vegas, Nov. 3-6, 2013!**

This year's DBIA Conference will feature many breakout sessions and seminars on design-build, including best practices, design management, public-private partnerships, sustainability, "design excellence through design-build", legislation, and many project team presentations. Five members of The Jefferson Society, Inc. will present on Nov. 5th at 10:00 a.m. on *"Architects Confront Challenges of Design-Build Contracting."* The five members are: Hollye Fisk, FAIA, Esq.; Bill Quatman, FAIA, Esq., Jim Whitaker, AIA, and Craig Williams, AIA, Esq.

**• Other Jefferson Society Speaking Engagements:**

- **October 23, 2013:** Texas A&M University College of Architecture, Architecture for Health Lecture Series. R. Craig Williams, AIA, Esq. and Hollye C. Fisk, FAIA, Esq. will give a presentation entitled, *The Legal and Contractual Implications of IPD - Integrated Project Delivery*.
- **November 8, 2013:** Texas Society of Architects Annual Convention, R. Craig Williams, AIA, Esq. and Hollye C. Fisk, FAIA, Esq. will give a presentation entitled, *Lawyer's Guide to Letter Proposals and Agreements*.

Do you have an upcoming presentation? Submit it for the January 2014 issue.

The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911



## Know of Another Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to President Craig Williams at cwilliams@hksinc.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

**AUTHORS WANTED**

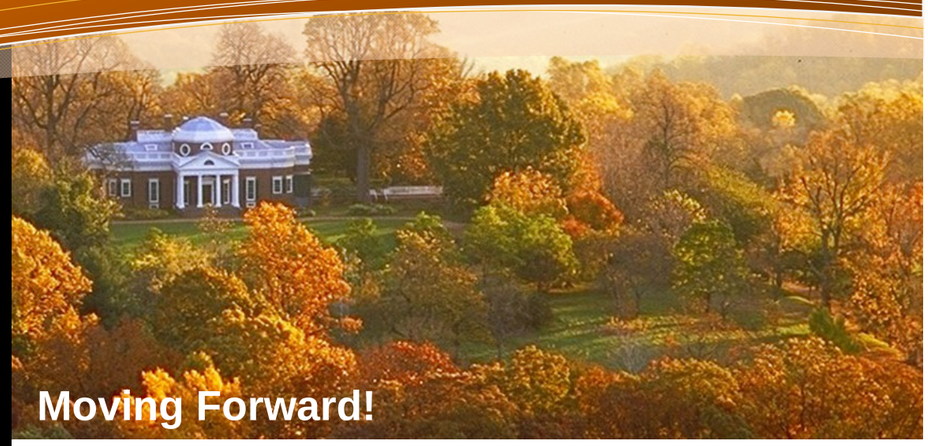
Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

**JOIN US ON FACEBOOK & LINKEDIN**

Want to connect with other members? Find us here.

**WEBSITE:**

www.thejeffersonsociety.org



## Moving Forward!

**By R. Craig Williams, AIA, Esq.**
**HKS Architects**

As the membership knows, the Board of Directors met in July for the first time to begin forming committees and discuss the future. The following committees were authorized and created:

- Membership Committee, chaired by board member Mehrdad Farivar.
- Newsletter Committee, chaired by board member Bill Quatman.
- Finance Committee, chaired by board member and Treasurer Wilkes Alexander
- Annual Meeting Committee, chaired by board member Julia Donoho.
- Industry Outreach Committee, chaired by member Yvonne Castillo.
- Program Committee, chaired by member Sue Yoakum.

The committee chairs will need volunteers. If you are interested in helping out with any of these committees, please contact the appropriate chairperson. Emails for each committee chair can be found by visiting our website and looking through the list of members found under the "Membership" tab. The Board voted to have annual dues, which are necessary to pay for the costs of maintaining our website, bank account, filing fees required for maintenance of a corporate identity, and other similar costs. The Board also voted to authorize a slight increase in dues to $50.00 annually. Requests for payment will be sent in December.

The Annual Meeting Committee is working on plans for our second annual meeting, to be held in Chicago at the time of the AIA Annual Convention. The convention is will be held June, with our meeting tentatively scheduled for the evening of June 25. Stay tuned for details. I encourage everyone to make the trip to Chicago for the meeting, and take advantage of timing and co-location with the AIA Convention.

Finally, several suggestions have been made for planning speaking events. Many of you have expressed interest in participating. The Program Committee was created for that purpose, to suggest and plan seminars and similar events. If you have an interest, please contact Sue Yoakum. Contact information for all committee chairs is on our website.

(Photo by R. Craig Williams, AIA, Esq.)

## California Court Upholds Contractual Statute of Limitations Provision In AIA's General Conditions

By: Jacqueline Pons-Bunney, Esq.
Laguna Hills, CA

It's not every day that we receive good news from our California courts with respect to the defense of design and construction claims. But alas, here you go. In the recent case of *Brisbane Lodging, LP v. Webcor Builders, Inc.*, the Court of Appeals held that the section 13.7.1.1 of the 1997 edition of AIA's A201 General Conditions to the Contract for Construction, triggering all causes of action upon Substantial Completion, is enforceable.

