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A Note From The Editors:

This Bulletin addresses recent developments affecting Design Professionals as well as business concerns as important as the specific professional and technical issues they face.

Coping with *Bilt-Rite*

By Neil P. Clain, Jr., Esquire

The legal relationships between construction project participants were altered significantly by the Pennsylvania Supreme Court's recent decision in *Bilt-Rite Contractors, Inc. v. The Architectural Studio*. Before *Bilt-Rite*, project participants could not sue each other for purely economic losses, which are financial damages that do not involve personal injury or property damage, unless they had a contract with each other. Thus, in a traditional relationship in which an owner contracts separately with a contractor and with a design professional, the design professional could not sue the contractor, and the contractor could not sue the design professional, for purely economic losses caused by the negligent acts of the other.

Bilt-Rite created an exception to this rule. Now, the economic loss doctrine will not apply where a project participant can show that it justifiably relied upon false information provided to it by another project member with whom it had no contract, if it can show that its

reliance upon the information was justifiable and that it was among the "limited group of persons for whose benefit and guidance" the information was supplied (or to whom the supplying party knew that the immediate recipient intended to supply the information).

In *Bilt-Rite*, the Supreme Court found that this exception to the economic loss doctrine allowed a contractor to allege in a lawsuit against a design professional with whom it had no contract that the design professional's plans and specifications made false express representations of constructability using "normal and reasonable" construction means and methods. The contractor alleged that it suffered damages in the form of increased construction costs when the erection of the building proved to be more complex than the contractor had anticipated, requiring "special" construction means and methods.

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Whether the contractor in that case would have been able to sustain its burden of proof and win such a case will never be known (the case was settled shortly before the opinion was handed down), but that is a question of small importance. The important point is that now such lawsuits clearly can be pursued, and design professionals and contractors can much more easily become embroiled directly in suits against each other.

This state of affairs creates many problems. As recognized by the dissenting minority opinions in the *Bilt-Rite* case, “allowing the tort cause of action to be maintained impairs the ability of design professionals to regulate their own risk by a contractual provision.” These judges correctly understood that the economic loss doctrine serves an important function in economic disputes arising from construction projects, “where multiple parties bargain and enter into a network of contracts to allocate risks and to define their respective rights and obligations.” The dissenters argued without success that “bargained-for contractual arrangements should govern the parties’ legal relationships and their economic expectations,” supporting their argument with cases decided in other states that recognize that “the construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract,” and that “the fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.”

What can be done to manage the new risks that result from this altered legal landscape? The best way, when it can be arranged, is to manage the risk contractually. We

recognize that in many cases this will not be possible; however, when it can be negotiated, the contractual limitation of the right of project members to sue each other represents the best approximation of the protection previously provided by the economic loss doctrine.

Managing the *Bilt-Rite* problem contractually will require you to convince the owner that it should work with you to assure that the contract documents, and not general tort law, will control the duties, obligations, responsibilities and risk allocation of the project participants. Parties to construction con-

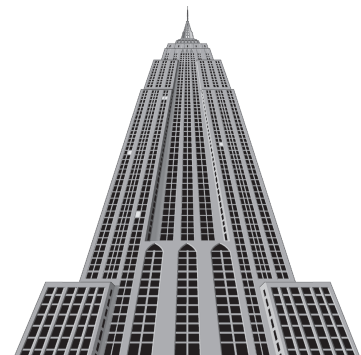
“allowing the tort cause of action to be maintained impairs the ability of design professionals to regulate their own risk by a contractual provision.”

tracts often waive rights that they would otherwise have under the law. For example, contractors often waive their rights to claim consequential damages, and project participants often waive subrogation rights pertaining to certain types of project losses.

We suggest attempting to address *Bilt-Rite’s* threat to project coherence in the same way. When possible, negotiate clauses in all of the project contracts that all project participants waive all direct tort claims against other project members with whom they are not in contractual privity (including without limitation claims for negli-

gence and negligent misrepresentation) unless the tort claim involves personal injury, property damage (other than to the project itself) or intentional conduct (subject to any other limitations on these types of claims that may appear elsewhere in the contract). The contracts should expressly state that the procedures contained in the contracts for adjustments of contract price and time, and all limitations upon the types of costs and expenses that can be recovered, shall be the exclusive method for addressing claimed economic losses, regardless of whether suit proceeds in contract, tort, or otherwise. It should also be made clear that these restrictions are expressly intended to benefit all project members, including without limitation the owner, the design professionals (and their subconsultants) and each contractor (and their subcontractors).

As appropriate to your contract, also make clear what information is being supplied with the intention that it will be relied upon, as opposed to being made available for general information purposes. For example, if available subsurface information is supplied to contractors who otherwise have an independent obligation to investigate subsurface conditions, make sure that this limitation is expressed (in the contract, in any transmittal of the information, and preferably in both).



If direct claims for negligent misrepresentation between a contractor and design professional occur, the owners will often find themselves joined to these suits as third party defendants;...

