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Legal Counsel

for the Design Professional

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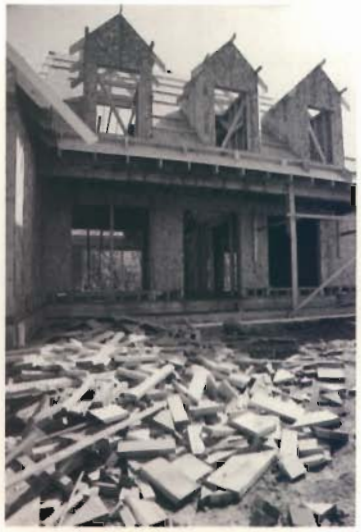
With a practice group comprised of nineteen lawyers whose combined experience approaches two centuries, we are the most experienced group of attorneys in the area, dedicated exclusively to representing design professionals.

RETURN AT YOUR OWN RISK

By Steven R. Goldstein

THE DESIGN PROFESSIONAL'S completion of services for a client usually marks the end of his or her involvement on the project. On occasion, a problem subsequently arises with respect to the design, construction, operation or maintenance of some aspect of the project which requires immediate attention. Often in these situations, the design professional is requested to return to the project site to help resolve the problem or, at the very least, assist in determining the cause of the problem. This is when the design professional needs to consider, *should I or shouldn't I?* The question of whether or not to return to the project site after the completion of professional services should be answered only after carefully considering all of the surrounding issues and consequences. Playing the knight in shining armor may provide immediate gratification, but the failure to consider all of the legal ramifications of gallantly providing post-completion services and assistance may result in the unintended extension of the design professional's duties and obligations on the project.



What are the legal ramifications of returning to the project to offer assistance after the completion of services? Are there inherent professional or ethical obligations to provide further services after the project is completed ? Is there a way to protect and maintain a favorable working relationship with the client while juggling these ramifications and any professional obligations associated with returning to the project? Before these questions can be adequately addressed, a basic understanding of this area of New York law is necessary.

Generally, after the design professional's completion of services,

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he or she is not legally required to perform any further project-related services for the client. In New York, any claim by the client-project owner against the design professional for negligence, or the improper performance of a service agreement resulting from alleged errors, omissions, defective design or improper performance of construction administration services, must be commenced within three years from the completion of the design professional's services on the project. It is this completion of services that starts the clock on the three year limitations period. After three years from completion, at least with respect to claims asserted by the client-owner for its damages, the design professional may usually breathe easy knowing that all is well at the project and that he or she will not be subject to the owner's claims for defective design or construction administration services.

Unfortunately, the design professional may unknowingly extend the limitations period by returning to the project (usually at the owner's request) to give advice or assistance to the owner in determining the cause of certain defective conditions and developing a remediation plan. This extension of the statute of limitations by the design professional's actions is known as the continuous treatment doctrine. In essence, this doctrine extends the time period in which the client-owner may commence a legal action against the design professional by preventing the statute of limitations from starting to run until the professional's "supplemental" services are completed, or until the "extended" professional relationship is terminated.

Fortunately, not every visit to the project or service performed after the completion of services triggers the continuous treatment doctrine. Rather, continuous treatment only extends the statute of limitations if the visit or subsequent service is to provide advice, service, remediation or treatment to correct deficiencies in the work (or related work) that was provided under the original agreement for services. Returning to the project merely to continue a general professional relationship, or to attend to any other condition or situation arising at the project, will not give rise to continuous treatment. In short, the doctrine may be invoked only if the design professional's purpose in revisiting the project is to provide ongoing efforts to correct a defective condition discovered in the original work, i.e., remediation services.

The design professional's performance of remediation services could delay the commencement of the three year statute of limitations until the last date of those services. Of course, if the statute of limitations has already expired, the return of the design professional to the project, or the new advice given, may start a new statute of limitations with respect to any alleged errors and omissions claimed as a result of the subsequent services rendered. In either case, claims that were, or could have been, barred by the passage of time may be revived by the design professional's subsequent services.

The question of whether or not to return to the project. . .after the completion of professional services should be answered only after carefully considering all of the...consequences.

