CHIUMENTO MCNALLY, LLC

Volume 1, Issue 1

THE MINUTES

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Welcome to Chiumento McNally, LLC's First Newsletter

Chiumento McNally, LLC (CM) is a Law firm dedicated to providing the highest quality legal services for the business and professional community. We specialize in commercial transactions and litigation with a focus on the construction industry, design professionals, title claim and title insurance matters. The members of the firm are admitted to practice before the state courts of New Jersey and Pennsylvania, the United States District Courts for New Jersey and the Eastern District of Pennsylvania, and United States Supreme Court. We welcome you to the inaugural edition of our newsletter, The Minutes.

Our goal is to bring to our friends and clients newsworthy articles authored by our talented staff of attorneys. The contents of this newsletter is not in any way to be deemed a substitute for sound legal advice but rather, an informative interaction between our staff and our professional clients.

We thank you for this opportunity to be of service and we look forward to the publication of future editions and any feedback that will help us accomplish our goal.

-Ashley H. Buono, Editor and Associate Attorney of Chiumento McNally, LLC

Upcoming Events.....

Back-to-School Breakfast Briefing

Wednesday, September 28, 2011

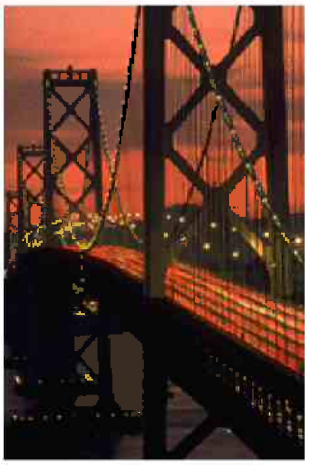
Breakfast: 8:00 am to 9:00 am
Seminar: 9:00 am to 12 noon

Camden County Boathouse
7050 North Park Drive
Pennsauken, NJ 08109

A light Continental Breakfast will be served
Early RSVP to 856-317-2215

CORPORATE OWNERS AND EMPLOYEES SUBJECT TO CONSUMER FRAUD ACTION ACCORDING TO THE NEW JERSEY SUPREME COURT

By: Stephen McNally, Esquire



Plaintiffs have often utilized the New Jersey Consumer Fraud Act, N.J.S.A. 56:8.1-20 ("CFA") as a tool in suits against entities involved in home construction projects. The CFA offers a valuable tool since it provides for treble damages and the recovery of attorney's fees for successful litigants. The New Jersey Supreme Court in Allen v. V&A Brothers, Inc. has increased the benefit to plaintiffs by permitting the CFA to be applied against individual owners and employees of a corporation when those individuals personally participated in a violation of the regulations set forth in the Act.

In Allen, V&A Brothers, Inc. were retained by William and Vivian Allen to install a retaining wall and level off their backyard. When the Allens were dissatisfied with the work, they sued V&A not only for the inferior services and materials but also for violations of regulations set forth in the CFA. The regulations included a failure to provide a written contract, failure to require final approval before receiving payment and failure to obtain Plaintiffs' consent before undertaking modifications. After the Trial Court dismissed the claims against the individual company owners, the Appellate Division reversed, reinstating the claims against them and the Supreme Court affirmed.

The Supreme Court reached its decision after analyzing the CFA and concluding that it was intended to be read broadly to impose individual liability. The Supreme Court did not believe that its decision ran afoul of the Business Corporation Act (N.J.S.A. 14A:1-1217:18) which purportedly grants protection for shareholders for the acts of the corporation. The Court felt that the decision was consistent with the existing tort participation theory which allows for liability against individuals if they actually participated in the violation.

While the CFA does not apply to licensed professionals such as Architects or Engineers except in extraordinary circumstances, the Allen decision makes it that much more important to assure compliance with the regulations set forth in the CFA including the requirements that a written contract be prepared and signed by the owner before work is commenced. It is recommended that you speak with counsel to confirm that your contract is compliant with the necessary regulations.

