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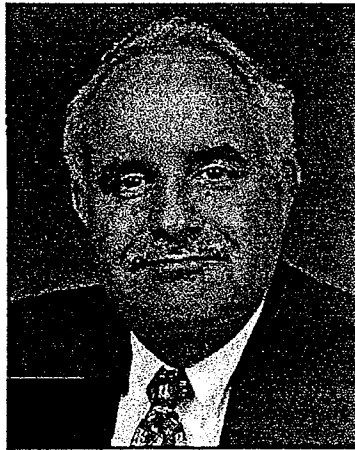
COVERING THE STATES OF NEW JERSEY AND PENNSYLVANIA

By Andrew Cohn, Kaplin Stewart

Liability is paramount in design services agreements

Optimism being the most common character trait of those involved in real estate development, it is not surprising that risk and liability are not at the top of the list of issues receiving attention in design services agreements. Developers, whose goals are to build and create, naturally prefer not to spend time and effort contemplating the possible "dark side" of negligently performed design services. Issues like scope of services, schedule, cost and payment are likely to receive more attention in design agreements. Yet, experience teaches that ignoring liability risks inherent when design services are provided can have severe financial consequences. These risks can and should be professionally handled up front to avoid larger problems and costs later.

One of the risk issues frequently ignored in design services agreements is insurance coverage for design errors and omissions. Many of the most commonly used standard form design services agreements, such as those published by the American Institute of Architects, do not provide for mandatory errors and omissions insurance. A developer's assumption that its architect or engineer maintains such cov-



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erage is often incorrect because many design firms go without coverage. Those that do maintain coverage typically provide "claims made" policies which, if not maintained continually from year to year, essentially expire following completion of the project.

The cost of uninsured design negligence is magnified when a "limitation of liability" clause is inserted in the design agreement. Such clauses, routinely used by architects and engineers in their own proprietary form agreements, cap financial liability for design negligence, typically at a fixed amount or the amount of the design fee. Such clauses are generally enforced by the courts. For example, in the case of *Valhal Corp. v. Sullivan*

Associates, a federal court in Pennsylvania enforced a limitation of liability clause in a design agreement that capped an architect's liability at \$50,000, or the amount of its fee. The architect had failed to disclose a building height restriction to a developer that resulted in losses exceeding \$1,000,000. The court held that between commercial parties, such limitation of liability clauses did not violate public policy and were enforceable. The court stated that such clauses were unenforceable only if the amount of the liability cap, compared to the fee being charged for services, was so disproportionate as to remove the design professional's incentive to perform its services with due care.

Owners and developers negotiating design services agreements should consider requiring their design professionals to provide insurance. They should also be aware of the financial risks created by limitation of liability clauses in those agreements. Dealing with such issues up front is the most effective way to handle the risk of damages from design negligence.

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