It should be remembered that the legal ramifications impacting upon the decision to offer post-completion advice or remediation services only relate to potential claims by client-owners. They have no bearing on potential claims against the design professional which seek contribution for the defective condition complained of by other project participants who are timely sued. Continuous treatment has little effect on claims asserted by parties other than the client-owner, since the commencement of the limitations period for those parties is different.

The decision not to provide post-completion services would be simple if there were only the legal ramifications to consider. However, professional and ethical obligations must also be weighed in determining whether or not to return to the project to remediate an alleged defective condition. The American Institute of Architects Code of Ethics and Professional Conduct provides that "members should

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The No-Damage-For-Delay Clause
(Little or No Comfort to the Design Professional)

By Douglas L. Pintauro

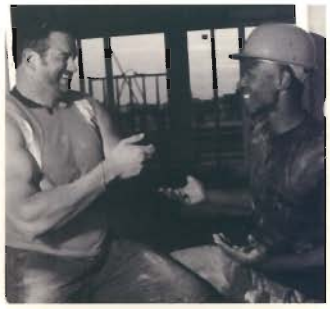
THE NO-DAMAGE-FOR-DELAY clause, while prominent in many construction contracts with municipalities, school districts, railroads, and the like, rarely provides any meaningful protection to the design professional. This general lack of protection, however, is not due to the unenforceability of such clauses. In fact, as a general rule, contract provisions which exonerate an owner, architect, engineer or any other party, from liability to a contractor for damages resulting from delays in the performance of the contractor's work are valid and enforceable. Of course, this rule, like all others, is not without its exceptions, even if the clause purports to exclude damages for all delays resulting from any cause whatsoever.

By way of example, the following represents a typical No-Damage-For-Delay clause:

"The contractor agrees to make no claim for damages-for-delay in the performance of this contract occasioned by any act or omission to act of the owner or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein."

Notwithstanding the scope of this provision, however, a contractor may still recover delay damages for: (1) delays caused by the owner's bad faith or its willful, malicious, or grossly negligent conduct; (2) uncontemplated delays; (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the owner; and (4) delays resulting from the owner's breach of a fundamental contractual obligation.

As with all exceptions, some will be easier to prove than others. In this regard, delays caused by bad faith, malice or gross negligence, require the contractor to prove that the owner either intentionally, or with reckless indifference to the contractor's rights, engaged in a course of conduct that delayed the contractor's performance of its work. Such proof, however, may be hard to establish since bad faith conduct can often be disguised in the complexities of the project itself. Uncontemplated delays, on the other hand, are generally held to encompass only those delays which are not reasonably foreseeable, do not arise from the contractor's work during performance, or are not specifically mentioned in the contract. As such, uncontemplated delays are generally easier to identify and prove.



...the typical No-Damage-For-Delay clause generally will not protect the...architect or engineer...

As with the first two exceptions, a No-Damage-For-Delay clause may also be avoided if the owner causes delays which are so great or so unreasonable that they may fairly be deemed to be equivalent to an abandonment of the contract. In order to satisfy this exception, however, a contractor must establish that the owner is responsible for delays which are so unreasonable that they constitute a relinquishment of the contract by the owner with the intention of never resuming it.

Consistent with the above, while a No-Damage-For-Delay clause may also be avoided by an owner's breach of contract, this last exception is only applied to an especially narrow range of circumstances. In this regard, since the No-Damage-For-Delay clause is specifically designed to protect the owner from claims for delay damages resulting from its failure of performance in ordinary, "garden variety" ways, delay damages may be recovered in a breach of contract action only for the breach of a fundamental, affirmative obligation which the agreement expressly imposes on the owner. An example of such a breach would be those instances where the owner fails in its obligation to obtain title to the worksite, or fails to make the worksite available to the contractor so

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About Our Newsletter

Legal Counsel for the Design Professional addresses current legal developments affecting architects and engineers. The articles contained in this publication are for your information. You are advised to consult with legal counsel to address whatever specific issues you may have. Your questions, comments and suggestions are appreciated and should be directed to Douglas L. Pintauro, Esq., L'Abbate, Balkan, Colavita & Contini, L.L.P., 1050 Franklin Avenue, Garden City, New York 11530, telephone no. 516.294.8844, email: dpintauro@lbcclaw.com.