THE ARCHITECT'S DUTIES TO OWNERS FOR GREEN BUILDING

By: Desmond O'Neill, Esquire

In today's construction market, it is clear that "green" or sustainable building" has become increasingly more prevalent and important. This is particularly true with respect to architects. Indeed, in 2007, the American Institute of Architects (AIA) amended its Code of Ethics and Professional Conduct to require architects to "advocate the design, construction, and operation of sustainable buildings and communities." (Ethical Standard 6.2). Moreover, in performing design work, the architect approach should be "environmentally responsible and advocate sustainable building and site design." (Ethical Standard 6.1). As a result of the amendment to its Code, the AIA amended its Standard B 101 Form to include provisions relating to sustainable building. Section 3.2.3 of the Standard B 101 Agreement, provides that "Architect **shall present** its preliminary evaluation to the Owner and **shall discuss** with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches." (emphasis supplied). In addition, "the Architect **shall consider** environmentally responsible design alternatives, such as material choices and building orientation." Section 3.2.5.1(emphasis supplied) These contract provisions impose ("shall") potentially troublesome obligations on the unsuspecting architect. First, the failure of an architect to discuss alternative approaches to design and construction, including sustainable building, could conceivably be used as a basis for an allegation of breach of contract by the architect. Even where not expressly recited in

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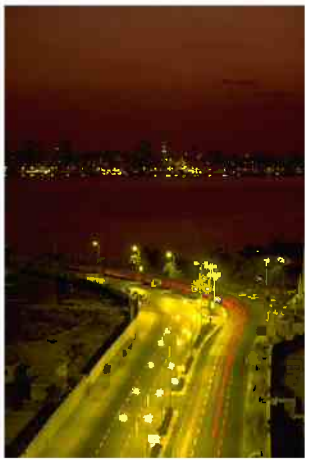

the contract, the possibility that the AIA code of Ethics might be used to indicate proof of the standard of care by all design professionals is a mere allegation in a complaint away. Alternatively, advising clients on sustainable building may prove troublesome as doing so can unreasonably heighten a client's expectations. If the "as designed" performance of the building fails to achieve what was discussed with the owner (or even what the Owner *thought* was discussed), this may form the basis of an additional claim against the architect. Moreover, the advocacy by an architect for a particular design could conceivably lead to a standard of care or warranty issue that might fall outside of an architect's professional liability insurance policy.

Perhaps, as a result of this lack of clear guidance, this year, the AIA released a new Guide for Sustainable Projects. This Guide provides model language that can be incorporated into standard AIA agreements. The Guide further emphasizes the important role the architect plays in educating owners and establishing reasonable expectations regarding sustainable design early in the project.

While the Guide seems to clarify that the architect's duty is to educate his or her client with respect to sustainable design, the Guide should not be used indiscriminately or without due caution. It is recommended that design Professionals consult with counsel, their PL Broker or insurance professional to determine the potential legal impact of incorporating the model language into various services agreements. Accordingly, a prudent designer should be aware of his or her obligations with respect to sustainable design under standard forms of AIA agreements, and should exercise caution and seek legal advice, before amending or incorporating additional terms and conditions relating to sustainable design, in order to potentially avoid future litigation.

Covering Your Assets: (CYA)

A Guide to Communicating In the Modern Project Era

By: Gary C. Chiumento

2500 years ago Aristotle broke it down: Communication requires a Sender, a Receiver and a Message. While that definition has not changed, methods of communication have. Marshal McLuhan's oft quoted statement that "the medium is the message" was more right than he could imagine. From clay tablet and stylus to internet and Blackberry, the ease or difficulty of communication methods have impacted not only our method of communication but our content and even our attitude. It is the intent of this article to remind design professionals of the importance of clear, efficient and effective communication and to provide strategies for communicating with clients, their contractors and others.

