CHIUMENTO MCNALLY, LLC

SEPTEMBER 2013 EDITION

THE MINUTES

BREAKING NEWS: SUMMER OVER, FALL TO FOLLOW!

INSIDE THIS ISSUE:

As of the publication date, there is excitement in the air! Housing starts are up and construction, generally, seems poised for a significant rebound. The Fall is a time of fresh starts as we move toward the final trimester of the year. The only thing that can slow us down is The Legislative, Executive and Judicial branches (not necessarily in that order). This edition of "The Minutes" focuses on defenses and immunities to some common claims. Claims often follow spurts in growth which stimulate activity and, therefore, risk. These risks run the gamut from property ownership to provision of professional services for parties with whom you have no contract (Economic Loss Doctrine) to Consumer Fraud Act violations.

We are also pleased to have a guest author this month. Steve Whitehorn of Whitehorn Financial Group, Inc. has provided a brief but informative article on increasing profitability. Finally, we are spotlighting our newest firm member, Lou Vogel, Jr., who also happens to be our Interim Editor of "The Minutes", pinch-hitting for Ashley Buono who just started maternity leave. We hope you enjoy this edition of "The Minutes" and always look forward to your comments to improve it.

~ Gary C. Chiumento, Partner

SPECIAL FEATURE:

Learn how to "Increase Your Profits in 5 Easy Steps"

Continue to Page 2 for an article contributed by Steve Whitehorn of Whitehorn Financial Group, Inc.

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INCREASE YOUR PROFITS IN 5 EASY STEPS

BY: STEPHEN R. WHITEHORN, WHITEHORN FINANCIAL

When working on projects, architecture and engineering firms often focus their energies on design, rather than on profits. With the right planning and focus, your firm can do both and increase its bottom line. For long-term success, it is critical that you exercise solid financial stewardship to ensure that your projects reach completion, but also that your firm gets paid.

Here are five strategies to maximize profit without sacrificing quality:

Be selective. Developing a set of quantifiable criteria to identify the right projects and clients will save you valuable time and resources. Public and institutional clients are often the most reliable, while developers may present more financial risk. Be cautious about taking on a client or a project if it doesn't meet your strategic goals. Seek out clients that are the right "fit" and have the right projects for your practice.

Practice open and effective communication about payment at the outset. Having a candid discussion with your client is the best way to ensure they will pay on time. When determining your fee, you should account for unforeseen issues that may arise during the project. Frank conversations up front will help you avoid headaches later on.

Avoid going into debt by extending credit to clients. Marvin Meltzer, principal of Melzter/Mandl Architects, says if clients want a loan, tell them to go to a bank. Sign a contract and communicate that work will stop if payment is late.

Grow strategically. You may want to expand your staff to accommodate new projects, but with a larger firm comes more overhead and less flexibility. Plan accordingly.

Use technology effectively. Client relationship management software and other tools can be excellent assets for your firm, but you should focus on developing real life, personal relationships with your clients. No software can ever substitute for a human connection.

Maintaining a plan based on these simple economic principles can have an enormous effect on the financial stability of your firm. Use these strategies and your practice will soon be on the path to long-term success.

Stephen R. Whitehorn is the Founder and Managing Principal of Whitehorn Financial Group, Inc. Whitehorn Financial Group, Inc. provides architects and engineers with strategies that maximize profitability, while reducing risk and improving cash flow. Whitehorn Financial Group, Inc. is the creator of The A/E Empowerment Program®.

Contact Steve at steve@whitehornfinancial.com.

POST-SANDY REBUILDING EFFORTS: CONFUSION REIGNS

BY: TERESA M. MUNSON, ESQUIRE

> From 1993 until April 2010, New Jersey experienced 1,241 floods causing more than 1.25 billion dollars in property damage and resulting in 14 deaths and 197 injuries. In each of the last eight years, New Jersey has experienced at least one major disaster declaration from FEMA resulting in millions of dollars of flood damage. In 2011, FEMA made five major disaster declarations in the State, four of which were due to flooding from severe weather events. Recent floods, such as those associated with Tropical Storm Irene in August 2011, have added significantly to these numbers. Most recently, in October 2012, Superstorm Sandy led the President of the United States to issue a major disaster declaration for all of New Jersey. The most recent estimates for Superstorm Sandy indicate that as many as 38 New Jersey residents lost their lives and that the statewide economic impact of the storm exceeds $37 billion.[1]

Recent tragedies such as the tornados in Oklahoma and the wildfires in California serve as constant reminders of the devastating effects Mother Nature can inflict. Whatever one's position on climate change, there is no disputing that in recent years we have been on a roller-coaster ride of extreme weather conditions. And none inflicted more damage to our area than Superstorm Sandy, which came ashore near Atlantic City the evening of October 29, 2012.