How do you convince an owner that these clauses are in its best interest? After all, owners might be inclined to regard *Bilt-Rite* as a blessing that allows them to avoid litigation costs while project members battle it out between themselves. Consider these talking points:

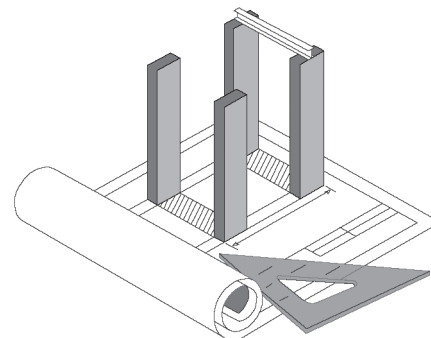
- If direct claims for negligent misrepresentation between a contractor and design professional occur, the owners will often find themselves joined to these suits as third party defendants; owners, too, provide information upon which others rely. In these cases, the owner may become a mere joint tortfeasor with the design professional, and may lose the benefit of many important contractual protections.
- The owner will not benefit by having the rights, duties and risks of project participants untethered to their contracts. The contracts are intended to define the rules for the project, and they promote a common understanding and stability. When those rules are set aside, and need not be followed in order

to recover for economic losses incurred during a project, the project will suffer for the lack of foreseeability and closure that the contracts were intended to provide.

- If the claim procedures established by the contracts are circumvented, the owner may lose the advantage of its contractual defenses and its chosen litigation means (for example, arbitration or mandatory pre-litigation mediation) and the rules that it negotiated concerning the litigation (for example, venue and choice of law provisions).

- As a matter of basic fairness, contractors should not be able to circumvent contractual damage limitations negotiated between the owner and the design professional, and thus allow disproportionate damage claims against a design professional who, unlike the owner, has no opportunity to negotiate contractual limitations with a contractor. Since the contractor is not bound by the design professional's contract with its owner, risk management devices such as limitation of liability clauses will not protect the architect in a suit by a contractor. Further, the design professional is constrained by Pennsylvania's anti-indemnification act from protecting itself against such claims by obtaining indemnity from the owner.

If you cannot obtain contractual protection from direct claims for negligent misrepresentation by contractors, then you must be even more scrupulous about using the same risk management techniques that we recommended in the pre-*Bilt-Rite* era, such as obtaining signed written contracts with clearly defined work scopes; reading and understanding the applicable contracts and adhering to their terms; documenting important project communications; making sure that your shop drawing review



stamps are clear and are consistent with your contractual review obligations; and making sure that RFIs and your responses to them are properly documented, and that your responses are consistent with the plans and specifications. Even if you are able to negotiate the contractual protections that we have suggested, you should never relax your compliance with these risk management techniques on the assumption that your contract will protect you from the consequences of misunderstandings or poor performance. Indeed, while we suggest negotiating contractual protection as an additional safeguard against the broadened scope of your potential liability under *Bilt-Rite*, even having such language in the contracts is not a guarantee of success, for the courts must also be willing to enforce these negotiated protections.

We will be monitoring, and reporting to you, how the lower courts apply *Bilt-Rite* in the cases that come before them and how they rule upon the assertion of contractual defenses to such claims.

SOME LICENSING NEWS FOR ARCHITECTS LICENSED IN FLORIDA

By: Anthony S. Potter, Esquire

Florida Board of Architects is pursuing disciplinary actions against Registered Architects for failure to complete courses on the Florida Building Code.

Architects licensed in the State of Florida should be aware that Florida's Board of Architecture and Interior Design (the "Board") is currently pursuing disciplinary actions based on the failure of architects to comply with continuing education requirements related to the Florida Building Code.

The Florida Architects Licensing Law, Section 481.215(5) Florida Statutes, requires licensed architects to provide evidence to the Board that an architect has completed the core curriculum courses or has passed the equivalency exam on the Florida Building Code. The time period for completing the course or passing the examination, and providing proof to the Board, has expired. The Board is in the process of identifying non-compliant architects and issuing disciplinary citations. Each citation carries a \$500.00 fine. Reportedly, the Board is issuing the citations alphabetically based upon the licensee's

first name. Payment of the fine results in a disciplinary record for the architect's Florida license.



Obviously, any architect licensed in Florida, who has not yet completed the core curriculum courses or an equivalency test, should complete the course and report to the Board before a disciplinary citation is issued. Completion of the course at this point will not guarantee that a citation will not issue, but it may provide a mitigating circumstance upon which to negotiate a more favorable resolution.

Information regarding courses established by the Building Code Training Program is available on the Florida Department of Community Affairs' website at www.dca.state.fl.us. Further core courses on the Building Code can be completed online at www.floridabuilding.org.

Pennsylvania Proposal to Expand the Sales Tax to Attorneys' Services

The Pennsylvania House and Senate are presently considering an expansion of the state sales tax as a means to defray the cost of eliminating school property taxes. One area of sales tax expansion that is now on the table is the taxation of legal services. At present, the proposal also includes a reduction of the sales tax from 6% to 5.7% (Senate version) or to 5% (House of Representatives version). Regardless, for the first time, you would have to pay a tax on the legal services that help support your practice.

Obviously, the proposal's adoption would increase the costs of doing business for all who rely upon lawyers to help them best represent their interests. Certainly, design professionals are among those whose business costs would increase, without increased benefit to them or their counsel.

The legal profession is opposed to this proposal and we recommend you join us in voicing opposition. The Pennsylvania Bar Association has a page on its website that makes this easy.

<http://www.congressweb.com/cweb4/index.cfm?orgcode=PABAR>

The first subject listed on this web page is "Compose a Message to Your Legislator Opposing a Sales Tax on Legal Professional Services." Click on the "Write Your Legislators" button under that subject, and follow the prompts to either download a letter for mailing, or sending an email. The web page will also help you find the names and addresses of your legislators.

You may find the "talking points" button on the web page useful in better understanding the substantial arguments that make this proposal both counterproductive and impractical. Of course, you can also call or independently write your legislators.

Of course, as we learn more about the proposal's prospects we shall let you know. In the meantime, we suggest you act to prevent this increase to your costs of doing business.

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