ConsensusDocs Construction Law Newsletter

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Allocating the Risk of Design Errors

Douglas L. Tabeling, Partner, Smith, Currie & Hancock LLP

Design flaws are a constant risk in construction. Acknowledging that threat, owners and contractors typically address the risks of design deficiencies in their construction contracts. The allocation of those risks, however, can and does differ considerably from project to project. Contract terms vary from fully expressing an owner’s warranty of the sufficiency of plans and specifications, which is an implied obligation in most jurisdictions, to transferring significant design responsibility and risk to the contractor. In some cases an express warranty of the design is undermined by contradictory contract provisions. Contracting parties can better identify, negotiate, and manage transfers of design risk by understanding how and why they are commonly achieved.

The Spearin Doctrine

The default allocation of risk for design errors on a traditional design-bid-build project is governed by the Spearin doctrine. Approaching its 100th anniversary next year, the Spearin doctrine is the principle derived from a United States Supreme Court decision holding that the owner (in that case, the U.S. government) was responsible for and bore the risk associated with any inadequacies in the design it provided and on which the construction contract was based. By extension of that principle, an owner is also liable to a contractor for additional time and costs caused by faulty design. That default principle has been adopted as the law or at least mentioned approvingly in nearly every jurisdiction in the United States. But it is only a default principle. The Spearin doctrine is a gap filler, an implied term in a construction contract that can be undermined and limited by express terms to which the owner and contractor agree.

The Designer’s Standard of Care Leaves a Gap

While designers accept some liability for design deficiencies in their agreements with owners and contractors, most design contracts do not obligate architects or engineers to prepare a design without imperfections. Design agreements typically require architects and engineers to perform their services with the level of skill, diligence, and expertise that other design professionals ordinarily provide under similar circumstances. This obligation is known as the designer’s standard of care. Not every shortcoming in a design is necessarily a breach of that

duty. That leaves the risk associated with the remaining design failings open to be allocated to either the owner or the contractor.

The Owner's Perspective

There are several reasons why contract proposals vary in their allocation of the risk of design failures. Some owners prefer to achieve the cost savings associated with limiting the contractor's risk concerning the design and curtailing the amount of contingency in the contractor's price. Other owners prefer not to assume the residual risk not assumed by the designer.

Going further, some owners prefer to be able to hold both the designer and the contractor liable for some of the same design problems. An owner might reason that an experienced contractor is in a better position to identify and manage the potential cost of design errors than an owner that is unsophisticated in construction. An owner might be wary, or even weary, of being stuck between a designer and a contractor pointing fingers at each other. An owner might determine that it generally prefers to try to limit a contractor's justifications for requesting additional time or money to complete the work. An owner might decide that a contractor with valuable equipment or other assets to support its bonding capacity, licensing, and business operations is a more solvent and attractive target than a designer's professional liability insurance that often has inadequate limits. Finally, an owner might conclude that the construction contract balance and retainage provide sources of funds for fixing design problems that can be quickly and reliably accessed as opposed to pursuing a designer whose fees have already been paid or the designer's insurer.

Transferring the Risk of Design Flaws to the Contractor

There are many ways that a construction contract can allocate design risk to the contractor. These include the contractor accepting responsibility to participate in design development or to verify the sufficiency of a design, procedural clauses dictating the contractor's obligations in the event of a design error, clauses limiting the owner's liability for certain claims or damages, and the owner simply disclaiming the accuracy or sufficiency of certain aspects of the design. At a minimum, many construction contracts obligate the contractor to notify the owner of any errors, omissions, or inconsistencies in the design documents that the contractor knows to exist before beginning the work. In those cases contractors must take care to identify and report patent or obvious defects and ambiguities or else risk waiving the right to a contract adjustment.

