Legal Counsel for the Design Professional
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Is it Time for an Affidavit of Merit Requirement Against Design Professionals in New York?

Lee Sacket, Partner in the Design Professionals Group, deliberates the pros and cons of implementing an Affidavit of Merit requirement in New York to weed out frivolous lawsuits against design professionals.

Why Design Professionals Should Request the Inclusion of Liability Clauses in Their Project Agreements

Keith Stevens, Partner in the Design Professionals Group, emphasizes how limitation of liability clauses serve to significantly reduce the exposure of design firms and their insurers.

Timing is Everything - A Significant Supreme Court Ruling on Copyrights

Paula M. Gart, Partner in the Design Professionals Group, discusses the recent U.S. Supreme Court ruling requiring the registration of copyright before commencing an infringement action.

Is it Time for an Affidavit of Merit Requirement Against Design Professionals in New York?

BY LEE J. SACKET

Frivolous lawsuits against design professionals are an ongoing concern and, based on this author's observations, on the rise. Advances in technology have created larger masses of data and documents, sending discovery costs skyrocketing. Correspondingly, with higher discovery costs, comes leverage by claimants to settle cases on a "cost of defense" basis. Since State Courts are generally reluctant to grant pre-discovery dismissals, exposing the design professionals (and the insurance carriers) to these rising discovery costs, settlement becomes an attractive financial option. However, this circular process invites more and more claimants to commence frivolous lawsuits, betting that there will be some "recovery" (*i.e.*, settlement) regardless of the merit (or lack thereof) of the claim. This brings us to the present dilemma: what can be done to weed out frivolous lawsuits against design professionals? A legislative, procedural tool implemented in many states, but not New York, is the Affidavit of Merit requirement. Is it time for New York to follow suit?

In general, an Affidavit of Merit is an Affidavit executed by a licensed design professional affirming under oath that the design professional's services were negligent and/or breached the applicable standard of care. It is a device used by many states as a condition precedent to commencing, or proceeding with, a lawsuit against a design professional, with the intent to eliminate meritless claims against design professionals without the need to incur the expenses associated with costly discovery. States with a version of an Affidavit of Merit requirement include Arizona, California, Colorado, Georgia, Hawaii, Kansas, Minnesota, New Jersey, Oregon, Pennsylvania, South Carolina and Texas.

In some states with an Affidavit of Merit requirement, a design professional can move to dismiss a Complaint should a claimant fail to file an Affidavit of Merit, or if the Affidavit fails to satisfy certain elements, which vary from state to state. The impact of the dismissal (with or without prejudice) also varies from state to state, with some states allowing a claimant the opportunity to cure any deficiency within the affidavit, rather than outright dismiss the lawsuit.

Since no one can honestly advocate that a frivolous claim is a good thing for our judicial system, why doesn't every state have an Affidavit of Merit requirement? In some states, Affidavit of Merit requirements have been challenged as unconstitutional inasmuch as the requirement arguably infringes on a party's right to sue and violates equal protection guarantees. Other arguments championed in opposition cite to a lack of information at the early stages of litigation, which preclude an early determination as to fault and which could render compliance with Affidavit of Merit requirements problematic. In this same regard, claimants have argued that they may not have pre-discovery access to certain evidence, such as drawings, specifications, etc., which may be necessary for an independent design professional to provide an informed opinion in an Affidavit of Merit.

Is it Time for an Affidavit of Merit Requirement Against Design Professionals in New York? *(cont'd)*

While an Affidavit of Merit requirement in New York, in concept, appears to be a no-brainer from the design professional's perspective, whether it would actually reduce the number of frivolous lawsuits remains uncertain. From a practical perspective, an Affidavit of Merit requirement is only as good as the system charged with enforcing it, specifically, the Courts. While certainly not predictive, a look at the New Jersey Court's treatment of the Affidavit of Merit requirement in neighboring New Jersey can be informative. The New Jersey Affidavit of Merit Statute, N.J.S.A. 2A:53-27 reads:

