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When are Demolition Blunders Intentional?

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It is a demolition company's worst nightmare: you just destroyed the wrong property! You sleep soundly because you have an insurance policy, which you believe will take care of the mistake. However, many insurance policies do not provide coverage for intentional acts, as opposed to occurrences or accidents.

Example 1: A school district hires a construction company to clear property and construct a new high school. However, when it is time to bulldoze and raze the property, a worker believes a surveyor's stake is a property marker, and razes adjacent - and the wrong - property.

Example 2: A municipality hires a demolition company to destroy a building. There is some confusion about which building to destroy, and the municipality tells the company to destroy the wrong house, which it does.

While these two cases are similar, courts have held that the insurance company need only defend and indemnify in Example 1, but not in Example 2.

Example 1: West American Insurance

Example 1 is the recent case of *West American Insurance Company v. Kamadulski Excavating & Grading Co., Inc.*, 2006 U.S. Dist. LEXIS 26196 (S.D. Ill. May 4, 2006). There, the owner of the adjacent property brought a lawsuit against the construction company, who, in turn, submitted the claim to its insurance company. The insurance

company sought to limit its responsibility through a separate lawsuit. The insurance company asked the court to decide whether the insurance policy covered the intentional acts of the construction company in destroying the wrong property. The court held that the policy applied.

The court found that there was an accident that triggered coverage. Specifically, the court held that the contractor meant to clear the school's property and not the adjacent property. The court found that while the contractor intended to tear the trees down, it accidentally razed property outside the scope of its contract. Accordingly, the insurance company had to defend and indemnify the insured because the intentional acts resulted in an unintended injury.

Example 2: Century Surety

Example 2 is *Century Surety Company v. Demolition & Development, Ltd.*, 2006 U.S. Dist. LEXIS 2128 (N.D. Ill. Jan. 18, 2006), which was the subject of a recent article in the Winter issue of the Construction Law Quarterly.

In *Century Surety*, the court focused on the fact that the municipality specifically told the contractor to demolish the wrong building. The court held that this was not an accident or occurrence under the insurance policy because the contractor did exactly what it was hired to do. That is, the injury was the intended result of the intentional destruction. Therefore, the insurance company did not have to defend or indemnify its insured.

Squaring the Cases

How can you square *West American Insurance* with *Century Surety*?

The answer, it seems, lies with the foreseeability of the injury. In both cases, the contractors were hired to

demolish property, and both did so intentionally. However, in *West American Insurance*, there was an accident attributable to the contractor. That is, the employee mistakenly believed that he was clearing land under the contract, when, in fact, he razed adjacent property. It was unforeseen by the contractor that his employee would demolish the wrong property.

In contrast, the contractor in *Century Surety*, made no mistake; he did exactly what he was hired to do. In taking orders from the municipality, it was entirely foreseeable that the contractor would tear down the wrong building because that is what he was told to do. That is, the contractor did not accidentally demolish the wrong building; he did so purposefully by following orders.

Contractor Employed Indicted

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Recently, a contractor was indicted for mail fraud for her alleged participation in a scheme to defraud the Board of Education of Chicago. Although the issue in this case focused on the contractor's motion to dismiss the criminal indictment against her prior to trial, the facts of the case demonstrate the dangers of circumventing contract requirements established by the Board of Education's Minority and Women-owned Business Enterprise Procurement Program.

In *United States of America v. Joseph Doyle and Mary Cavanaugh*, 2006 U.S. Dist. LEXIS 21616 (N.D. Ill. 2006), defendants Doyle and Cavanaugh worked for True-Lite, a window replacement business. True-Lite bid for an \$11 million Chicago Public Schools (CPS) contract to install aluminum windows and asked CPS to waive the WBE/MBE program requirements because they were specially trained to perform the particular work.

The Board awarded the \$11 million CPS contract to True-Lite and partially waived the program requirements allowing True-Lite to subcontract a smaller percentage of the work to minority and women-owned business enterprises. True-Lite bid for a \$6 million extension of the prior contract and represented in its bid materials that "Quality Window Installation" was a minority-owned company which would perform the required percentage of the extension contract work.

The indictment against the defendants alleged that Quality Window Installation was a sham corporation controlled by True-Lite which did not satisfy the Program's minority and woman-owned business enterprise requirements. The government alleged the defendants misrepresented Quality's minority-owned status to obtain the \$6 million contract extension.