The case involved a contract between an owner and a contractor for the construction of a hotel. The AIA clause at issue reads:

*"any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion."*

Substantial Completion of the project was July 31, 2000. In early 2005, the owner discovered a break in the sewer line which caused waste to flow under the hotel. It was determined that the plumbing problem was a latent defect. Both the contractor and its plumbing investigated the problem and attempted repairs. It was ultimately discovered that the plumbing subcontractor had installed ABS pipe rather than cast iron pipe for the sewer line, in violation of the Uniform Plumbing Code. The owner filed a lawsuit in May 2008, nearly eight years after Substantial Completion.

California has two basic statutes of limitation governing construction defects:

- CCP 337.1 provides that recovery for death, injury or damage caused by a patent deficiency in design, supervision or construction of an improvement to realty must be sought within 4 years of the date of substantial completion; and,
- CCP 337.15 provides that latent deficiencies (i.e., deficiencies that are not discoverable with reasonable inspection), when read with CCP sections 337 and 338, must be filed within 3 or 4 years of discovery depending on whether the action rests in breach of warranty or negligence, but in any case within 10 years of the date of substantial completion.

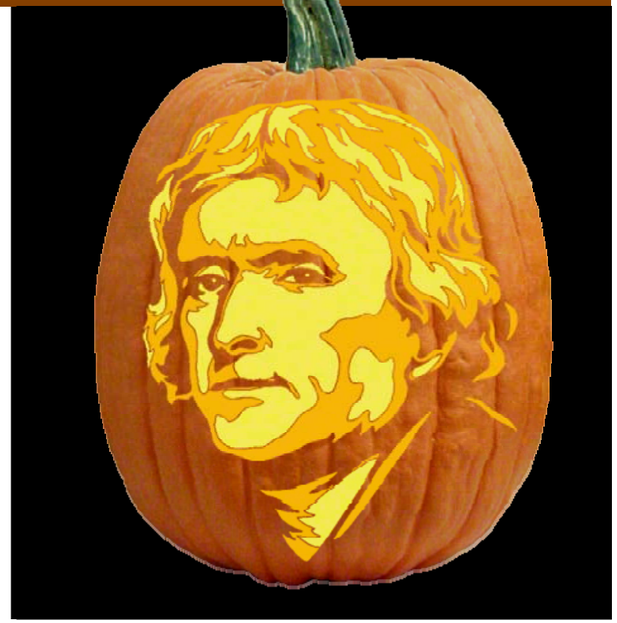
The latter statute provides for a "delayed discovery" exception to the statute of limitations. The court held that the AIA provision was enforceable to limit the owner's timeframe to file a lawsuit to the 4-year statute in CCP 337.1. The court put significant weight on the sophistication of the contracting parties, noting that there may be a different result if a contracting party was a homeowner, for example. The argument that upholding such a provision would be against public policy was disregarded by the court, which cited the long-standing philosophy of the California courts to uphold the wishes expressed by contracting parties.

Finally, the court was not persuaded by the owner's argument that the contractor's investigation of the plumbing somehow waived the time limitations set forth in the contract. The case citation is 216 Cal. App. 4th 1249, 157 Cal. Rptr. 3d 467 (Cal. App. 1 Dist.2013.

*Editor's Note: This was a case of first impression in California, but the Court stated, "numerous out-of-state authorities have examined this same clause; and without exception, have concluded the provision altered the normal rules governing accrual of causes of action, including the delayed discovery rule, and was valid and enforceable." The Court cited decisions from Kentucky, Maryland, Massachusetts, New York and Pennsylvania, noting that, "The reasoning of these out-of-state cases is fairly consistent."*

## Owner Agrees To Pay Engineer $21 Mil. in Legal Fees

*Engineering News Record* reported on Oct. 21st that after losing both at trial and on appeal, Tampa Bay Water's board voted 8-0 to end its lawsuit against HDR by paying the engineering firm's legal fees, totaling about $21 million. HDR was the project engineer on the C.W. Bill Young Reservoir, the largest in Florida, which began operating in June 2005. Cracks developed in the earthen embankment and the utility is reportedly spending about $122 million to fix the problem. In 2008, Tampa Bay Water sued HDR and two contractors for repair costs. The contractors settled for $6.75 million, leaving HDR as the lone defendant. HDR offered to settle the $225 million claim for $30 million but the water officials rejected the offer. The case went to trial which resulted in a jury verdict for HDR after only four hours. The utility appealed but lost. Based on the contract's prevailing party attorney's fee clause, the trial court ruled that HDR was owed $9.25 mil. in attorney's fees, plus $10.9 mil. in expenses. "This was no ordinary engineering malpractice case," the judge said, adding that testimony suggested, "this case is the largest engineering professional liability case ever tried to a jury." More than 20 experts were retained by the parties. Discovery included more than 17 million pages of documents, plus 35 depositions, resulting in 19,000 pages of transcripts. The court noted that, "From the inception of the lawsuit, the battle lines were drawn, with HDR having to defend itself on all fronts, not just against Tampa Bay Water's claims. [The two contractors] also claimed that HDR's design was to blame for the unusual cracking in the Reservoir. In a sense, Tampa Bay Water, [and the contractors] were aligned against HDR." HDR hung in there in a tough case. Congrats! See *Tampa Bay Water v. HDR*, 2012 WL 5387830 (M. D. Fla.).