A contractor's early involvement often includes reviewing and commenting on design documents while they are in development. This is common in contracts for construction management at risk in which the contractor provides pre-construction services prior to establishing a guaranteed maximum price, or GMP. The 2015 Massachusetts decision, Coghlin Electrical Contractors v. Gilbane Building Company, addressed the potential risk that contractors assume in taking on contractual obligations related to the design work. Gilbane, as construction manager at risk, agreed to review design documents on a continuous basis before the design was completed, including conducting design reviews with its own architects and engineers. Gilbane agreed to review the design documents for clarity, consistency, maintainability, operability, and coordination among the trade contractors. While the court held that Gilbane was not liable for the design errors at issue in that case, the court also said that the scope of the owner's implied warranty of the design is limited in a construction-management-at-risk contract:

[T]he [construction manager at risk] may benefit from the implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the [its] own design responsibilities. The [construction manager at risk's] level of participation in the design phase of the project and the extent to which the contract delegates design responsibility to [it] may

affect a fact finder's determination as to whether [its] reliance was reasonable. The greater the [construction manager at risk's] design responsibilities in the contract, the greater [its] burden will be to show, when it seeks to establish the owner's liability under the implied warranty, that its reliance on the defective design was both reasonable and in good faith.

A contractor accepts even more risk when it agrees to verify the accuracy and sufficiency of the design before beginning the work rather than simply reviewing the design for specific purposes. Contract provisions that obligate a contractor to verify the correctness of the design intend to establish a contractor's waiver of any claim for design flaws discovered after the work is begun. These provisions also take the form of an acknowledgement that at the time of the agreement the contractor has already resolved to its satisfaction any ambiguities, conflicts, or discrepancies in the design or the contract documents, foreclosing any claim down the line. An owner's risk for design defects can be reduced by other contract provisions. A no-damages-for-delay provision can significantly undermine a contractor's claim for additional compensation even if the owner is liable for the design error that caused the delay. Project delays caused by design defects extend and increase field overhead, supervision, and inspection costs for the contractor and its subcontractors. While the law in a handful of states prohibits enforcement of these clauses on public projects and fewer still on private projects, they are enforceable in many jurisdictions.

In a 2016 federal appellate decision, DFW International Airport Board v. INET Airport Systems, the Fifth Circuit found that the owner and contractor expressly agreed in their contract that they were obligated to cooperate to resolve design defects. Despite determining that there was no dispute that the project design was defective and that the contract allocated the risk of design defects to the owner, the court held that the owner would not be liable to the contractor if the contractor breached the affirmative duty it undertook to properly participate in resolving the defects in the owner's design.

ConsensusDocs and AIA Contract Documents

Both the ConsensusDocs and the AIA Contract Documents address an owner's and contractor's obligations related to a project's design. ConsensusDocs 200 is the Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum). ConsensusDocs 500 is the Standard Agreement and General Conditions Between Owner and Construction Manager (Where the CM is At-Risk). Section 2.3 of each document obligates the owner to provide "all architectural and engineering design services necessary for the completion of the Work" except for design services delegated to contractor or construction manager in the Contract Documents and the contractor's or construction manager's "means, methods, techniques, sequences, and procedures." By contrast, the AIA A201–2017 General Conditions of the Contract for Construction obligates the contractor to perform work consistent with and reasonably inferable from the Contract Documents that was not provided in the design. Specifically, Section 1.2.1 of the A201 says that the contractor's performance shall be required "to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results."

Section 3.3 of the ConsensusDocs 200 lump-sum agreement and Section 3.7 of the ConsensusDocs 500 CM at-risk agreement obligate the contractor or the construction manager to "examine and compare the drawings and specifications with information furnished [in the] Contract Documents, relevant field measurements made by [the contractor or construction manager], and any visible conditions at the Worksite affecting the Work." They also require the contractor or construction manager to report to the owner "any errors, omissions, or inconsistencies" that they discover in the Contract Documents. But both documents also clarify that the "examination is to facilitate construction and does not create an affirmative responsibility to detect errors, omissions, or inconsistencies or to ascertain compliance" with any law, building code, or regulation. The ConsensusDocs 500 CM at-risk agreement goes a step further, expressly acknowledging that the construction manager

"shall have no liability for errors, omissions, or inconsistencies discovered . . . unless [it] knowingly fails to report a recognized problem to [the] owner."