Practice Tip:
Permitted Use of Proprietary Specifications In New York

By Paula M. Gart

THE USE OF proprietary specifications in New York public construction projects may violate New York's competitive bidding laws. In general, proprietary specifications are descriptions of materials or equipment that either require a specific brand, without providing for an equivalent, or are so restrictive that only one vendor or manufacturer is able to supply the items. But what does one do when only one product or system, and no equivalent, will do?

There are times that a certain product or system is within the taxpayers' best interests but specifying that product or system may run afoul of New York's competitive bidding laws. These laws require that all contracts over $20,000 be awarded to the lowest responsible bidder after advertisement for sealed bids. Accordingly, while there are certain limited exceptions to the competitive bidding requirement, for the most part these exceptions do not permit municipalities to specify a particular brand, manufacturer or supplier. In fact, New York courts have invalidated specifications that are drawn to the advantage of one manufacturer or supplier in order to insure the award of the contract to that particular manufacturer or supplier, rather than for reasons benefiting the public interest.

Specifications may not be designed to shut out true competition and should not be written in such a way that only one contractor, supplier or manufacturer may satisfy them. Municipalities may, however, fix reasonable standards and limitations on products and services, even if they favor one bidder over another, provided that the public interest is served. The design professional should advise the municipality that given the policy favoring competitive bidding, contracts awarded outside the competitive bidding protocol will be scrutinized and the law strictly applied in actions challenging the propriety of an award of a public contract.

In the absence of sound, legitimate reasons that the product or system is essential to the public interest, specifications that limit the bidders or suppliers on a public project to a single bidder or supplier will be considered illegal. A showing of a legitimate public interest, however, may permit specification of a certain manufacturer's equipment. For example, a school district having already installed a cohesive HVAC automation system in all of its buildings would want the installation of new HVAC controls that efficiently interact with its existing system. Of course, the district may consider using this proprietary specification only after carefully considering and properly documenting the justification of enabling uniform, streamlined operation and maintenance of the system, which is in the public interest.

Proprietary specifications that do not survive legal challenge may void the contract that contains those specifications.

Proprietary specifications that do not survive legal challenge may void the contract that contains those specifications. It is prudent practice, therefore, to obtain legal counsel conversant in these issues to discuss, document and be prepared to demonstrate the specific public interest to be served before preparing the proprietary specifications. ■

LBC&C Expands its New York City and New Jersey Offices

LBC&C IS AGAIN IN THE PROCESS of expanding its New York City office from 7,700 square feet to 12,900 square feet. Currently accommodating ten attorneys, this expansion will add at least nine more attorney offices to allow for LBC&C's continued growth in the New York City area.

As with the New York City office, LBC&C's Livingston, New Jersey office is also being expanded from 3,700 square feet to 5,500 square feet in order to accommodate the growth of this office, which is currently staffed by five attorneys. The firm's state of the art communications and computer systems seamlessly link all three of LBC&C's offices, affording its clients full access to all of LBC&C's legal resources and expertise throughout the New York/New Jersey area.

Preserve Your Practice And Reputation
(How to Avoid a Claim)

By Douglas L. Pintauro

UNFORTUNATELY, in today's society it is almost a certainty that the majority of design professionals will be sued sometime in their career as a result of services rendered in connection with the design or construction of a project. No matter how careful you are, or how precise or meticulous you are, the law of averages dictates that you will eventually be sued. Prior to being sued, however, you will often receive clear signs that a lawsuit is either imminent or under careful consideration. Your awareness of these telltale signs and willingness to address the prospective claimant's concerns could make the difference between becoming a litigant, or being viewed as a conscientious, respectable design professional. The following are just some examples of the more typical telltale signs to litigation:

- The client fails to honor financial obligations (i.e., fails to pay your fees);
- The client repeatedly expresses dissatisfaction with your services (whether justified or not);
- You receive a communication from an attorney either by telephone, letter, subpoena, or during an otherwise routine meeting, inquiring about your services, requesting project documents or requesting you to testify at a deposition;
- You receive an excessive number of requests by the contractor to clarify various aspects of the contract drawings;
- The client requests that you compromise your fee because of various additional costs that your client incurred due to (what your client perceives to be) design errors or omissions;
- A unilateral unannounced change in the contract administration (e.g., the job meetings are tape recorded; you start receiving "written" complaints/ directives instead of the usual verbal communications);
- Any request by an owner or contractor on a project that you ask your professional liability insurer to contact them; and
- You are terminated for cause.