Looking for a pumpkin that will turns some heads? This pattern sells for $1.49 along with several other patriotic faces at www.pumpkinlady.com

## CHICAIAGO 2014

The 2014 AIA National Convention is coming to Chicago and will take place at McCormick Place, June 26–28, 2014. Owing to its architectural prowess and cultural heft, Chicago is one of the more highly anticipated host cities for the annual convention. There will be great food, great architecture and an opportunity for a gathering of the members of The Jefferson Society, Inc. ***Do you live in Chicago? Are you interested in helping to organizing our meeting in Chicago?*** Contact President Craig Williams, AIA, Esq. to let him know at cwilliams@hksinc.com The tentative date for our meeting is the evening of June 25.

A nudge to our Chicago-area members, which include: ***Gary L. Cole, AIA, Esq., Ted Ewing, AIA, Esq., Scott R. Fradin, Esq., John B. Masini, AIA, Esq., Gracia M. Schiffrin, AIA, Esq., and Bryan M. Seifert, Esq.***

Mark your calendar for June 25! See you in Chi-Town!

# Dealing with the Request for Contractual Liability Coverage Under a Professional Liability Policy

By Gilson Riecken, AIA, Esq..
San Francisco, CA

How should a design professional respond when a client insists on proof of contractual liability coverage under the designer's professional liability insurance (PLI)? Designers' attorneys know that, as a rule, PLI expressly *excludes* coverage for liability that exists solely because of its contractual assumption. So, when a client refuses to delete a PLI contractual liability requirement, is the designer out of luck? Probably not. Most likely, the problem is one of communication.

For a number of years I provided contract review for a small E&O carrier, and in that role often encountered requirements for "contractual liability" coverage under the PLI policy. My initial response involved explaining that such coverage was not available under PLI. In most instances, that would resolve the problem. Sometimes, I would have to talk to the client's attorney, or its insurance advisor, before the client would agree to delete the requirement. But in a minority of cases, the client representative insisted the requirement as non-negotiable, and refused to abandon it. Some clients insisted they had engaged numerous other consultants with the requirement, and that no other designer ever objected to it.

In one such negotiation, a multi-campus state university system's general counsel office insisted it had retained scores of architects and engineers with its PLI contractual liability requirement. So I asked for a copy of the policy language or endorsement that the university accepted. He sent me more than a half dozen examples. After weeding out the language from general liability policies, several examples remained – all them of stating the standard PLI contractual liability *exclusion*.

The typical PLI contractual liability exclusion reads something like the following: "This policy excludes any liability assumed by contract, except to the extent that such liability would exist in the absence of the contractual requirement to assume it." To an insurance company, this is an "exclusion." But to many clients, this provides an important declaration that the PLI insurer will not deny coverage for a "legal liability" just because the contract enumerated it.

For many years, architects and engineers have told their clients that they have *no* coverage for contractual liability. Some designers even say that overly-broad liability language in a contract may "void" or "invalidate" their PLI. Such statements are not correct; PLI only excludes those contractual liabilities that would not otherwise exist *but for* their contractual assumption. PLI coverage applies to a designer's "legal liability" – liability that exists regardless of contractual assumption – even if the designer expressly assumes that same legal liability in the contract. As one PLI carrier tells its insureds: PLI covers the designer's legal liability for design negligence, regardless of what a contract says; it does not cover contract language. So the designer/client contract does not change what the PLI covers. But after repeatedly hearing that designers have "no coverage" for liability assumed in a contract, some clients apparently became concerned that, if a contracts identifies a specific liability (such as an architect's responsibility for its own negligence), that mention in the contract might transmute the architect's *insurable* "legal liability" into an *uninsurable* "contractual liability." For such clients, PLI requiring "contractual liability" coverage means a statement confirming that identification of liability in the contract does not automatically exclude it from coverage under the architect's PLI.

In summary, the best approach to address a PLI contractual liability requirement involves communicating with the client about coverage. And, if that fails, then understanding what the client means by its requirement. I have developed a three stage response to address such requirements:

- **First,** explain to the client that "contractual liability" coverage is not available for PLI. Involve your carrier in the discussion, if necessary. This should work in most cases.
- **Second,** if it does not resolve the issue, you can ask your client for examples of satisfactory PLI contractual liability coverage language and/or endorsements. Often, you will receive language from a CGL or other non-PLI policy. The client may even provide a professional liability endorsement to a design/builder *contractor's* CGL policy. Such policies are irrelevant to designers because a designer's CGL policy does not cover design work, and a professional liability endorsement to contractor's CGL policy will exclude design work performed by the contractor itself. In any of these cases, you may be able to resolve the issue by showing the client that it had not actually received contractual liability coverage under any PLI policy.
- **Finally,** if neither of the previous steps resolves the issue, you can provide the client with a copy of your PLI policy language regarding contractual liability. This also should work if, at the second stage, the client submitted the professional liability exclusion from another designer's PLI policy.

In the many years that I've had to negotiate insurance requirements for designers, I have found one or another of these steps always resolves the problem. The recommended order reflects my personal approach: I try to avoid wading into insurance policy language, if possible, since project managers on both sides of most negotiations often admit that they do not understand it themselves.