> *IN ANY ACTION FOR DAMAGES FOR PERSONAL INJURIES, WRONGFUL DEATH OR PROPERTY DAMAGE RESULTING FROM AN ALLEGED ACT OF MALPRACTICE OR NEGLIGENCE BY A LICENSED PERSON IN HIS PROFESSION OR OCCUPATION, THE PLAINTIFF SHALL, WITHIN 60 DAYS FOLLOWING THE DATE OF FILING OF THE ANSWER TO THE COMPLAINT BY THE DEFENDANT, PROVIDE EACH DEFENDANT WITH AN AFFIDAVIT OF AN APPROPRIATE LICENSED PERSON THAT THERE EXISTS A REASONABLE PROBABILITY THAT THE CARE, SKILL OR KNOWLEDGE EXERCISED OR EXHIBITED IN THE TREATMENT, PRACTICE OR WORK THAT IS THE SUBJECT OF THE COMPLAINT, FELL OUTSIDE ACCEPTABLE PROFESSIONAL OR OCCUPATIONAL STANDARDS OR TREATMENT PRACTICES. . . .*
>
> *IN ALL OTHER CASES, THE PERSON EXECUTING THE AFFIDAVIT SHALL BE LICENSED IN THIS OR ANY OTHER STATE; HAVE PARTICULAR EXPERTISE IN THE GENERAL AREA OR SPECIALTY INVOLVED IN THE ACTION, AS EVIDENCED BY BOARD CERTIFICATION OR BY DEVOTION OF THE PERSON'S PRACTICE SUBSTANTIALLY TO THE GENERAL AREA OR SPECIALTY INVOLVED IN THE ACTION FOR A PERIOD OF AT LEAST FIVE YEARS. THE PERSON SHALL HAVE NO FINANCIAL INTEREST IN THE OUTCOME OF THE CASE UNDER REVIEW, BUT THIS PROHIBITION SHALL NOT EXCLUDE THE PERSON FROM BEING AN EXPERT WITNESS IN THE CASE.*

On its face, the statute is clearly intended to protect design professionals from frivolous lawsuits by requiring a modest showing, through a licensed, financially uninterested design professional, of a departure from the accepted standard of care. However, challenges over the years have weakened the statute beyond recognition. New Jersey Court decisions have created exceptions for "extraordinary circumstances" and "substantial compliance" so that "technical defects will not defeat valid claims". New Jersey Courts cite to these "exceptions" to "temper the draconian results of an inflexible application of the statute". While the New Jersey Courts treatment and interpretation of the statute is not uniform, through the creation of these "exceptions", the damage has been done. The New Jersey Court's self-mutilation of the Affidavit of Merit Statute is instructive that the legislative imposition of an Affidavit of Merit requirement does not guarantee the intended result.

The bottom line is that an Affidavit of Merit requirement in New York is not the likely game changer it was once thought to be, or some hoped it would be. Instead, it will take a concerted effort from the legislators and the Courts, in the drafting of statutory requirements and corresponding enforcement, and the insurance companies and design professionals themselves, in their litigation behavior in response to meritless lawsuits, to curb the conduct of the frivolous litigant. Only when those forces act in concert will litigants pause, even ever so slightly, before filing a questionable lawsuit.

Why Design Professionals Should Request the Inclusion of Limitation of Liability Clauses in Their Project Agreements

BY KEITH J. STEVENS

Many experienced design professionals practicing in today's litigious society unfortunately have been exposed to some type of legal claim or, in the very least, the threat of a claim. While most claims for professional negligence or malpractice are covered by professional liability insurance, the amounts in controversy often exceed the limits of available insurance coverage, thereby leaving the design professional vulnerable to personal exposure. Further, even when claims are fully covered by the underlying insurance policies, the amounts expended by insurance carriers on such claims all too often result in an increase to insurance premiums. The constant threat of personal exposure and increased insurance premiums unnecessarily diverts the design professionals' focus from their practice. In order to protect their bank accounts and achieve peace of mind, design firms should consider the inclusion of limitation of liability clauses in their project agreements.

Before considering whether to negotiate a limitation of liability clause into a project agreement, the design professional should have an understanding of the definition and purpose of such a clause. A limitation of liability clause is a contractual provision that caps the amount of damages that a client may recover from the design professional as a result of the design professional's wrongdoing. The rationale for capping damages is that the relatively small fee paid to the design professional does not justify the firm's assumption of the risk that the project goes awry. In the interest of fairness, the design professional's exposure should be relative to its potential reward.

The monetary cap included in limitation of liability clauses varies depending on the goals of the design professional. While there is no set amount, the cap oftentimes represents the design professional's fee or available professional liability coverage. Other times, the cap is a "reasonable" fixed amount dependent on the size of the underlying project. Most of the "B" series standard agreements published by the American Institute of Architects contain clauses whereby the owner and design professional waive all claims for consequential damages, as well as damages covered by property insurance (except such rights as they may have to the insurance proceeds).

While limitation of liability clauses are one of the most effective risk allocation tools available to design firms, many firms do not even attempt to negotiate such clauses into their agreements. Many of these firms express concern about the legality of limitation of liability clauses and whether such clauses will hold up in court. Some firms are likewise concerned that limitation of liability clauses are unprofessional and could jeopardize the relationship between the firm and its potential client.