No one needs statistical proof to demonstrate the obvious. Lawsuits involving construction are on the rise. Design professionals, previously permitted to stay in the background consulting and assisting Project Owners, are now in the legal spotlight. Shifting allegiances by Owners often cause them either to instigate suits against design professionals or participate, willingly or otherwise, in suits by contractors or persons injured or damaged due to "building failure."

In construction, the "documents" are the key to any case. However, our definition of "documents" must be more expansive than simply the contract documents, the plans and specifications. Often the most critical documents are the communica-

"No one needs statistical proof to demonstrate the obvious. Lawsuits involving construction are on the rise."

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tions we have with Owner and contractors, memorialized in telephone notes, file memoranda and letters. These documents, in and out, should be maintained as part of the design professional's project file. The project file is ordinarily preserved by the design professional for a period consistent with the Statute of Limitations or Repose (usually a longer period) of the state where the project is located, which is the state where you are most likely to be sued.

All forms of communication should be memorialized: telephone discussions, face to face conferences, job meetings. If a subject was discussed, regardless of whether there was a resolution (and perhaps even more importantly when there was no resolution), it is usually to the design professional's advantage to memorialize and, in many instances, communicate it to appropriate parties.

Modern communication technology provides us with more methods for communicating than ever before. Even the mobile phone has undergone a metamorphosis: it is a camera, a voice recorder, a library-like resource. Electronic transmissions allow us to send thousands of pages of scanned documents at the click of a mouse. We jot off thoughts, organized or random, with the same click.

Regardless of the method, however, all our communications should have a purpose. It is important to have a clear idea of that purpose and an appreciation of who is the likely receiver of the message, intended or otherwise.

E-mail users are far more casual in their style than a "snail mail" letter writer. This level of informality may result in some minor convenience and rapidity in getting out the message but it can also lead to negative results. It is important to remember that e-mail is often preserved either electronically or by hard copy and is no more secure from access than a paper letter sent in the mail or by fax. The informality which is the hallmark of expression in an e-mail should not allow the sender to forget that that communication will be cited, perhaps out of context, in a courtroom years after it was sent and often with disastrous results. Therefore, every communication, letter or fax or e-mail, even if only to your own file, should be created with certain guidelines in mind. **Next Issue– Specific Tips for Specific Circumstances**

Enforcement of the Limitation of Liability Clause In the Professional Service Contract

BY: Ashley H. Buono, Esquire

There exists a general misconception in the legal community as to a design professional's right to limit its exposure in a professional negligence suit. Some believe it too good to be true that a professional could control the outcome of litigation through contract negotiation. While everyone is entitled to their "beliefs" the case law outlined below suggests that limitations of liability provisions in construction contracts are enforceable, although underused.

A general rule of law familiar to most lawyers is that courts generally will not rewrite a contract better than the one written by the parties. The court's primary focus is whether the parties were in equal bargaining positions during the formation of the contract. Limitations of liability provisions are bound by the same premise.

The case of **Valhal Corp. v. Sullivan Associates, Inc.**, 44 **F.3d** 195 (3rd Cir. 1995) is one where the Federal Court of Appeals analyzed a liability limitation provision in a contract between an architect and a real estate developer. Proposals were sent by the architect to the developer which attached a Standard Consulting Terms and Conditions. The terms expressly limited the architect's professional liability to $50,000. The developer eventually brought

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suit against the architect for professional negligence for failing to inform it of a height restriction. The architect brought a motion for partial summary judgment seeking enforcement of the limitation of liability clause. The Federal Trial Court found the limitation was not enforceable (professionals shouldn't be able to shield themselves from damages if they err") and struck the provision.