Should you be the recipient of one of these, or similar communications, you probably would be ill-advised to either respond or to proceed without the advice of counsel. While you may think otherwise, keep in mind that many times it was your conduct that caused the owner or contractor to even consider asserting a claim against you. With matters now escalating, do you really think it is wise to continue to counsel yourself ? If so, you should realize that the prospective claimant is probably being guided by legal counsel. Accordingly, you run the risk of saying or doing something that may ultimately be used against you in a court of law.

...willingness to address the prospective claimant's concerns could make the difference between becoming a litigant, or being viewed as a conscientious, respectable design professional.

While there are many examples, consider the case of the general contractor who is far behind schedule. To justify his delays the contractor repeatedly asks you to clarify various details on your drawings. Even though the drawings are clear, in the interest of moving the project forward and neutralizing the contractor's excuses, you issue one sketch after another (rather than simply referring to the specific detail or specification section for the information). While this may keep the project moving, be aware that the sketches could be used against you. Specifically, one argument that is typically asserted in such circumstances is that the contract documents were so ambiguous and incomplete that the design professional had to issue one clarification sketch after the other to compensate for his inadequate designs. Why else would a design professional expend so much time and effort to prepare so many sketches?

Of course, while there are appropriate answers to such a claim, the point is why put yourself in this position in the first place. If counseled properly, you can not only minimize the risk of such claims, but avoid potential litigation altogether. All things considered, it is in your interest to seek the advice of experienced counsel. But just as you would not seek the advice of a podiatrist to counsel you on a heart condition, you should not seek the advice of just any attorney to guide you through a potential construction claim. LBC&C's experience in the construction industry, and in particular with claims asserted against architects and engineers, has been recognized throughout the insurance industry, the

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PRESERVE YOUR PRACTICE AND REPUTATION

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legal community and the design professionals community. As a result of this expertise, many of the leading professional liability insurers have listed LBC&C as approved counsel. In fact, LBC&C's experience in this field was one of the primary reasons it was chosen to launch the pre-claim assistance program for one of the more prominent architects and engineers professional liability insurers in New York.

Should you find yourself the recipient of a questionable communication, do not wait until you are embroiled in a lawsuit before seeking the advice of experienced counsel. Counsel's early intervention can make the difference between a contentious, time consuming lawsuit and a successful project. In this regard, LBC&C can provide you with the necessary immediate experienced assistance to guide you through such situations and can assist you in providing the information needed by your insurer to secure coverage in the appropriate circumstances. ■

LEGISLATIVE UPDATE

Corporate Practice

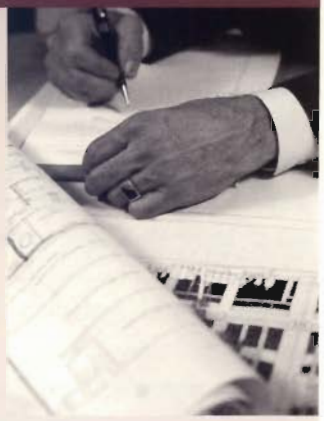
THE PROPOSED LEGISLATION on corporate practice discussed in our prior Newsletter allows for the formation of design corporations where less than 25% of the shares are owned by unlicensed persons. This legislation is still in the Corporations Committee and has not been submitted to the General Assembly for a vote. According to Assemblyman Canestrari's office, this proposed legislation is presently stalled due to lack of support.

Statute of Repose

In 1997, the New York State Legislature enacted a statute (New York CPLR §214-d) restricting the ability to institute legal action against design professionals and construction contractors where their services were completed more than ten years before the time of the personal injury, wrongful death or property damage giving rise to the litigation. Unfortunately, this statute does not absolutely restrict the institution of legal action against design professionals and contractors even if the injury or damage occurred more than ten years after they completed their services.