As of May 28th, FEMA disaster assistance to New Jersey included $396 million in grants to individuals. $782 million in SBA disaster loans, $351 million in public assistance grants to communities and non-profit organizations and $3.5 billion in flood insurance payments.[2] As families, businesses and communities struggle to re-build, the logistics of re-building pose significant challenges. One of the most pressing challenges are building code requirements in flood-prone areas.

Even before Sandy came ashore, FEMA and the NJDEP were re-mapping the Jersey Coast. FEMA estimates that the existing mapping underestimated the actual 100-year flood elevation by approximately one to four feet and, in some circumstances, by as much as eight feet.[3]

In December 2012, FEMA introduced advisory flood zone maps, which included information concerning building elevation requirements.[4] FEMA expects to release revised maps later this month. These maps will serve as the basis for calculating flood insurance premiums.[5] Bear in mind, however, that it may be another eighteen to twenty four months before final rules and maps are in place.[6] In the interim, the NJDEP has adopted the advisory maps as the State's new elevation requirements,[7] even though the DEP acknowledges that the maps, and thus the elevation standards, may change. In addition to meeting the FEMA standards (whenever they are finalized), properties located in areas subject to the Flood Hazard Area Control Act must be constructed one foot above the FEMA standard.

The emergency rules NJDEP adopted on January 24, 2013 are intended to provide a measure of comfort to those who decide to re-build before the FEMA maps are finalized. Architects, engineers and contractors working in flood prone areas must become conversant with these rules.

Additionally, the NJDEP also adopted emergency rules for the reconstruction of damaged structures in CAFRA and Waterfront Development areas. The emergency measures include the elimination of permits to elevate bulkheads, docks or piers within existing footprints, and permitting-by-rule and by general permit rather than individual permits for certain rebuilding and dredging activities.[8]

Another item for consideration is the impact of rebuilding and local zoning laws. Structures built many years ago may not comply with current zoning requirements, such as lot size, set back requirements, and conforming uses. The Municipal Land Use Law provides that non-conforming uses and structures may be restored or repaired in the event of partial destruction.[9] To determine whether the damage constitutes a partial destruction the local land use ordinance should be consulted.

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However, if the destruction is total, the property owner may be required to obtain a variance from the municipal zoning board in order to continue a non-permitted use. So-called "d Variances," a reference to subsection (d) of *N.J.S.A.* 40:55D-70, require a super-majority vote. Even if successful, the property owner will incur costs for applications, escrows, and design professionals and attorneys' fees.

For those who have simply had enough, relief may be available under the State's *Blue Acres* program. Designed to complement the popular *Green Acres* program, the program allows residents in chronically flood prone areas, along the Atlantic Ocean and the floodways of the Delaware, Passaic and Raritan Rivers, to sell their homes to the State. Existing structures are removed and the properties are preserved as open space.[10] Unlike condemnation or eminent domain proceedings, participation in the *Blue Acres* buy-back is purely voluntary. A similar program in Missouri resulted in the purchase of more than 4,000 properties and a reduction in individual assistance payments from $33 million after the 1993 floods to $2 million after the 2003 floods.

Ten months after Superstorm Sandy ravaged our state, recovery efforts continue. While the State has been pro-active in streamlining the permitting process, navigating this process still requires diligence and perseverance.

Footnotes:

1 NJ DEP Emergency Rule-Making under the Flood Hazard Area Control Act, effective January 24, 2013.
2 FEMA Press Release, May 29, 2013, *New Jersey Recovers From Superstorm Sandy: By the Numbers*.
3 See Footnote 1.
4 FEMA Press Release, January 5, 2013, *Advisory Flood Elevation Maps on the Web.*; NJ DEP Fact Sheet, *Rebuilding After Sandy*.
5 Asbury Park Press, June 2, 2013, *Final FEMA Maps to be Posted.*
6 See Footnote 4.
7 NJ DEP Fact Sheet, *Rebuilding After Sandy*.
8 NJ DEP Press Release, April 17, 2013, *Christie Administration Takes Emergency Action to Expedite Recovery and Rebuilding Projects for Sandy Affected New Jerseyans.*
9 *N.J.S.A*. 40:55D-68.
10 South Jersey Times, November 25, 2012, *Hurricane Sandy brings relevance to Blue Acres program*.
11 Steve Adubato, November 1, 2011, *Blue Acres: Now is the Time.*