## Wisconsin Broadly Interprets Contract Indemnity Clause.

In a 2013 Wisconsin case an engineering firm was hired to design a 65–mile water pipeline and related facilities for a County Water Authority. The Authority later sued the engineer for $15 million and for punitive damages. Both sides moved for summary judgment. The lawsuit claimed that due to the engineer's failure to perform its duties under its contract in accordance with the professional standard of care, the pipeline was not properly constructed.

The engineer relied on a contract clause that said the firm would, *"indemnify [the Authority] from and against any and all damages, loss, or costs if and to the extent arising from [engineer's] failure to meet generally accepted professional engineering standards ... [Engineer] makes no other warranties either express or implied and the parties' rights, liabilities, responsibilities and remedies with respect to the quality of Services, including claims alleging negligence, breach of warranty and breach of contract, shall be exclusively those set forth herein."*

The engineer argued that this language limited its liability to reimbursing the Authority for payments the Authority had been required to make to third parties on account of the engineer's failure to perform in accordance with professional engineering standards. Since the Authority had not sustained any pecuniary loss to third parties, the engineer argued the Authority has no claim for "*damages, loss, or costs."*

The Court held that the contract clause did not limit the engineer's obligation to indemnify the Authority for the Authority's liability to others, stating, "It would appear from the context that the broader definition is the intended meaning of the word here."

Under Wisconsin law, indemnity agreements "are liberally construed" and therefore, the Court found that the engineer's liability was not limited to reimbursement of the Authority for payments made, but covered "any and all damages, loss, or costs" arising out of the engineer's failure to properly perform its duties.

However, the Court went on to find that "absent actual damages, the Authority's contract claim should be dismissed." While no actual repair costs had been incurred, it was found that the Authority had presented "some evidence" that the pipeline that was built is of lesser quality because of the engineer's breach of its duties, including an estimate of the costs needed to repair the alleged defects. That estimate was enough to avoid summary judgment. Close call for the Authority.

See, *Central Brown County v. CTE*, 2013 WL 501419 (E.D.Wis. 2013).

## Membership Grows to 75 Dual Professionals!

The following new members have joined since our last Newsletter:

NEW MEMBERS:

John C. Livengood, AIA, Esq.
ARCADIS
Columbia, MD

Deborah B. Mastin, Esq.
Broward County
Ft. Lauderdale, FL

Christopher M. Mills, Esq.
Wiley Rein, LLP
McLean, VA

Eric O. Pempus, AIA, Esq.
Oswald Companies
Cleveland, OH

Kerri Ranney, AIA, Esq.
Huckabee & Associates
Georgetown, TX

Henry I. Reder, Esq.
Attorney at Law
Chesterland, OH

# Jefferson Society Member Helps Save Historic House By Making Custom Pens

Frank Lloyd Wright's "Affleck House" in Bloomfield Hills Michigan, represents one of the finest examples in the world of the Usonian style, the last great period of Wright's career. A design concept Wright conceived after being asked by a client to design a home that could be built for $5,000 for everyone to afford, Wright failed to achieve that goal due mainly to insistence on higher quality materials and fine detail which consistently drove the cost well above that mark. Only 60 Usonian homes were ever built. The Affleck house was placed on the Michigan Register of Historic Places in 1978, and the National Register of Historic Places in 1985. AIA Michigan includes the house among Michigan's 50 most significant structures. Donated to Lawrence Technological University in 1978 by the children of the original owners, the house had not been neglected, but is was in dire need of work when a small group consisting of a few of the past winners of the LTU College of Architecture Distinguished Alumni Award took it on as a pet project.

The house was in need of masonry repairs, kitchen and electrical system upgrades, and suffered from grading, paving and drainage issues that exacerbated some of the other problems. Unfortunately, without a funding source there was little that could be done. Jefferson Society member **Frederick F. Butters, Esq., FAIA**, an accomplished woodworker, solved that problem when he agreed to manufacture a limited edition commemorative pen from scraps of wood removed during the most recent siding repairs, an effort that raised $40,000 for the restoration work.

It happened just in time. When the masons removed the brick on a large retaining wall showing significant distress, their engineer opined the house was not more than 18 months away from a catastrophic collapse. To stretch limited funds, the group approached local material suppliers, tradesmen, and unions, and sought labor and material donations. To date, the retaining walls have been rebuilt, the exterior slabs and stairs have been removed and replaced, and the entire structure has been tuck pointed and the mortar re-stained. In addition, the drainage problems have been resolved with the removal of extensive asphalt paving and replacement with landscaping and crushed limestone drive matching the original design. Work is progressing to the interior with the replacement of the main electrical panel. A new kitchen and a fully updated electrical system are also scheduled for this year.

While the total retail cost of the project to date exceeds $250,000, the group has succeeded in paying all costs from the funds raised by selling the limited edition pens.

Fundraising will be an issue for the final stages which include the restoration of the rooftop deck, replacement of the single pane glazing with a high performance product, and the installation of an air conditioning system, but the work to date is an amazing example of what can be done by a small group of dedicated volunteers and the generosity of the construction community. For progress photos and more about the project, visit http://www.butters-law.com, follow links on the left side of the home page. The efforts ensure that this architectural treasure will survive for future generations.