To further close the possibility of most litigation against design professionals and contractors more than ten years from the completion of work, a Bill has been introduced in the New York State Senate (Bill No. 4172) that precludes actions (including claims for contribution and indemnification) for personal injury, wrongful death or damage to property brought more than ten years after the completion of such work. The Bill also provides that personal injury, wrongful death or property damage actions occurring within the tenth year after completion of work, may be brought within the tenth year, but not after eleven years from the time of completion of the work. Thus, any action for personal injury, wrongful death or property damage brought eleven years or more from the time of the completion of the work would be absolutely time barred.

The Bill also attempts to define the meaning of "completion of work" or "completion of such improvement" by stating that an "improvement" is deemed to be "completed" under the following scenarios:



(a) When, after the improvement has been started, a permanent certificate of occupancy is issued by the municipality in which the improvement is situated if such is required or is actually issued;

(b) If a public improvement, then the work is completed upon acceptance of the improvement by the owner, if a certificate of occupancy is not required and has not been issued; or

(c) On the earlier of the following dates, if the above provisions are inapplicable:

— Four months prior to the last day on which a mechanic's lien, resulting from work performed or materials furnished with respect to such improvement may be filed, or

— Upon the owner's final payment for services rendered or materials supplied with respect to such improvement.

The State Senate reasoned that design professionals and construction contractors are being subjected to open-ended and continuing liability for work performed ten or more years before circumstances occurred which give rise to the litigation, even though the problem arose because the structures are not being properly maintained by their owners, and not because of the original design or construction. As a result, the design professional and/or contractor are being sued and unnecessarily required to defend their designs or construction practices when the defects in the structures are due to poor maintenance.

Similar legislation is before the Codes Committee, however, is presently stalled due to lack of support.

LBC&C Gives Defamation A Bad Name

LBC&C's last newsletter addressed the issues surrounding defamation at the job site. Recently, LBC&C had a $5.5 million verdict vacated at the appellate level and obtained the dismissal of another multi-million dollar lawsuit by successfully applying its expertise in the area of defamation to scenarios that could befall any design professional working on a construction project.

In the lawsuit that resulted in the $5.5 million verdict, a contractor accused the project architect of ruining the contractor's reputation and putting him out of business by writing a series of letters during the construction phase of the project in which the architect attacked the contractor's competency, honesty and ethics. The architect's letters, although heated and impassioned, actually dealt with issues regarding the contractor's use of inferior materials and improper construction methods. Significantly, copies of the letters were only distributed to the project owner's principals.

LBC&C did not represent the architect during the trial of the defamation claim. Rather, LBC&C was retained to represent the architect after the jury returned a $5.5 million verdict against him (which included $500,000 in punitive damages) for damage to the contractor's reputation and business, as well as for his humiliation and physical/emotional distress. In representing the architect in his appeal from this verdict, LBC&C was sensitive to the fact that success was especially crucial since the verdict was not only several million dollars in excess of the architect's professional liability insurance policy, but included a punitive damage award which was not covered by his insurance.

LBC&C won the appeal for the architect and successfully vacated the jury's verdict. In doing so, the appellate court dismissed that portion of the verdict which awarded the contractor $2.5 million for his business and financial losses, while ordering a new trial to determine the dollar amount for punitive damages, as well as the damages for the contractor's loss of reputation, humiliation and emotional distress. Capitalizing on the favorable appellate decision, LBC&C was able to resolve the case to the mutual satisfaction of all parties.

In a separate lawsuit, an architect was sued by a contractor and its principal, who claimed that the architect's defamatory statements caused the owner to reject the contractor's low bid. In that case, following the opening of the bids, the architect (whose contractual obligations included investigating the qualifications of bidders and assisting the owner in the selection of contractors) expressed concern about the contractor's reliability, noted the contractor's failure to properly perform its duties on other projects and recommended that the owner conduct its own investigation of the contractor prior to awarding the contract. After its bid was rejected, the contractor and its principal sued the architect, seeking over $5 million in damages for defamation, lost profits and punitive damages. LBC&C was successful in obtaining a dismissal of the lawsuit prior to trial on the grounds that the statements were non-defamatory, privileged opinions which were made in fulfillment of the architect's contractual obligations.

