LIMITATIONS OF LIABILITY IN CONSTRUCTION SITE SAFETY AND CONSTRUCTION CONTRACT CLAIMS: CORPORATE COUNSELS' ESSENTIAL ROLE IN UNDERSTANDING AND SHAPING CIVIL JUSTICE REFORM AND CONSTRUCTION INDUSTRY STANDARD CONTRACTS

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The process of construction and renovation leads to immense potential liability. Concern over the extent of this liability is highlighted in the proposed "New York State Civil Justice Reform Act," which is currently pending before the New York State Legislature (Bill Number S02277). The concern is also carried over to the actions of industry groups, such as the American Institute of Architects (AIA), when they consider revisions to standard industry construction and design agreements and to legislative enactment of limitations on indemnity provisions and contract terms.

Critical to the process of changing allocation of risk is that "the devil is in the details." The details and practical impacts of legislative or industry action must be examined carefully. Inhouse corporate counsel are uniquely well-positioned to provide deep insights into detail and practical impacts as the legislation is drafted and as industry positions are developed. Leadership rather than reaction is key.

Limitations on Liability and Liability Shifting in the Construction Industry

Construction Site Safety

The proposed New York State Civil Justice Reform Act proposes to clarify the duties and obligations of contractors, owners and employees regarding protection devices and equipment for construction workers. The bill proposes to amend Labor Law section 240 to require certain contractors, owners and their agents (1) to provide devices and equipment of the type necessary to give reasonable protection to workers employed on the construction site; and (2) when such devices and equipment are provided, to construct, place and operate such devices and equipment to reasonably protect those workers. If passed, the proposed amendment to Labor Law section 240 would state that if a contractor or owner complies with applicable state and federal health and safety regulations, this proof may be asserted as *prima facie* proof of compliance with Labor Law section 240.

Supporters of the bill urge that the amendments are necessitated by the Court of Appeals' decisions that misinterpreted the clear legislative intent of Labor Law section 240: *Zimmer* v. *Chemung County Performing Arts*, 45 N.Y. 2d 513 (1985) and *Bland* v. *Manocherian*, 66 N.Y. 2d452 (1985). Notably, in the *Zimmer* decision, Chief Judge Wachler called for legislative reform of Labor Law section 240.

The *Zimmer* and *Bland* decisions held that a contractor or owner is liable for virtually any injury suffered on the job site, regardless of whether the contractor or owner had done everything they

should have done to protect the worker from injury and regardless of whether the injury was caused by the worker's own negligence. The practical affect of these decisions is that contractors and owners have become insurers of work site safety. They have become a second source of workers' compensation for workers who suffer injuries on the construction site.

The bill would impose a negligence standard rather than the strict liability standard imposed by the Court of Appeals. It would also provide guidance to contractors and owners who must also comply with a confusing array of federal, state and local building codes and regulations by making compliance with Federal OSHA regulations *prima facie* evidence of compliance with Labor Law section 240. The bill's advocates also urge that passing the bill would also promote work site safety by making workers responsible for their own culpable acts, while alleviating serious liability insurance issues confronting the construction industry.

Revisions to the Standard AIA Contract Documents Providing For Agreement to Mutual Waiver of Consequential Damages

The Construction Industry relies so heavily on the standard form contracts developed by the AIA that changing these standard form contracts is tantamount to legislation. For this reason, it is important for inhouse counsel to be involved in, or at least to be aware of, these important developments.

For example, the most recent amendments, incorporated in the 1997 version of the Owner-Contractor Agreement (A201) and the Owner-Architect Agreement (B141), provide for each of the parties to waive consequential damages. Essentially, this means that only actual or direct damages are recoverable and that any incidental or indirect damages are not. In a state such as New York, there are cases dating back virtually 200 years defining "consequential damages." By the AIA adding the mutual waiver of consequential damages, 200 years of precedent are erased without the parties, in most cases, even focusing on it. This is because most parties to the contract simply sign the standard form without asking for revisions or consulting with counsel.

The ramifications are extraordinary. In the context of construction contracts, consequential damages typically include delay damages.

From the perspective of the Owner, the consequential damage may amount to loss of rental income, loss of use, loss of income or profit and incurring additional finance costs. It can also include loss of business or loss of reputation or even loss of management or employee productivity.

From the Contractor's perspective, the consequential damage may include additional home office expenses, loss of financing, business or reputation, loss of bonding capacity, and loss of profit.

These issues are the subject of numerous appellate decisions including a number of recent Court of Appeals cases in the State of New York. Yet, by signing the Standard AIA contract, parties agree that damages will no longer be measured by this well-developed body of appellate case law.

Industry Trend Toward Limiting Liability of Design Professionals by Contract

The Association of Soil and Foundation Engineers (ASFE) has campaigned effectively to limit the liability of the design professional under the contract between Owner and Design Professional. Standard forms created by the Design Professional may be expected to limit liability in some fashion, for example: (1) to the amount of the design fee; (2) to the Design Professional's profit; (3) to the Design Professional's insurance limits; (4) to a direction from the Owner to the Design Professional to re-do the work; or (5) to a fixed dollar amount.

New York State General Obligations Law Limitation on Breadth of Indemnity Clauses

Some states' laws contain limitations on indemnity clauses, and an indemnity clause that is too broad may, in some instances, be void. For example, New York State General Obligation Law section 5-324 provides that indemnity clauses that exceed its limits are to be deemed void as against public policy

Proposed Legislation Allowing Contractors to Sue Owners For Damages Due to Delay of the Project

During 1999, legislation was introduced in New York State which would have voided a contract clause in the Owner-Contractor Agreement barring a Contractor from recovering from the Owner damages due to delay.

Policy arguments are abundant on both sides of the issue. Contractor advocates felt that public policy was not well served by allowing Owners, especially public sector Owners, to delay with impunity to the detriment of the Contractor who is kept waiting for a decision or for access. The Owner advocates felt that a lump sum contract should hold a Contractor to its bid price and cited the additional hundreds of millions of dollars of funding required to finish contracts where Contractors claimed delay. The Owner argument, particularly in the public sector, is "the scope did not change, we did not get any additional value, why should we be forced – by a court – to pay more." With the strong advocacy of New York City Mayor Ed Koch and a beefed up New York City Law Department – during the early and mid-1980s – the Courts, including the Court of Appeals, agreed, and hundreds of millions of public sector construction claims were dismissed.

It is not surprising that Governor Pataki vetoed the bill, which would have ruled the "No Damage For Delay Clause" void as against public policy, after it passed both houses of the legislature in 1999.

Conclusion

To accomplish effective Civil Justice Reform, "the devil is in the details." Inhouse corporate counsel are critical in developing an accurate overview of industry concerns and then in communicating their reasoned views. Without effective advocacy from those in a position to have an accurate perspective based upon day-to-day experience, legislation will pass which will not take into account practical concerns. Thorough investigation, which includes consulting with

individuals in one's own company, with individuals in the industry and with outside counsel, allows inhouse counsel to develop an accurate perspective on the impact of proposed legislation and to exert effective advocacy before the legislators or industry groups act. The details of developing legislation and industry contract documents and their impact must be studied carefully with the long term in mind.

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