COMMERCIAL / RESIDENTIAL SIDEWALK LIABILITY

BY: STEPHEN MCNALLY, ESQUIRE

The New Jersey Appellate Division in the recent Grijalba v. Floro decision considered the issue of sidewalk liability. Prior to the Grijalba decision a residential owner could have no liability for an injury that occurred on a sidewalk abutting his property. The owner of a commercial property, on the other hand, would have liability. In further analyzing the issue, the pre-Grijalba courts held that an owner occupied two/three family house was considered residential in determining sidewalk liability. The Appellate Division in Grijalba, however, changed the analysis for two/three family houses and, rather than establishing a bright line test, concluded that the use of the property must be considered on a case-by-case basis and only then can a determination be made as to sidewalk liability.

In Grijalba, the owner-defendant, Floro, previously resided on the first floor of a two family house while renting the second floor to another family. She subsequently moved to the basement and then began renting the first and second floors to separate families. The plaintiff slipped on the abutting sidewalk and sued Floro for his injuries. Floro moved to dismiss the case on the theory that the property was residential and as such there was no liability. The trial court agreed and dismissed the case. On appeal, however, the Appellate Division returned the case to the trial court to consider the particular circumstances of the property use.

The Appellate Division, in considering the matter, cited the Supreme Court decision Stewart v. 104 Wallace Street, Inc., 87 N.J. 146, 157 (1981) which held that "commercial landlords are responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so." The Stewart court specifically refused to extend liability to residential owners. The Stewart court also concluded that commonly accepted definitions of "residential" and "commercial" should be considered in the analysis. The Grijalba court then analyzed the history of cases since Stewart, focusing particularly on those cases involving two/three family houses occupied by the owner. While it had generally been accepted that two and three family houses are residential in nature, the court concluded that no such bright line was ever expressly created. The court concluded that the record in Grijalba must be more fully developed at the trial level to understand the nature of the ownership including whether the property was being used to generate a profit.

The Court's rationale continues the trend away from hard and fast rules or "bright line" tests in dealing with an individuals' right to sue for personal injuries. The Grijalba decision stands for the proposition that sidewalk liability must be a consideration for all property owners. It, therefore, is that much more important to assure that insurance is in place and it covers injuries which occur on the abutting sidewalk.

RESURRECTION OF THE ECONOMIC LOSS DOCTRINE IN NEW JERSEY?

BY: DESMOND O'NEILL, ESQUIRE

The Economic Loss Doctrine is a legal principle that precludes recovery by an injured party for purely economic damages if there is no contractual relationship with the party that allegedly caused the injury. Personal injury matters are exempted from this Doctrine. This defense has been used in many states by design professionals to avoid liability for claims by contractors, tenants, and others who suffer purely economic loss as a result of design errors or omissions. While this Doctrine has been rejected in the construction litigation context in New Jersey for many years, recent court decisions have opened the door for design professionals to assert this as a possible defense in construction litigation cases, depending on the wording of their services agreement.

Based on a 1985 New Jersey Supreme Court decision, New Jersey Courts have permitted a contractor who sustains economic damages as a result of a design professional's demonstrated negligence to recover those damages from the design professional, even when there may have been no direct interaction between those parties before or during the course of the project. Typically, such claims are couched in claims of damages arising out of construction delays or additional work that are purportedly because of errors and/or omissions by the design professional in the plans or specifications or because of delays by the design team in providing design deliverables, responding to Requests for Information, etc.

In early 2011, however, the New Jersey Appellate Division issued an unpublished opinion, which barred a contractor's claim for pure economic loss against an engineer acting as a subconsultant to an architect. Horizon Group of New England, Inc. v. New Jersey Schools Construction Corp., 2011 N.J. Super. Unpub. *LEXIS 2271* (App. Div. 2011). In that case, the Court held that when a complaint sounds in negligence, the relationship between the parties is defined by the contract between them. Thus, in such cases, any relief would rise from a breach of the party's contractual obligations.

However, since the contractor in this case had no contract with the engineer (or the architect for that matter), the contractor had no basis for a breach of contract claim. The Court further held that the contractor could not maintain a claim for negligence against the design professional under the Entire Controversy Doctrine. Significantly, in applying the Doctrine, the Court noted that the contractor still had a means of recovery in this matter by virtue of its contract with another defendant in the case; specifically, the Project Owner. Accordingly, the Court found that the contractor could not sustain its claim against the design professionals and upheld the lower court's dismissal of the contractor's claim.