Why Design Professionals Should Request the Inclusion of Limitation of Liability Clauses in Their Project Agreements *(cont'd)*

Limitation of liability clauses are generally valid and enforceable in most states. Courts in both New York and New Jersey routinely uphold limitation of liability clauses which: (1) are clear and unambiguous; (2) are not unconscionable as a result of inequities in the bargaining power of the contracting parties; and (3) are not against public policy to the extent that the monetary cap is unreasonably low relative to the value of the underlying services. However, design professionals in New York and New Jersey are barred from limiting their liability resulting from their own gross negligence (voluntary disregard of the need to use reasonable care), recklessness and/or intentional torts.

The benefits gained from requesting limitation of liability clauses often outweigh the inherent risks associated with requesting a limitation. As discussed above, valid and enforceable limitation of liability clauses serve to cap, if not negate, design professionals' personal exposure and reduce their insurance premiums (through incentives provided by insurance carriers as a result of their limited exposure). Further, design professionals oftentimes derive benefits from the negotiating process even when their clients ultimately reject the proposed clause. Notably, candid discussions regarding risk allocation and reduction serve to improve communications and understanding. For example, the potential client may offer the design professional an increased scope of services and/or increased fees in exchange for removing the limitation of liability clause from the project agreement.

The benefits derived from limitation of liability clauses are perhaps best illustrated by a lawsuit I personally handled. My architect client was sued for over $3 million in damages when a fire destroyed a new home designed and inspected by the architect. The home owner claimed that the direct vents for the hot water heater and boiler system were negligently designed and installed too close to grade level. The home owner substantiated nearly $3 million in claimed damages with backup documentation. However, we settled the lawsuit for under $20,000 because the agreement between the home owner and architect contained a limitation of liability clause capping the architect's exposure at an amount equal to his fees for services rendered.

While design professionals cannot eliminate the risk of potential exposure, limitation of liability clauses go a long way in reducing such exposure and consequently decreasing the premium amounts paid for professional liability insurance coverage. In negotiating limitation of liability clauses into their agreements, design professionals protect their bank accounts and gain the peace of mind needed to focus on their practice.

Timing is Everything - A Significant Supreme Court Ruling on Copyrights

BY PAULA M. GART

Most design professionals understand the benefits of protecting their designs through registration of their copyrights with the U.S. Copyright Office. Some wisely register their architectural works as a matter of course, or at least register their more significant or important designs prior to them being built or published, making them more likely to be copied by others as a result. Publication of an architectural work occurs when the designs or images of the designs are displayed publicly in promotional materials, websites, design awards or in digital or print publications.

Why register copyrights at all? Even though the design professional who authors the designs − or the firm that the design professional is an owner of or employed by – is the owner of the design's copyrights automatically, registration has always been required before a copyright infringement action against the one who copies those designs – known as the infringer, could be started.

Upon learning of an infringement of its designs, the design professional could file her registration application with the U.S. Copyright Office and then *immediately* start a copyright infringement action for damages or to stop, or enjoin, the construction of those designs.

The U.S. Supreme Court has recently changed the timing of the ability to commence that infringement action. Now, instead of being able to pursue the infringer immediately on simply *filing* for copyright registration, the aggrieved design professional must wait until the filed application is *actually registered* by the U.S. Copyright Office. The mere filing of a copyright application is no longer sufficient to permit a copyright infringement action to proceed under the Copyright Act; obtaining the registration of the copyright is now required to do so. This hurts architects and engineers whose designs are often misappropriated by others because the U.S. Copyright Office is taking approximately seven to nine months to register copyrights, with seven months being the average wait time to receive registration from the time of application. Adding in the time needed to properly apply for registration results in the design professional having to wait and seethe for close to a year while his or her designs are being used by another, all because the lawsuit now cannot commence until the registration is actually granted.

Had the design professional filed for registration on the completion of the designs so that registration occurred prior to the infringement, the design professional would be entitled to statutory damages, avoiding the need to prove actual damages and attorneys' fees. Of course, upon the actual registration of the copyright, the registering design professional could recover damages for infringement that occurred before and after the registration period. But since registration is a prerequisite to recovering statutory damages and attorneys' fees, filing for copyright registration of the designs as they leave one's firm puts the design professional in a position to take more immediate action against the infringement if it occurs. Statutory damages can in some cases be significantly more than actual damages suffered by the

Timing is Everything - A Significant Supreme Court Ruling on Copyrights *(cont'd)*

design professional owning the copyright in the designs. A showing of willful infringement, which is often accomplished if the drawings and architectural work contain the appropriate notice of copyright ownership and indicia of ownership, may entitle the copyright owner to receive up to $150,000 per architectural work infringed. Those statutory damages, plus attorneys' fees, may provide the incentive needed to register copyrights as the designs are produced and issued in an effort to avoid infringement.

There is no way to know when someone will infringe a design, so it behooves design professionals to routinely register their designs as soon as they are issued. Given the relative ease and low cost of filing registrations and the wait time for the registration to be received, filing a copyright registration of the designs on their completion or issuance should be part of every design professional's standard practice.

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