The indictment alleged Doyle and Cavanaugh offered to help Andre Prophet, an African-American True-Lite employee, form his own company and promised that True-Lite would subcontract CPS work to the new business. Doyle and Cavanaugh chose the name Quality Window Installation, prepared the paperwork to incorporate and license Quality Window Installation, made all of the decisions associated with starting a new business, and paid all fees with True-Lite checks. It was alleged that Mr. Prophet's actual participation in the company was negligible.

On August 2, 2005, defendant Doyle pled guilty to Count I of the indictment and was sentenced to two years probation and ordered to pay restitution in the amount of \$89,304. At the time of the court's decision, defendant Cavanaugh was scheduled to stand trial for her intent to defraud the Board of Education of Chicago. Defendant Cavanaugh attempted to have the indictment dismissed stating that no reasonable jury could find she intended to defraud the Board beyond a reasonable doubt. The court declined to assess the strength or weakness of the government's case, denied Cavanaugh's motion to dismiss, and allowed the government to proceed to trial against defendant Cavanaugh for her part in the plot to defraud the Board!

Restatement 414 Update - Federal Court Holds No "Control" By General Contractor

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While Illinois state court decisions "ping pong" back and forth on just what factors comprise enough "control" to create a duty of providing a safe place to work for construction workers, general contractors and construction managers may want to consider removal to federal court where circumstances allow. In the recent decision of *Aguirre v. Turner Construction Co., et al.*, 2006 U.S. Dist. LEXIS 9816 (N. Dist. Ill. March 9, 2006 decided), the United States District Court for the Northern District of Illinois held that no duty was owed by the general contractor and construction manager under Restatement (Second) Section 414, despite contract safety language and an extensive safety program.

Aguirre's backdrop was the Soldier Field renovation project. A joint venture served as the construction manager for the project. The construction manager's contract required that it:

take all necessary precautions and institute programs necessary to ensure the safety of the public and of workers performing the Work on the job, and to prevent accidents or injury to persons on the Site...

The construction manager contracted with, among other subcontractors, a masonry contractor. The masonry company contracted to "perform and furnish all the work, labor, services, materials, plant, equipment, tools, scaffolds, appliances and other things necessary for the work," and agreed "that the prevention of accidents to workmen and property engaged upon or in vicinity of the Work is its responsibility." The masonry contractor was required to and prepared its own site-specific safety program and employed its own project manager to oversee the project and administer its own safety program. During the course of building a garage opening, a mason was injured when a poorly constructed scaffold gave way and fell, causing injuries.

The injured worker brought suit against the general contractor, claiming it was in control of the work site

under Restatement (Second) of Torts Section 414, which states:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty of reasonable care, which is caused by his failure to exercise his control with reasonable care.

In a motion for summary judgment, the construction manager argued no duty was created under section 414 of the Restatement (Second). The District Court agreed.

Similar to the analysis seen in most Section 414 state cases, the Court focused on the limiting language of Comment (c) of Section 414, which discussed the term "retained control." Comment (c) provides:

In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it *does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.*

Restatement (Second) of Torts 414, Comment (c) (Emphasis added). Under Comment (c), sufficient "retained control" was not shown over the operative details of the plaintiff's work so as to impose a duty under Section 414.

Here, although the construction manager instituted an extensive safety program, the court recognized the Illinois state court decision of *Martens v. MCL Constr. Corp.* where the court found that enforcement of safety standards does not constitute control over the "incidental aspects" of subcontractor work. Distinguishing the *Bokodi* case, the District Court found the *Martens* line of cases more persuasive

because "penalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety," quoting *Martens*, 807 N.E.2d at 492.

In addition, the court focused on the masonry contractor's own obligations by contract. Here, the masonry contractor agreed to be responsible for its own workers' safety, agreed to design its own safety program, and employ its own personnel to ensure compliance. The masonry company's contract also provided that it controlled operative work details, including providing and setting up its own scaffolding equipment. As such, the construction manager had no duty of care because it did not have control over the operative details of the mason's work or its workers' safety. Thus, summary judgment was appropriate.