A201 Section 3.2 establishes an affirmative obligation for the contractor to become familiar with the local conditions under which the work will be performed and to correlate its observations with the requirements of the Contract Documents. That section also affirmatively requires the contractor to "carefully study and compare the various Contract Documents relative to that portion of the Work" and any owner-furnished survey of the site and to "take field measurements of any existing conditions," and "to observe any conditions at the site affecting [the Work]." These affirmative duties are broader than the ConsensusDocs obligations to compare the drawings and specifications with visible conditions at the site and any field measurements the contractor might take. While, like the ConsensusDocs, the A201 acknowledges that these duties "are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents," Section 3.2.4 of the A201 also expressly places liability on the contractor for any costs and damages that would be avoided by the Contractor performing these design reviews and verifications.

The ConsensusDocs limit a contractor's design risk in a couple of other ways. Section 3.8 of ConsensusDocs 200 and Section 3.10 of ConsensusDocs 500 address the contractor's or construction manager's warranty obligations. Both clauses warrant that the work "shall be free from material defects not intrinsic in the design or materials required in the Contract Documents." Section 3.15 of ConsensusDocs 200 and Section 3.17 of ConsensusDocs 500 acknowledge that if the contract specifies that the contractor or construction manager "is responsible for the design of a particular system or component to be incorporated into the Project," then the "Owner shall specify all required performance and design criteria" and neither the contractor nor the construction manager is responsible for the adequacy of the those criteria.

Don't Rely on Spearin Alone

The lesson for owners and contractors in allocating the risk of design flaws is neither to rely nor feel constrained by the implied warranty of the accuracy and sufficiency of the plans and specifications that the owner provides. The implied warranty is a presumption and default position, but it can be altered significantly by the parties' express agreement. Beyond an owner simply disclaiming the adequacy of all or part of the design, contract terms that obligate a contractor to verify the sufficiency of a design or that limit an owner's liability for certain claims or damages are common ways of allocating more risk for design errors on the contractor.

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Have You Been "Delayed" or "Disrupted"? – Why the Distinction Matters

Ann B. Graff, Partner, **Pepper Hamilton LLP**

No-damages-for-delay clauses are commonly found in construction contracts and, with certain exceptions, are generally recognized as valid and enforceable. The exact language can vary, but the typical clause provides that the contractor shall have no claim for compensation for delay and that an extension of time shall be the contractor's sole remedy. While the case law is fairly uniform and well-developed regarding the effect no-damages-for-delay clauses have on claims for delay damages, whether these clauses also bar disruption damages is less clear.

"Delay and disruption" damages are often lumped together, but they have distinct definitions. "Delay damages" refer to damages "arising out of delayed completion, suspension, acceleration or disrupted performance." 5 Philip J. Bruner & Patrick O'Connor, Construction Law § 15:29 (6th ed. 2002). These damages compensate a contractor that is injured when a project takes longer to complete than the construction contract specified. Conversely, "disruption damages" occur when a project may be timely completed, but at a greater expense to the contractor because of disruptive events caused by another party. Id. at § 15:102. Disruption damages compensate the contractor for the resulting reduction in its expected productivity in labor or equipment. Id.

Often, a no-damages-for-delay clause will also expressly bar disruption damages. And, even when the word "hindrance" or "disruption" is not expressly used, many courts have held that disruption damages caused by the breaching party's delay are also barred by a no-damages-for-delay clause. See, e.g., Cleveland Constr., Inc. v. Ohio Pub. Emps. Ret. Sys., 10th Dist. No. 07AP-574, 2008-Ohio-1630, 2008 Ohio App. LEXIS 1403 (Ohio App. 10th Dist. April 3, 2008); The Law Co. v. Mohawk Constr. & Supply Co., 523 F. Supp. 2d 1276, 1285-86 (D. Kan. 2007) (contractor's sole remedy of "schedule extension" for contractor's delays barred subcontractor's claim for disruption damages), rev'd on other grounds, 577 F.3d 1164 (10th Cir. 2009); U.S. ex rel. Tenn. Valley Marble Holding Co. v. Grunley Constr., 433 F. Supp. 2d 104, 109-11 (D.D.C. 2006) (holding that contractual provision allowing damages for delays "recovered on [Supplier's] behalf by the Contractor from the Owner" barred disruption damages because "the ordinary meaning of the word 'delay'" encompasses disruption damages that are caused by another party's late performance.).