LBC&C takes great satisfaction in knowing that its successful defense of these cases should greatly benefit other design professionals in the event they are sued for defamation as a result of ordinary project site disagreements. ■

Seminar Bulletin

Firm partner Douglas R. Halstrom and Greg Kumm of Prosurance/Redeker Brokerage recently presented a seminar to the Queens Chapter of the New York State Society of Professional Engineers on the topic of minimizing the design professional's risks through effective use of contractual provisions. The seminar also addressed the impact of design/construction related claims on insurability and insurance premiums.

LBC&C also presented a risk management seminar for one of the largest engineering firms in New York. This seminar, presented by firm partners Orin Ketyer and Marie Hoenings, focused on strategies to manage construction phase situations that can create liability for the design professional while fulfilling the design professional's contractual and ethical responsibilities.

Additional information regarding these seminars can be obtained by contacting Margie Morabito at 516-294-8844 or mmorabito@lbcclaw.com.

RETURN AT YOUR OWN RISK

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embrace the spirit and letter of the law governing their professional affairs and should thoughtfully consider the social and environmental impact of their professional activities." Accordingly, in certain circumstances, the design professional must address whether the requested assistance could protect both the client and the public from potential harm. Indeed, where the design professional may have caused, contributed to, or knowingly failed to prevent a situation which could compromise the health and safety of others, the professional and ethical obligation must override the legal ramifications of the design professional's decision not to return to the project to offer post-completion remediation services.

Further, if the design professional returns to the project to provide remediation services, the opportunity exists to mitigate the extent of the potential damages or harm. Since typically the longer a problem exists the greater the resulting damages, providing early assistance in the investigation and remediation of a defective condition may sufficiently minimize damages so as to make them manageable. Of course, not to be overlooked is the successful strengthening of the design professional's long-term relationship with the client if he or she provides early assistance.

Deciding whether or not to return to the project to offer advice or remediation services involves several important issues that must be carefully analyzed in order to protect the interests of the design professional. This article identifies some of these considerations, but the advice of knowledgeable legal counsel with respect to assessing the particular facts and circumstances involving each such decision should always be sought. ■

About The Firm

LBC&C, founded in 1981, has offices in Garden City, New York, Livingston, New Jersey and Manhattan. From these three locations, the firm provides a wide array of legal services to design professionals throughout the New York metropolitan area, Long Island and upstate New York counties and central and northern New Jersey. In addition to representing design professionals, the firm also has a recognized practice in other areas of professional liability, as well as environmental, product liability and insurance law. As a full service law firm with a total staff of more than 150, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices. Always on the alert to new trends in business and changes in the law, LBC&C is continuously striving to keep its clients ahead of their competitors. Working in conjunction with each other, the Practice Groups at LBC&C provide a network of legal experience that can meet any needs faced by today's design professional. For additional information visit our website at www.lbcclaw.com.

LBC&C in The News

Mercedes Colwin, Co-Chair of LBC&C's Labor and Employment Practice Group and an Administrative Law Judge at the New York State Division of Human Rights has become a frequent legal commentator on *Court TV, Fox News* and *MSNBC.* Mercedes has appeared on *The O'Reilly Factor* and *Hannity & Colmes* offering her legal analyses on a number of significant cases in the news.

Check your local listings!

THE NO-DAMAGE-FOR-DELAY CLAUSE

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that the contractor can timely commence its work.

Of course, even if the No-Damage-For-Delay clause were to survive the exceptions, the issue is how does the clause benefit the design professional. In this regard, the typical No-Damage-For-Delay clause generally will not protect the project architect or engineer inasmuch as such clauses are designed to only benefit the owner (as with the sample clause noted above). Accordingly, in order for the design professional to benefit from such a clause, the design professional must be specifically referenced in the clause as one of the beneficiaries. Of course, while other arguments can be marshalled to support the position that the architect or engineer is afforded the same protections under the No-Damage-For-Delay clause as the owner, absent being specifically named in the provision, such arguments will likely yield little benefit to the design professional. ■