Above, one of the custom-crafted pens made by Jefferson Society member, Frederick Butters, FAIA, Esq. from scraps of wood siding from the historic Usonian-style "Affleck House."

Below, the Affleck House in Bloomfield Hills, Michigan, saved in the nick of time from a total collapse.

## MEMBER PROFILE:

## DONOVAN OLIFF, AIA, ESQ. (HOK-St. Louis, MO)

HOK Legal (on casual Friday), from left to right, Mark Baum (Staff Attorney), **Donovan Olliff (Assistant General Counsel),** Peter Mosanyi (Associate General Counsel) Dianne Brown (Contract Administrator), Lisa Green (General Counsel) and Jeff York (Associate General Counsel)

Jefferson Society member Donovan Olliff, AIA, Esq. is an Assistant General Counsel and Senior Vice President with HOK in St. Louis. He is a construction law attorney and registered architect with 20 years of combined industry experience working as an architect, private practice construction law attorney and corporate counsel at a multi-national architectural firm.

Prior to joining HOK, Donovan practiced construction law at the law firm of Cokinos, Bosien and Young in Houston, Texas. Before law school, he practiced architecture with Page Southerland Page (Austin), 3D/International (Houston) and Ziegler Cooper Architects (Houston). Donovan has a Bachelor of Architecture degree from Texas Tech University (1993) and a Juris Doctorate from the University of Houston Law Center (2001). He is also a member of the American Institute of Architects, State Bar of Texas and Missouri State Bar. Donovan's transition from architecture to law was inspired and mentored by two architects-turned-attorneys, John Hawkins and Alan Fleishacker. Both are practicing construction law attorneys in Houston.

For Donovan, there is a sense of purpose behind being an architect and an attorney. The work HOK does – whether designing cities, universities or airports – changes the lives of people for the better. Having been an architect, Donovan understands that great design is at the core of every architecture firm. Helping architects and engineers understand the risks, rewards, rules and responsibilities of their practice enables them to go out into the world and deliver great projects.

One of more rewarding job activities has been serving HOK's Diversity Advisory Council Chair since November 2012. The Diversity Advisory Council is a firm-wide group focused on promoting fairness in opportunity, employee engagement and fostering a truly global culture at HOK. The best part of being architect-attorney, of course, is the creative and brilliant people with whom Donovan works. None are brighter the people at HOK Legal (pictured above).

In his leisure, Donovan enjoys reading presidential biographies, including *Thomas Jefferson: The Art of Power* by John Meacham, and *No Ordinary Time* and *Team of Rivals*, both by Doris Kerns Goodwin. The former is about the Roosevelt Administration during World War II and the latter is about Abraham Lincoln's Administration during the Civil War. His advice to anyone considering career in architecture/law? "Being an architect-attorney is a great combination and has served me well. I encourage students to view their careers, not solely terms of practicing architecture, but as participants in the broader construction industry. The dual background, if managed properly, enables a person to participate in the industry in a much more substantive way. It is hard work, but it is exceptionally rewarding." Amen to that!



## LEGAL BRIEFS

### NEVADA: Subcontractor Cannot Sue Engineer for Economic Loss Under Theory of Negligent Misrep.

As matter of first impression, the Nevada Supreme Court held that the economic loss doctrine applied to bar claims by a steel installation subcontractor for negligent misrepresentation against the structural engineer. This case involves the troubled CityCenter project in Las Vegas, the building which originally was to consist of over 40 floors, could not be built above 26 floors due to flaws in the steel installation. Litigation ensued involving many parties to the project. The steel installer sued the structural engineer alleging claims for negligence, equitable indemnity, and contribution and apportionment, and seeking declaratory relief. The engineer filed a motion to dismiss based on the economic loss doctrine, which was granted. The sub then sought leave to amend to assert a claim for negligent misrepresentation, which the engineer opposed.

Following a hearing, the trial court granted the sub's motion to amend. On the engineer's Writ of Mandamus, the supreme court held that negligent misrepresentation is not an exception to the economic loss doctrine. "Determining that design professionals have a separate and distinct duty . . . to any subcontractor that must rely on their plans would essentially allow any party to recast their barred negligence claim into a negligent misrepresentation claim. In the context of commercial construction projects, the evidence that would need to be presented in order to prove a negligent misrepresentation claim is almost identical to that which would be necessary in proving a claim for negligence. Allowing one and not the other would create a loophole in [the] objective of foreclosing professional negligence claims against commercial construction design professionals and would, essentially, cause the economic loss doctrine to be nullified by negligent misrepresentation claims."