The Appeals Court recognized , however, that there was no general policy in Pennsylvania against limitations of liability clauses. Moreover, the court distinguished between plain exculpatory clauses in a contract (i.e., where one attempts to exonerate himself totally from any liability) versus a limitation of liability clause (i.e., liability permitted but capped at a reasonable , agreed upon amount). The court ultimately held that limitations of liability provisions are not disfavored in Pennsylvania when contained in contracts between informed business entities, dealing at an arm's length, and where there has been no injury to person or property. Because the architect exposed itself to an amount related to the cost of its services, the court reasoned that it did not "immunize" itself from liability and the limitation was reasonable. And besides, the parties had agreed to it in the first place.

Although the **Valhal** case interprets Pennsylvania law, its holding and rationale was applied to New Jersey law in **Marbro, Inc. v. Borough of Tinton Falls, et al.**, 297 **N.J. Super.** 411 (Law Div. 1999). In **Marbro**, an engineering firm was hired by the Borough of Tinton Falls to design improvements to a local park and to serve as a consultant during the construction phase of the project. Two separate contracts were negotiated between the parties to include a limitation of liability clause limiting professional liability to $32,500, an amount equal to its fees for the project. Glass was located in the soil and it was determined that the park was unusable and had to be resurfaced. The Borough eventually brought claims against the engineer for professional malpractice. The engineer raised as a defense the limitation of liability clauses in its contract.

The court acknowledged that parties to a contract may limit their liability so long as the limitation is not violative of public policy. The court utilized the test announced in **Valhal Corp. v. Sullivan** in ultimately concluding that the capped amount was not so minimal compared to the expected compensation as to minimize the engineer's concern for the consequences of a breach of its contractual obligations. The cap was sufficient enough to give the engineer ample incentive to perform the work proposed or, in short, he would not be paid.

The Appellate Division accepted the holdings in **Marbro** and **Valhal** in **Lucier v. Williams**, 366 **N.J.Super**. 485 (App.Div. 2004). However, in **Lucier**, the court found a limitation of liability not enforceable. In **Lucier** a home inspector was sued for fraud by homeowners. The home inspector had a clause in his contract, which limited liability to one half of his purported fee. The court found the limitation in the home inspector's contract to be problematic since: a) the contract was one of adhesion (i.e., "take it or leave it") and left the consumers with no room for negotiation; 2) the contracting party was an inexperienced consumer; 3) statutes have been expressly enacted to protect against specific harm caused by home inspectors; and 4) the substance of the limitation of liability provision eviscerated the contract because the damage level was nominal compared against the professional's expected compensation. It is clear the court did not issue a universal prohibition of limitation of liability clauses and instead, considered the bargaining powers between the parties.

In conclusion, design professionals can limit their liability so long as the provision is part of a negotiated contract between parties in equal bargaining positions.

And, in case you think that liability limitations exist only in musty old law books, we are pleased to announce that our firm recently received a judgment of the NJ Appellate Division upholding a limitation of liability provision on behalf of our clients for $25,000 against a Plaintiff land developers claim in excess of $4 million

Contact the Professionals at Chiumento McNally to help you fashion an appropriate limitation provision for your next contract

Visit CM on the Web:
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Attorney Spotlight of the Quarter: Stephen McNally, Esquire

Chiumento McNally, LLC's Partner, Stephen McNally, has been an attorney for the past 21 years. Originally from Northeast Philadelphia, Steve attended St. Joseph's University and graduated *cum laude* with a degree in Criminal Justice. The most important event in college, however, was not related to academics; it was meeting his wife, Holly. Upon graduation, Steve went on to law school at Temple University School of Law. Steve's current legal practice is devoted to the areas of Title Claims Litigation and Lender Defense. He has been a key note speaker in several seminars and written articles on these topics.

Steve's greatest accomplishment during his legal career is becoming a partner after 15 years of practice. When Steve is not working he can be found coaching his two children's basketball or baseball teams. Reading and running are Steve's favorite hobbies. A book he recommends reading is The Prize: Epic Quest for Oil, Money and Power by Daniel Yergin. If Steve was not an attorney, another professional he would try is teaching. Steve, his family and dog Cody reside in South Jersey.