Recently, however, in Central Ceilings, Inc. v. Suffolk Construction Co., 75 N.E.3d 40 (Mass. App. Ct. 2017), the Massachusetts Court of Appeals refused to bar a subcontractor's claim for disruption damages, holding that the no-damages-for-delay clause only precluded claims for "delay." Central Ceilings involved the construction of three dormitories at Westfield State University. The dormitories were to be ready for occupancy by students arriving for the 2005 fall semester, with a substantial completion date of July 1, 2005. As an incentive for the general contractor, Suffolk Construction Company, to finish on time, its contract provided that it could earn a bonus for completing the project early or face liquidated damages for finishing late.

Central Ceilings, Inc. served as a subcontractor for installation of the exterior heavy metal gauge framing, drywall and hollow metal door frames. Critical to Central's estimate and ability to timely complete its work was the "flow" of the project, with each aspect of work following in sequence, floor by floor, exterior to interior, building by building.

From the outset, the project was plagued by problems, as Suffolk failed to coordinate the work of other trades; failed to establish proper elevation, column and control lines from which Central worked to construct the building; failed to provide for and timely coordinate delivery of the hollow metal door frames; and failed to ensure that the buildings were weather-tight, all of which were essential to Central's ability to complete its work.

As a result, Central's workers were repeatedly forced to break down and remobilize to different areas to carry out different tasks, then go back and remobilize to complete the original task. Central's supervisory personnel were also forced to spend an inordinate amount of time coordinating all of the changes and filling out related paperwork. The problems also resulted in significant trade stacking.

Given the substantial completion date and the related financial incentives and disincentives, Suffolk advised Central that no time extensions would be granted. As a result, while the start dates for various aspects of Central's subcontract work were consistently pushed back due to Suffolk's various breaches, the completion dates remained the same and the time within which Central had to perform was constantly compressed. Central was forced to assign additional manpower to keep the project on track. Ultimately, while the project was substantially completed on time, Central's productivity was significantly impacted.

The trial judge found that Suffolk breached the contract and awarded Central damages for its lost productivity. The judge determined that the contract's no-damages-for-delay clause did not apply because Central was not, in fact, seeking damages "for delay." The appeals court upheld the judge's ruling, rejecting Suffolk's suggestion that the finding was in error because Central was seeking damages "caused by delays." The appeals court noted that no-damages-for-delay clauses are strictly construed due to their harsh effects. In strictly construing the contract language, the appeals court found that Central was not seeking damages because it had been delayed but, rather, because it had been forced to increase its workforce due to the compression of the schedule caused by Suffolk's breaches. Quoting the trial judge, the appeals court noted that "Suffolk's breaches did not affect Central's ability to complete its work on time . . . but, rather . . . its ability to complete its work on budget."

Central Ceilings is not the only case to hold that disruption damages may be recoverable despite a no-damages-for-delay clause. In John E. Green Plumbing & Heating Co. v. Turner Construction Co., 742 F.2d 965 (6th Cir. 1984), the court agreed that the no-damages-for-delay clause, strictly construed, only barred delay damages and not damages due to hindering the contractor's work. See also Mecca Constr. Corp. v. All Interiors, Inc., No. 06-3823, 2009 Mass. Super. LEXIS 253 (Mass. Super. Middlesex Oct. 16, 2009) (allowing contractor to recover increased labor and other costs required to timely complete the job in light of hindrances despite no-damages-for-delay clause).

Given the lack of consistency in case law regarding applicability of a no-damages-for-delay clause to claims for disruption damages, consider the following:

1. Be familiar with the state's law applicable to your project. Do not simply assume that disruption claims are barred by a no-damages-for-delay clause.
2. When drafting a no-damages-for-delay clause, expressly include language to also bar disruption damages (i.e., "no claim . . . for hindrances or delays"; "delayed . . . or obstructed or hindered").
3. As a party seeking to recover disruption damages, be mindful of the distinction between delay and disruption damages and be sure to carefully characterize your claim in correspondence and claim filings.