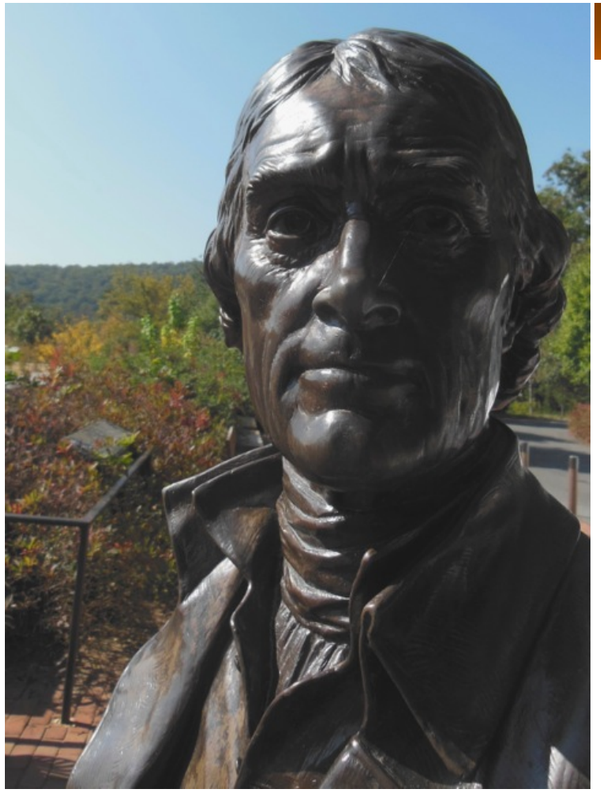
The case is *Halcrow, Inc. v. District Court,* 302 P.3d 1148 (Nev. 2013).

### TEXAS: Teaming Partner's Competing Bid Was Breach of Exclusivity

One party to a teaming agreement sued the other, alleging breach of the exclusivity provisions when that party submitted its own competing bid. The jury found in favor of the Plaintiff, awarding $336,000 in damages, plus attorneys' fees. The teaming agreement stated, "This is an exclusive agreement between [Party A and Party B]. [Party B] will not team up with any other company for [this] solicitation." Pursuant to the agreement, the Plaintiff submitted a bid of $3.2 million with its teammate as a critical subcontractor. When the government rejected the bid and issued an amended solicitation, the teammate submitted a lower, separate bid of $2.4 million and won the contract. The Plaintiff sued for damages, claiming that even though the teaming agreement only limited Party B's ability to team with others (unilateral restriction), that was an incentive for the opportunity to be part of Plaintiff's team. In upholding the verdict, the Court of Appeals held that there was sufficient evidence to support the jury's verdict. The case is *X Technologies, Inc. v. Marvin Test Systems, Inc.,* 719 F.3d 406 (5th Cir. 2013).

### ARIZONA: Homeowner Can Sue for Economic Loss, Despite No Contract.

While Arizona's economic loss doctrine limits contracting parties to their agreed upon remedies for purely economic losses, the state supreme court held that a homeowner who has no contract with the builder of the home can still sue in negligence or breach of implied warranty for construction defects. In this case, a contractor built a home and sold it in 2000 to its initial purchaser, who in turn sold it to Mr. & Mrs. Sullivan in 2003. In 2009, the Sullivans first noticed irregularities with the home's hillside retaining wall. An engineer determined that the wall and home site had been constructed in a dangerously defective manner. The Sullivans sued the original builder for the cost of repair. The trial court dismissed all of the claims, in part based upon the economic loss doctrine. On appeal, the supreme court held that Arizona's economic loss doctrine "serves to encourage the private ordering of economic relationships, protect the expectations of contracting parties, ensure the adequacy of contractual remedies, and promote accident-deterrence and loss-spreading." However, the doctrine is limited to contracting parties. The case: *Sullivan v. Pulte Home Co.,* 306 P.3d 1 (Ariz. 2013).



**Getting Up Close to Mr. Jefferson!**

Jefferson Society President R. Craig Williams, AIA, Esq. snapped this close-up photo of our namesake on a recent motorcycle outing to Monticello.

## POTTED PLANTS? YOUR ROLE WHEN DEFENDING YOUR EMPLOYEE'S DEPOSITIONS

Bill Quatman, FAIA, Esq.
Kansas City, MO

Some of us are old enough to remember Oliver North's lawyer Brendan Sullivan who argued, "I'm not a potted plant. I'm here as the lawyer. That's my job," during Congressional hearings on the Iran-Contra scandal. But a recent New York case suggests that in some situations, lawyers defending their clients are not much more than a potted plant.

Here is the situation that many design firms run across. There is a lawsuit between the project owner and the contractor, or maybe it's a contractor and a sub-contractor. Your firm was the prime designer and you have lots of project records, plus fact witnesses employed by you. Since your firm is not a party to the case, you are served with a subpoena ordering one or more of your employees to appear for a deposition. First, it's a hassle since the court rules only require a minor fee be paid to the witness for his or her time and mileage (nothing close to what your firm loses each day the witness is out of the office testifying or reviewing records). But second, does your employee need a lawyer to accompany him or her to the deposition? You bet they do, and here's why.

If you take a lax view about a third-party deposition, thinking your firm is not a party to the suit – so who cares, think again. The two lawyers (or more) who are questioning your employee, under oath, often on video-tape, may be setting the stage to join your firm to the lawsuit. In the process of examining the witness, evidence may come out that implicates your firm as a contributing cause to the loss or damage. If the court deadline has not passed for joining third-parties (and you should inquire about that), you may find that shortly after the deposition testimony a third party petition is filed to add your firm to the suit. You are at an immediate disadvantage because: 1) all of the other lawyers have a year or so in the case, and your lawyer is playing catch-up; 2) they've all had time with the judge, and you are the new-bee; 3) your employee was just recorded on tape making statements that hurt your case, and it's out there as a permanent record; and 4) you are "fresh money" – and everyone loves having a new player bring their checkbook.