Given the federal court's analysis favoring general contractors and construction managers, it is worth investigating early on (given the time limitations) if removal to federal court is possible. In addition, general contractors and construction managers should review their contracts to ensure that subcontractors have as much control shifted to them as possible. Where a safety program is employed by the general contractor or construction manager, there should be requirements that the subcontractor develop and submit its own site-specific safety program, to show the subs exclusive control over its own operative details on a particular project. If you have not done so, have an experienced construction lawyer review your contracts for any additional language that may help defeat a claim or at very best prevent being named a defendant. An ounce of prevention is worth a pound of cure!

Admiralty Court Applies Illinois Construction Law

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In a recent admiralty case, the U.S. District Court for the Northern District of Illinois, sitting as an admiralty court, applied Illinois common law in

granting a motion for summary judgment on the issue of a contractor's liability for work it subcontracted to another company. The matter of *Garvey Marine* involved an accident on the Calumet-Sag Channel in which a barge struck a man-basket attached to a hydraulic underbridge boom. 424 F.Supp.2d 1109 (N. Dist. Ill., 2006).

The City of Blue Island, owner of the Division Street Bridge, entered into a preliminary engineering services agreement with Robinson Engineering to perform bridge rehabilitation. Robinson agreed to "perform or be responsible for the performance, in accordance with state approved design standards and policies, of engineering services" for rehabilitation of the bridge. Although the agreement allowed Robinson to subcontract its services, the agreement specifically stated that "the consent to sublet, assign or otherwise transfer any portion of the services to be furnished by [Robinson] shall not be construed to relieve [Robinson] of any responsibility for the fulfillment of this agreement."

Robinson retained Collins Engineers to conduct an inspection of the bridge, which was required before the actual rehabilitation could be performed. Collins' project proposal to Robinson contained similar contractual language stating that Collins would conduct the inspection in full compliance with the various bridge inspection standards.

A short time before beginning the inspection, Collins informed Robinson, and Robinson in turn informed Blue Island, of the schedule for the bridge inspection, specifically indicating which days of the inspection would involve "overhead" activities and which days would involve "underdeck" activities. Robinson requested that Blue Island "notify the proper emergency services with this information." Blue Island only notified the police and fire departments of the inspection schedule, but did not notify the Coast Guard.

On April 10, 2003, a tugboat was pushing ahead several barges down the Calumet-Sag Channel. Claimants, bridge inspectors employed by Collins, were in a basket attached to the arm of a hydraulic underbridge boom and were suspended under the bridge conducting their inspection. The captain of the tugboat did not see the boom and basket until too late. The front of the barge struck the arm of

the boom attached to the basket which was occupied by the inspectors. The inspectors were thrown into the channel, and one of them drowned.

Robinson moved for summary judgment, claiming it owed no duty of care to the inspectors because it never undertook to provide the inspectors with a safe working environment. Robinson further contended that it had no duty to the inspectors because it did not retain control over the means, method or manner in which Collins performed its inspection.

The respondents, on the other hand, argued that Robinson had a non-delegable duty to remain responsible for all work performed under its agreement with Blue Island, including the inspection performed by its subcontractors, because Robinson had primary and direct responsibility for the bridge rehabilitation project. The respondents claimed that this included an obligation to supervise Collins during the inspection. Alternatively, the respondents argued that Robinson assumed a duty to provide the inspectors with a safe working environment when it voluntarily undertook to control traffic around the bridge by informing Blue Island of the inspection schedule and instructing it to notify emergency services.

The court noted that it could not find any federal admiralty case law on the issues presented and, therefore, the court applied Illinois common law. The court held that a contractor is not liable for injuries or damage caused by the negligence of its subcontractors, unless it can be shown that the contractor retained or exercised control over the subcontractor. The court went on to cite with approval Comment C to Section 414 of the Restatement (Second) of Torts which explains that:

It is not enough that he has merely a general right to order the work stopped or resumed, to inspect the progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of right of supervision that the contractor is not entirely free to do the work in his own way.

In this case, the court found that Robinson had no control over the means, manner or method of Collins' inspection because Robinson was not involved in nor did it oversee any aspect of the inspection. The court also found that Robinson's agreement with Blue Island did not explicitly impose a duty on Robinson to supervise the work of its subcontractors. Furthermore, it was reasonable for Robinson to rely on its contract with Collins because Robinson had no reason to believe Collins' methods were dangerous or unlawful.