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complexity, anywhere at any time. For more information about Pepper's Construction Practice, visit www.constructlaw.com.

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Workers' Compensation Insurance Can Save Your Ass—ets!

Tracey L. Williams Cloutier, Associate, **Peckar & Abramson**

On July 13, 2017, the Houston Court of Appeals for the Fourteenth District reversed a $43 Million Dollar jury verdict in a case and rendered judgment that the injured construction worker recover nothing on his common law claims of negligence, gross negligence and intentional injury against the defendant. Berkel & Co. Contractors, Inc. v. Tyler Lee, No. 14-15-00787-CV, 2017 Tex. App. LEXIS 6471 (Tex. App—Houston [14th Dist.] July 13, 2017, no pet. h.). Mr. Lee, the general contractor's superintendent, was injured on a commercial construction project following a crane collapse and was the claimant in the lawsuit. Berkel was the subcontractor responsible for drilling the foundation pilings for an office building at the project and Lee suffered his injury as Berkel's crew was attempting to complete one of the pilings. Berkel was the named the defendant in the lawsuit. The facts in this case are unsettling to say the least and Mr. Lee's injury was certainly preventable. The facts, not recited at length herein, are set out in detail in the Court's opinion and paint a vivid picture of the consequences of failing to follow safety and other operational policies and procedures.

Berkel is a workers' compensation case involving a contractor-controlled insurance program (CCIP) where the workers' compensation insurance was provided by the general contractor to the subcontractor and the subcontractor's employees pursuant to a written agreement between the parties. Mr. Lee recovered workers' compensation benefits under the CCIP for his injuries, but sought additional damages against Berkel under common law theories of negligence, gross negligence and intentional injury. The jury ultimately found in favor of Mr. Lee and awarded him more than $35 million in actual damages, plus an additional $8.5 million in punitive damage based on a finding that Berkel was grossly negligent. The primary issue in the case was whether the exclusive remedy provision of the Texas Workers' Compensation Act was applicable under the facts of the case, precluding Mr. Lee's recovery in tort against Berkel, a subcontractor with whom he had no direct employment relationship. The Court of Appeals held that it was and reversed and rendered judgment that Mr. Lee take nothing on his common law claims against Berkel.

The "exclusive remedy" provision is not unique to Texas. The fundamental precept of workers' compensation insurance is the exchange of rights between employers and employees. Prior to the existence of workers' compensation statutes, employees' claims for injuries suffered on the job were subject to common law defenses including contributory negligence and assumption of risk, which often left employees without adequate recourse for their injuries. Workers compensation insurance is intended to provide employees a guaranty that they will be compensated for the injuries they sustain in the course and scope of their employment. In exchange for this guaranty, employers enjoy limited liability under workers' compensation statutes. Stated another way, employees obtain prompt payment of benefits regardless of fault since the employers give up their right to assert certain defenses that would otherwise potentially bar an injured worker's recovery and, in exchange, employers and their representatives receive immunity from civil liability with few exceptions. This quid pro quo forms the basis of workers' compensation statutes nationwide, with some variation in the extent to which employer immunity applies. Although some states afford greater protection for employers than others, virtually all provide that injuries resulting from intentional conduct are not barred by the employer's immunity defense. Other common exceptions to the immunity defense are claims arising from retaliation for filing workers' compensation claims, and claims

arising when the employer has failed to provide workers' compensation insurance mandated by statute.

Although workers' compensation obligations typically arise in direct employment relationships, it is becoming commonplace for the insurance to be provided on a per-project basis, extending coverage to all project participants thus eliminating the need for multiple insurers on a single project. When the workers' compensation benefits are provided on a project basis through a contractor-controlled insurance program (CCIP) or an owner-controlled insurance program (OCIP), the question of whether and to whom the immunity defense will be available has yet to be answered in many states. Therefore, state law where the project is located should be consulted to determine whether CCIPs and OCIPs are expressly included or excluded from the relevant workers' compensation statutes and whether such programs alter the employer-employee relationships of the project participants who enroll in such programs. California, for example, expressly extends immunity where benefits are provided pursuant to a written agreement between the parties and the parties comply with the workers' compensation statute. Likewise, Nevada extends immunity to owners and principal contractors who establish and administer consolidated insurance programs in accordance with the statutory requirements. The Nevada definition of "Employer" includes "owners and principal contractors who establish and administer consolidated insurance programs."