So, back to the potted plant. If you are smart, you or your insurer will retain a lawyer to help prepare your employee for a deposition (what to expect, how to handle yourself, etc.); and to object to improper questions. *But wait a minute!* Can you object – or even speak – at a deposition if your company is not in the lawsuit? A recent New York case puts this in doubt.

In the case of *Thompson v. Mather*, 70 A.D. 1436 (N.Y. 2010) a patient sued her doctor for malpractice. During discovery, the plaintiff's treating physician (not the defendant) testified at a deposition. The physician's insurer hired a lawyer to attend the deposition during which the witness' lawyer objected to some questions as to form and relevance. The plaintiff's attorney objected to the participation of the physician's lawyer, suspended the deposition and asked the court for an order that the witness' lawyer could not make any objections except as to: 1) attorney-client privilege; and 2) abusive or harassing questions. The court agreed and ruled that, "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition." The case has caused a stir in the New York legal circles.

A 1977 Missouri case had a similar ruling in a criminal setting. In *State ex rel. Naes v. Hart*, 548 S.W. 2d 870 (Mo. App. 1977) a woman was charged with stealing. Her lawyer served notices to take depositions from several doctors. The first doctor brought his own lawyer to the deposition who announced that he planned to actively participate in the deposition, which he did by making objections to questions and even asking questions of other witnesses who were deposed. The defendant's lawyer protested, that as a nonparty to the suit, the lawyer could not take such an active role. The court ruled that his conduct was out of line, since his client was a mere witness and not a party to the suit. "A deponent is entitled to access to legal advice on the subjects of privilege and self-incrimination in connection with his appearance" at a deposition, the court held, "as a matter of essential fairness." However, that lawyer may not make general objections, nor observations or remarks "on the record" related to relevancy or any other matter not relating to privilege or self-incrimination, the court said.

So, potted plant or not? Case law permits a nonparty's lawyer to appear and object on these limited grounds:

1) self-incrimination;

2) attorney-client privilege;

3) questions that violate any court order; and

4) clearly improper, abusive or harassing questioning.

Other than that, keep your mouth shut!

So, the next time you get a subpoena for one of your folks to show up at a deposition, should you send a lawyer . . . or a nice plant? I'd opt for the lawyer.

## Nevada Supreme Court Rules for Engineering Firm on Certificate of Merit Grounds

Hot off the press is an October 3, 2013 opinion by the Nevada Supreme Court holding that two sub-contractors who sued an engineering firm had to file an expert report or risk dismissal.

In the April 2013 issue of *Monticello*, we highlighted states that have Certificate of Merit laws. This included Nevada's NRS 11.258 which requires an affidavit and expert report to be filed concurrently with the first pleading in an action involving non-residential construction against a design professional.

In this case, Converse Professional Group (CPG) filed a Motion to Dismiss lawsuits by two subcontractors, whose work CPG had inspected. The suit arose out of the large-scale, mixed-use development in Las Vegas known as "CityCenter." The design firm argued that the initial pleadings were void ab initio since the subs had not filed the affidavit and expert report. The trial court denied the motion. On appeal, the Nevada Supreme Court ruled that the Certificate of Merit law applied and that the trial court "must dismiss" the pleadings "as they were *void ab initio* for their failure to comply with NRS 11.258.

The trial court had been concerned that if is dismissed the pleadings, it might dismiss the entire action. The subcontractors argued that their initial pleadings did not involve the design or construction of the project, but only "representations about inspections." The state supreme court did not buy this argument, however, holding that, "Construction of a building involves inspection of the ongoing construction activity, and claims that a quality control and assurance inspector made misrepresentations about the construction's quality or was at fault for defective conditions concern the construction of the building." Also, CPG's services involved professional engineering, which brings them within the coverage of the Certificate of Merit law.

The case is *In Re; CityCenter Construction, 129 Nev. Adv. Op. 70 (Nev. 2013). Editor's Note: NRS 11.258 requires that in an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney: (a) Has reviewed the facts of the case; (b) Has consulted with an expert; (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and (d) Has concluded on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact." In addition, a report from the expert must be attached to the affidavit.*

# Indemnity Wars

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(Guest Contributor)

The battle in the 50 states over whether and how one party should indemnify another on a construction project has constantly been fought. After 30 years under one statutory scheme of allowable indemnity agreements and agreements to insure that indemnity, the Minnesota legislature has again stepped into the fray and re-aligned the rules of engagement. This article examines the new amendments to Minnesota's statute and provides insights on how to work within the new law.

**Context and History.**

In 1983, the Minnesota legislature established the framework with which we all are familiar: An indemnification agreement in a construction contract is unenforcedable except to the extent the injury or damage in question is attributable to the negligence or breach of contract of the indemnitor. Under the 1983 statute, the indemnitor could still agree to procure insurance for the benefit of others, including the indemnitee. The statute made an exception for the common practice where the indemnitee requirew the indemnitor to agree in the contract to provide an insurance policy that will insure the parties' contractual indemnity agreement. By this mechanism, the parties could agree to a broad form indemnity that by itself would be unenforceable, but if the indemnitor merely agreed to provide insurance that covered the obligations of the broad form indemnity agreement, then the agreement to provide insurance was still valid and enforceable.