While a New Jersey Federal Court decision earlier this year disagreed with the State Appellate Court's rationale in the above case, it should be noted that no subsequent State Courts have seen fit to do so. While it is likely that future cases will deal with this issue, at this time, the use of the Entire Controversy Doctrine to bar claims for purely economic loss in construction litigation cases remains a potentially viable defense for the design professional sued by a party with whom it has no contractual relationship.

If you are negotiating a public or private sector professional services contract, it may be possible to limit or eliminate altogether liability for economic losses alleged by those with whom you have no agreement.

Contact our firm to see if this defense should be included in your next agreement.

LICENSED PROFESSIONALS IMMUNE FROM CONSUMER FRAUD ACT … ALMOST!

BY: LOUIS J. VOGEL, JR., ESQUIRE

Enacted in 1960 to supplement federal consumer protection measures, the New Jersey Consumer Fraud Act (the "Act"), N.J.S.A. 56:8-1 *et seq.*, was implemented to protect consumers from deceptive business practices. Over the course of its now 53-year history, the Act has become a lightning rod for litigation throughout the State. As claims filed under this Act rapidly expand, those persons and businesses that engage in the sale of "goods, services, or real estate" must be vigilant in guarding against potential claims under the Act.

This consumer friendly Act has several noteworthy pitfalls that may act to the detriment of defendants in this state. Of particular note, the Act seeks to punish deceptive business practices rather than focus on injuries incurred by plaintiffs. N.J.S.A. 56:8-2 provides that,

> "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice."

As this provision shows, a variety of actions may constitute a violation of the Act even though no person was actually misled, deceived, or damaged. Therefore, those engaged in business in New Jersey must exercise extreme caution in the course of operation as a successful plaintiff will be awarded both treble damages and attorney's fees under the Act. The threat of treble damages and the shifting of fees from an angry "consumer" merits careful preparation and caution.

However, while the Act has developed into a powerful tool for New Jersey consumers, it is subject to certain judicially recognized exceptions. In particular, the courts of this State have established a "learned professional exception" that stands to protect many of those who render highly technical, professional services from the long-reaching tentacles of the statute. Under this exception, professionals, including architects and engineers, are deemed to be beyond the ambit of the Act while providing services under their professional license. Macedo v. Dello Russo, 178 N.J. 340 (2004).

However, it is critical that professionals stay within their licensed areas of expertise while performing services in New Jersey. Case law shows that a licensed professional who performs services outside the scope of their professional capacity may incur liability under the Act. Blatterfein v. Larkin, 323 N.J. Super. 167 (App. Div. 1999). Additionally, inserting oneself into a role as entrepreneur of a product or realty could also incur liability.

"The threat of treble damages and the shifting of fees from an angry "consumer" merits careful preparation and caution."

While design professionals currently enjoy an important protection from the Act, the threat of liability remains. Therefore, our clients should be certain to perform only those services permitted under their State licensure. Failure to stay within the confines of these licenses risks foregoing the "learned professional exception" and unnecessarily exposes one's self and one's firm to both treble damages and attorney's fees. Jurisprudence in this field is constantly evolving, but the first step to protecting one's professional interests from this type of liability comes from careful and vigilant attention to the contours of the New Jersey Consumer Protection Act.

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ATTORNEY SPOTLIGHT OF THE QUARTER

LOUIS J. VOGEL, JR., ESQUIRE

This edition's "Attorney Spotlight" shines on Chiumento McNally, LLC's newest Associate, Louis J. Vogel, Jr. Lou is originally from Haddon Heights, New Jersey. He is a graduate of the University of Pennsylvania (BA History 2009) and the Villanova School of Law (JD 2012). During law school, Lou served as a student attorney in the Villanova Civil Justice Clinic. While at Villanova, Lou received the Dorothy Day Award for Public Service.

Lou is admitted to practice in New Jersey and Pennsylvania. He also serves as volunteer legal counsel for Bloom Africa, a 501(c)(3) organization dedicated to improving the lives of orphans and vulnerable children in Lesotho, Africa.

Lou is the author of an article in this edition of "The Minutes" entitled "Licensed Professionals Immune from Consumer Fraud Act...Almost!" For casual reading, Lou recommends The Seven Storey Mountain by Thomas Merton.

Lou currently resides in Philadelphia. His interests include European Soccer, travelling, reading and Liverpool Football Club.