The inquiry does not end there, however. Even if the state statute is silent on the issue, courts may have extended coverage in some form or fashion based on particular wording in a statute. For instance, an owner or general contractor could be deemed a statutory employer for purposes of workers' compensation and be entitled to immunity if it pays for or provides the workers' compensation insurance, depending on the language used in the statute and the courts' interpretation of that language. However, the courts of most states have yet to determine whether the immunity afforded under the exclusive remedy provisions extend specifically to consolidated insurance programs. Courts in the District of Columbia, Georgia, Indiana, Michigan, Nebraska, New York and Oregon have found that the exclusive remedy provision does not apply to these programs. Although the exclusive remedy provision has been applied to these programs by courts in California, Connecticut, Kentucky, Maryland, Nevada, Ohio and Texas, how and to what extent it applies is determined by reference to state statutes and varies in application.

Under the Texas Workers' Compensation Act at issue in the Berkel case, the general contractor becomes the "deemed employer" of the subcontractor for workers' compensation purposes if the general contractor and subcontractor enter into a written agreement under which the general contractor provides workers' compensation insurance to the subcontractor and the subcontractor's employees. In Berkel, the general contractor agreed to provide workers compensation insurance to all of its subcontractors and their employees through a CCIP. During the project bidding process, prospective subcontractors were instructed to omit the cost of workers' compensation insurance in their bids. The subcontractors that were awarded contracts, including Berkel, were then required to enroll in the CCIP as a condition to performing work on the jobsite. Because the written agreement provided that the general contractor provided workers' compensation to Berkel and its employees and they were required to enroll in the CCIP, the court of appeals held that the general contractor was Berkel's statutory employer. Consequently, the general contractor's employees and the subcontractor's employees were statutory co-employees for the purpose of the workers' compensation statute. As a co-employee, Berkel was entitled to rely on the Act's exclusive remedy provision, barring Mr. Lee from recovering on his common law claims against Berkel. Both workers compensation and consolidated insurance programs have the common goal of controlling costs through containing litigation. While OCIPs and CCIPs provide economic benefit on the front end to owners and contractors alike, any benefits derived will be quickly eroded if it is later determined that an injured employee's recovery of workers' compensation benefits under the OCIP or CCIP is not the employee's exclusive remedy and the employee is permitted to file a civil action and recovers a multi-million dollar judgment against the owner or

contractor. Consolidated insurance programs are not a one-size-fits-all solution for providing workers' compensation benefits. Performing due diligence prior to implementing such programs can literally save your ass—ets!

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Using ConsensusDocs Subcontracts When ConsensusDocs isn't the Prime Contract

Brian Perlberg, Executive Director, **ConsensusDocs**

A common question I receive is, "what if I am forced to sign an American Institute of Architect (AIA) A201 and AIA A101 as my prime agreement with the Owner, can I then use a ConsensusDocs subcontract agreement without exposing myself unduly to liability gaps in flow-down provisions caused by two different families of agreements?"It is a good question. Optimally, it would be best to use ConsensusDocs from the prime to subcontract, and even subsubcontract level. However, using one agreement at the prime level and a different document at the subcontract level is done all the time. Many General Contractors use a standard subcontract (potentially a modified version of a standard subcontract). That said, you have to be careful because the good contract practice is to make your contracts consistent or at the least, you can give (to a downstream party) what you don't get from an Owner (or upstream party). The ConsensusDocs website provides several legal comparison articles that compare AIA and ConsensusDocs terms, which helps pinpoint the risk allocation provisions you need to most bear in mind.

One of the aims of creating a truly standard industry contract is that all parties could agree because it is fair to all parties. One of the original ads with the release of ConsensusDocs that I penned stated, "What if Owner, Contractors, Designers, and Subcontractors," could finally agree on a contract? Now they can!" The construction industry is often described as fractious, slow-moving, and contentious. Though ConsensusDocs usage and more collaborative forms of project contracting have made tremendous progress (last year was ConsensusDocs biggest jump in usage and usage continues to grow), it is clear that use of unfair contracts is still a major issue for the industry that need improvement. And keep in mind, even if you start out with a standard document that is fair, it can be modified so heavily that it doesn't bear recognition to the original (thereby making the concern of staying within the same contract family seem almost irrelevant).