The validity of this risk management technique was upheld in *Holmes v. Watson Forsberg Co.*, 488 N.W.2d 473 (Mn. 1992) in which the court stated: "In our view, the legislature both anticipated and approved a long-standing practice in the construction industry by which the parties to a subcontract could agree that one party would purchase insurance that would protect 'others' involved in the performance of the construction project. Such a risk allocation method is a practical response to problems inherent in the performance of a subcontract and…the parties are free to place the risk of loss upon an insurer by requiring one of the parties to insure against that risk."

A common example used to explain the benefits of this risk management technique is Builders Risk insurance. Owners, general contractors, and subcontractors can all subject the project to the risk of fire. If a fire occurs, the parties could all sue each other for their alleged respective fault for the blaze. After years of litigation, one or more of them will be held liable. In the meantime the building will remain unconstructed until the litigation proceeds are recovered to rebuild it. Fortunately, there is an insurance solution to avoid this morass – Builders Risk insurance can be purchased by one of the parties for the peril of fire, and all the interests of parties on the project will be covered by it. By agreement, all the covered parties will waive their claims against each other to the extent caused by that insurance (waiver of subrogation), and the risk of fire caused by the negligence of one or more of the parties will effectively be transferred to insurance. Of course, the insurance companies charge a substantial premium to accept this risk, but by intelligent underwriting the insurers will make a profit, and the owners, contractors and subcontractors who are the beneficiaries of the policy will receive a relatively quick recovery and avoid the cost and delay caused by litigating over fault and responsibility.

**Legislative Intervention.**

This year, the Minnesota legislature tried to correct some of the practical problems in the current legislative scheme of allowing parties to insure their indemnity agreement as a way to keep in broad-form indemnity. The amendments can be found in Minn. Stat. § 337.05, which is the section allowing agreements to provide insurance for the benefit of others, and took effect on August 1, 2013. Some have described the amendment as a fundamental "game changer"; while others believe it barely changes the status quo. As with most claims by advocates, the truth may lie somewhere in the spectrum between the poles, but it will likely take a few significant court cases to learn the exact impact of the new statute. What the amendment does expressly state is that agreements to provide insurance coverage to other parties for the negligence of any of those other parties is *against public policy and void.* (See inset on p. 13).

In the realm of commercial general liability (CGL) insurance, coverage provided to another party certainly means Additional Insured coverage because one party (e.g. the subcontractor) is agreeing to provide Additional Insured coverage to another party (e.g. the general contractor). Thus, the 2013 amendment should significantly restrict the types of widely used blanket-type Additional Insured endorsements that an upstream indemnitee can demand from a downstream indemnitor. As an example, the ISO 2004 Additional Insured endorsements allowed Additional Insured coverage for the partial negligence of the additional insured. The new Minnesota amendment should restrict that coverage unless the endorsement is appropriately changed. The new ISO 2013 Additional Insured endorsements were drafted to respond to statutory amendments from many states restricting Additional Insured coverage to the promisor's negligence. The 2013 endorsements limit that cover-age "to the extent provided by law," which in Minnesota would mean to the extent caused by the promisor's negligence.

As with many states, the new statutory amendments contain their own set of exceptions, that attempt to preserve many of the benefits intended by the original statute. For instance, the amendment expressly allows Builders Risk insurance because, even though it provides insurance to some other party for that party's negligence, the premium is known up front and can be fully priced and allocated by contract. The exceptions also include performance and payment bonds and workers compensation insurance. Perhaps the most interesting exception is the one for project-specific insurance, including, without limitation, OCIPs and CCIPs. Finally, the exceptions include promises to provide insurance coverage for the vicarious liability of the indemnitee, liability imposed by warranty, or work performed within 50 feet of a railroad.

**Conclusion.**

There are still several questions surrounding indemnity agreements left unanswered by the statute. It often is argued that agreements "to defend" are different in kind and scope from indemnity agreements. Most contracts require downstream indemnitors to defend upstream indemnitees from even mere allegations of liability. The statute does not expressly address such agreements "to defend." The original statute's prohibition of broad form indemnity agreements was left untouched. What was modified was the allowable scope of agreements to provide insurance coverage to another party. The meaning of the phrase "to provide insurance coverage to one or more other parties, including third parties" will now be the focus of interpretation. Unfortunately, the original statute generated a significant amount of litigation to establish the meaning of that statute in the broad variety of circumstances that arise on a construction project. The new statute certainly intends to make a change, and hopefully not as much litigation will be needed to fully define its new scope.

As with any change, tried and tested approaches will have to be modified. Currently, existing contractual indemnity and insurance provisions have been literally tried and tested in many court battles. They will now have to be changed to respond to the new statute. Yet, contracts can still be negotiated and insurance purchased to achieve almost any desired result. The types of insurance specified and purchased, however, will have to be changed. Insurance counsel should be consulted to help you draft and negotiate agreements and subcontracts that will not, in the words of the new amendment, be found to be "against public policy" and "void and unenforceable". Good luck.

Key changes to Minn. Stat. § 337.05 (effective Aug. 1, 2013):

(a) Except as otherwise provided in paragraph (b), sections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.

(b) A provision that requires a party to provide insurance coverage to one or more other parties, including third parties, for the negligence or intentional acts or omissions of any of those other parties, including third parties, is against public policy and is void and unenforceable.