The court further held that Robinson's agreement to comply with all applicable laws in performing the rehabilitation project was discharged by Robinson's inclusion of a similar provision in its contract with Collins. The court went on to say that to hold otherwise would require Robinson to possess the legal and technical expertise necessary to ensure Collins' inspection was in accordance with such laws, thus defeating the purpose of hiring Collins to perform the inspection.

Finally, the court held that Robinson did not assume responsibility for the safety of the inspectors or assume responsibility to insure that the Coast Guard was notified simply by informing Blue Island of the inspection schedule. Robinson merely assumed a responsibility to transmit information, which Robinson did in a non-negligent manner.

Protect Your Lien Rights

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In *Lazar Bros. Trucking, Inc. v. A&B Excavating, Inc.* 2006 Ill.App.LEXIS 277 (1st Dist), the Illinois Appellate Court examined the sufficiency of notice of a subcontractor's mechanics liens. There, the subcontractor took no action to perfect its mechanics lien claim until after the prime contractor for whom it had performed the work had been paid by the owner.

In this case, an owner acted as its own general contractor on a building project. The excavation contractor on the job provided lien waivers and acknowledgments of payments made by the owner.

The waiver stated that no subcontractors worked on the excavation project. The lien waiver incorporated an affidavit in which the president of the excavation company again swore that no subcontractors worked on the excavation. All amounts due to the excavation contractor were paid before the subcontractor, who asserted that it removed excavation debris, filed its notice of mechanics lien.

The appellate court held that for a subcontractor to protect its right to receive payments, each subcontractor must provide timely written notice to the owner of the amount owed to the subcontractor for work on a project. Lien waivers can establish a prima facie defense to a subcontractor's claim.

In this case, the court found that the waiver showed that the owner fully paid for the excavation work before the subcontractor filed its mechanics lien. The evidence, including an affidavit from the subcontractor's president, failed to support an inference that the owner acted in bad faith or that it knew that the excavation contractor had supplied false affidavits. As a result, the subcontractor was not entitled to share in payments the owner made to itself as a general contractor, because the evidence established that the owner's last payment to itself was prior to the date the notice of lien was served. Accordingly, the court affirmed dismissal of the subcontractor's claim for foreclosure on its mechanics lien.

Arbitration Agreements: Be Prepared To Accept The Award, Like It Or Not

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In a recent Illinois Appellate Court case, the impact of arbitration awards on construction and business contracts and the right to judicial review was discussed. In *National Wrecking Co. v. Sarang Corp.*, 2006 Ill. App. LEXIS 490 (1st Dist., June 6, 2006), the court analyzed the scope or review of an arbitration award stemming from a dispute regarding the formation of a joint venture between a corporation and a certified small business contractor under

applicable provisions of the contracting requirements for set-aside jobs under the Small Business Administration (SBA).

In *National Wrecking*, Sarang Corp. (Sarang), a certified small business eligible for federal set-aside jobs, created a joint venture with National Wrecking Company (National), an otherwise ineligible business, which enabled National to obtain set-aside work under the Mentor-Protégé Program. The Mentor-Protégé Program allows small business set-aside contracts to go to larger businesses who qualify as a mentor if a joint venture is created with a qualifying small business contractor and the small business contractor does a certain percentage of the work.

Sarang and National entered into a joint venture agreement with the express purpose of obtaining part of a Navy Project for demolition of certain buildings and the removal of potentially contaminated soil. As part of the agreement, Sarang was to obtain bids for the work on the project; specifically, for any work not to be performed by National as part of Sarang's obligation to do at least 15 percent of work under the SBA guidelines.

In the initial bidding process the Navy required bids for the removal of the soil. National, as part of the joint venture bidding, initially only submitted a per-ton basis for the soil removal due to the financial risk of not knowing how much tonnage of contaminated soil may need removal. Subsequently, the Navy requested a supplemental bid with a lump-sum price.

National submitted a bid based on the estimated amount of contaminated soil to be removed, plus transport and disposal fees. This supplemental bid, according to National, was prepared with the intention that National would perform the soil removal work and that National would take the risk if its calculations were wrong in order to win the contract. Sarang denied that National was to do the work and believed that the contaminated soil removal was to be subcontracted at the discretion of Sarang.