The good news is that ConsensusDocs drafters, had consistency flow-down issues in mind when drafting the ConsensusDocs subcontracts (such as ConsensusDocs 750 long form or the 751 Short form Subcontract). Some of the more progressive provisions in the subcontracts are fully dependent upon the provision being in both the prime and subcontract to take effect. This makes it easier to flow-down provisions consistently, and avoid liability gaps in your

contracts. I should also note that most subcontracts incorporate the prime agreement as part of the Subcontract documents.

The retainage provisions in the ConsensusDocs subcontract illustrates how a subcontract can be mindful of flow-down consideration. The ConsensusDocs 750 Subcontract at subsection 8.2.2. provides for early release of retainage. However, this is dependent upon the General Contractor getting an early release from the Owner.

Retainage: The rate of retainage shall be percent [__] (%), which is equal to the percentage retained from the Constructor's payment by the Owner for the Subcontract Work. If the Subcontract Work is satisfactory and the prime agreement provides for reduction of retainage, the Subcontractor's retainage shall also be reduced when the Constructor's retainage of the Subcontract Work has been so reduced by the Owner.

The ConsensusDocs 200 and 205 provides for no more retainage after the work is 50% complete.

Another important provision, the waiver of consequential damages, is also dependent upon a similar waiver being made at the prime level. In the ConsensusDocs 750, at subsection 5.4.1, the following is provided:

Except for any (a) liquidated, consequential, or other damages that the Owner is entitled to recover against the Constructor under the prime agreement, and (b) losses covered by insurance required by the Subcontract Documents, the Constructor and the Subcontractor mutually waive all claims against each other for consequential damages, including damages for loss of business, loss of financing related to the Project, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. Similarly, the Subcontractor shall obtain in another agreement from its Subsubcontractors mutual waivers of consequential damages that correspond to the Subcontractor's waiver of consequential damages herein. The provisions of this subsection shall also apply to and survive termination of this Agreement.

ConsensusDocs provide a balanced provision that waives consequential damages which does not cripple the General Contractor if that provision was not negotiated into the prime agreement.

One fundamental issue that might require changes in contract administration, if not contract drafting, is AIA A201's requirement to funnel all communications through the architect rather than to the Owner directly. Section 4.2.4 of AIA A201 provides, "Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract." ConsensusDocs does have a similar provision and actually encourages direct party communications.

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Construction SuperConference to Welcome Todd Buchholz as the Opening Keynote

Atlanta: Todd Buchholz brings a wealth of knowledge and experience to CSC and you will not want to miss it!

Bruce Ficken, Member, Cozen O'Connor and CSC Co-Chair: "Anyone planning to attend the opening keynote session, featuring Todd Buchholz, is in for a treat."

As a frequent commentator on the state of the markets, Buchholz brings his experience as a former White House director of economic policy, a managing director of the $15 billion Tiger hedge fund, and a Harvard economics teacher to the cutting edge of economics, fiscal politics, finance, and business strategy.

"This is a session anyone involved in the legal construction sector cannot afford to miss, Not only does Mr Buckkolz make difficult and important information about the economy and our industry easily understood, his programs are always entertaining, insightful and fun." says Ficken.

Buchholz, a best-selling international author, is a frequent guest on ABC News, PBS, and CBS where he has debated with such personalities as James Carville and Ben Stein, and recently hosted his own special on CNBC.

Buchholz will be speaking on "How to Compete in a Global Economy." Learn about new industry trends in manufacturing, service, and technology.

"This is a session you will not want to miss and it's included with your conference pass," says Kevin Gaffney, CSC Director. "As a special incentive, those registering by September 1 will receive 10% off the full conference rate."

To learn more about Todd Buchholtz, **click here**.

For more information and to register for the Construction SuperConference, **click here**.

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