The joint venture bid the soil removal at \$511,180 with an option on 5 additional buildings at \$518,000. The joint venture was then awarded the contract. After obtaining the contract for the work and partial performance, a dispute arose between Sarang and National regarding the extent of work National was

to perform and the amount of money each entity was to receive for the contaminated soil removal.

Once the demolition project commenced, none of the soil was found to be contaminated and, thus, none needed to be removed. Based on the potential windfall to National for the amount the Navy paid for the intended removal of contaminated soil that ultimately did not need to be done, Sarang informed National that the joint venture would not pay National any of the money for the bid price for removing the contaminated soil since that work was not done by National.

Because of the dispute, Sarang demanded arbitration against National to determine the scope of the joint venture and, among other issues, the right to the money paid for the contaminated soil removal. The arbitrator held hearings and heard testimony over a four-month period and ruled that the joint venture should continue with some restrictions and that National be paid the \$511,180, representing the price for the contaminated soil remediation and a portion of the option price for the additional 5 buildings.

After the arbitrator's decision, National filed an application for confirmation of the arbitration award in the Circuit Court of Cook County. Sarang objected and sought to vacate and/or modify the award because:

- 1) the arbitrator exceeded his power;
- 2) there was no arbitration agreement;
- 3) the award violated federal law;
- 4) the award violated public policy; and
- 5) the award failed to dispose of all the matters submitted at the arbitration.

After a hearing, the Circuit Court denied Sarang's application and granted National's application.

On appeal, the court looked at the scope of review of an arbitration award. The court stated that, unlike trial court decisions, arbitration awards are given great deference. This deference is based on the concept that the arbitration was the chosen path of the parties and should be encouraged as alternative dispute resolution. The court examined the allowable grounds to set aside an arbitration award both from the Illinois Uniform Arbitration Act and common law. Finding that the

standard of review on appeal is much stricter when reviewing arbitration awards, the court ruled that unless there is gross error the award should stand. Finding no gross error, the Appellate Court upheld the Circuit Court's decision in favor of the application to enforce the award.

Lack of Professional Engineering License Cannot be the Sole Basis to Prohibit a Civil Engineer from Testifying

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In *Thompson v. Gordon*, 2006 Ill. LEXIS 1083 (June 2, 2006), the Illinois Supreme Court determined that the trial court erroneously struck the testimony of a retained expert engineer solely because he was not licensed under the Illinois Professional Engineering Practice Act of 1989.

Relevant considerations in determining whether an engineer can testify as an expert include his/her knowledge, skill, experience, training and education; whether that knowledge, skill, experience, training and education afford the engineer knowledge and experience beyond that of an average citizen; and whether that engineer's testimony will aid the trier of fact in reaching its conclusions. While licensing may be a factor to consider in determine whether an engineer is qualified to testify as an expert witness, Illinois courts do not require an engineering license as a prerequisite for testifying.

Thompson, in its discussion of the case, alerts the reader to a potentially devastating litigation tactic: a cease-and-desist order entered against a non-Illinois licensed engineering professional. The court noted that responsibility for determining whether a non-licensed person engaged in the unlicensed practice of professional engineering in Illinois rests with the Department of Professional and Financial Regulation.

Burger King Case Affirmed

The Illinois Supreme Court affirmed the decision of the Illinois Appellate Court in *Marshall v. Burger King Corp.*, 355 Ill.App.3d 685, 824 N.E.2d 661. The Supreme Court agreed with the Appellate Court that the representative of a Burger King patron who had been fatally injured when a car crashed through a window wall of the restaurant could maintain a suit against Burger King and the franchisee for failure to exercise due care in the design and the construction of the restaurant. 2006 Ill. LEXIS 1087 (2006). We reported on the Appellate Court case in the Summer, 2005 issue of the Construction Law Quarterly.

Prompt Pay Acts Amended

The State and Local Government Prompt Pay Acts have been amended in two significant respects by Public Act 094-0972 effective July 1, 2007. First, if a state or local government agency disapproves only part of a bill or invoice from a contractor, but not the entire bill or invoice, the portion which is not disapproved should be paid by the government agency. Second, any interest received by the contractor for a late payment should be paid to any subcontractors and vendors for whom payment has been delayed upon a pro rata basis.

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