Table of contents

- Newsletter Launched
- Implied Warranty and Lost Profits
- Indemnity Obligations
- Statute of Repose
- New Consensus Security Features

New ConsensusDocs Construction Law Newsletter

Brian Perlberg, ConsensusDocs, Executive Director & Sr. Counsel

Getting concise and free information that impacts your bottom line is both useful and rare. I am excited to announce a new ConsensusDocs newsletter that provides you useful construction law information that impacts your risk profile. To ensure continued access, simply hit the subscribe button on the upper left and send an email with the word "subscribe." ConsensusDocs is partnering with some of the best construction law firms for up-to-date information that will be delivered bi-monthly. Don’t hesitate to contact me with any feedback that you might have at bperlberg@consensusDocs.org.

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.
Owner's Implied Warranty and Lost Profits Claims Against Contractor Are Denied

Kenneth I. Levin, Pepper Hamilton, LLP, Partner
Stephen W. Kiefer, Pepper Hamilton, LLP, Associate

Fire Brick Engineers (“FBE”) was hired to install refractory lining for two furnaces in Spectro Alloys Corporation’s (“Spectro”) smelter plant. When the lining failed prematurely, Spectro sued FBE for breach of express and implied warranties and breach of contract in a U.S. District Court in Minnesota. Spectro sought direct damages for repair costs and consequential damages for lost profits while its plant was closed for repairs.

Under the contract, FBE agreed to install lining material manufactured by a third party, and expressly warranted that its work would be free from defects. FBE’s warranty specifically excluded materials manufactured by third parties, but provided that such materials would carry the warranty extended to FBE by the material’s manufacturer. In capital letters, the warranty excluded consequential damages.

On FBE’s motion for summary judgment, the court found that installation services were the predominant purpose of the contract, and that the Uniform Commercial Code (UCC), governing transactions in goods, was therefore not applicable. Spectro Alloys Corp. v. Fire Brick Eng’rs Co., Inc., 2014 U.S. Dist. LEXIS 140817 (D. Minn. 2014). Accordingly, Spectro could not sue for breach of implied warranties under the UCC. Important to the court’s decision were FBE’s disclaimer of warranties for goods manufactured by others and the skilled nature of the installation work. The court held that Minnesota’s common law does not recognize an implied warranty of fitness or merchantability in service contracts.

While Spectro could still sue FBE on the basis of its express warranty that its installation services would be free from defects, the Court next ruled that the disclaimer of consequential damages in the express warranty clause limited the damages which Spectro could recover. The court held that the disclaimer did not bar damages for repair costs because they were direct damages, but agreed with FBE that Spectro’s claimed lost profits due to
production losses were consequential damages. The court held that the contract’s exclusion of consequential damages was enforceable because it was not unconscionable and because the parties were sophisticated entities that negotiated at arm’s length.

To view a more extended discussion of the case, including a link to the full text of the court’s decision, click here.

Pepper Hamilton’s Construction Practice Group has an unparalleled record of resolving complex construction disputes and winning complex construction trials. Our litigation experience – and success – informs everything we do, including translating into better results in our contract drafting and project management. Our lawyers counsel clients on some of the biggest, most sophisticated construction projects in the world. With more than 25 lawyers – including 15 partners who all have multiple first-chair trial experience – and a national network of 13 offices, we have the depth and breadth to try cases of any complexity, anywhere at any time. For more information about Pepper’s Construction Practice, visit www.constructlaw.com.

---

**Indemnity Obligations vs. Obligations to Provide Additional Insured Coverage: And How AIA & ConsensusDocs Compare**

*Charles W. Surasky, Smith Currie & Hancock, LLP, Partner*

One of the most important risk-shifting devices in a construction contract is the indemnification provision because it protects one party from financial loss and damages arising from future problems occurring during the project. Indemnification is a promise that one party will make good on any loss, damage, or liability incurred by another. There are two parties in an indemnity relationship – an indemnitor and an indemnitee. An indemnitor gives protection while the indemnitee receives protection. When triggered, the indemnitor cover potential losses of the indemnitee, including third-party claims. For example, an indemnification clause may require a general contractor to protect an owner from a subcontractor’s employee work injury.

If not carefully drafted, an indemnification can pass all risks away from a negligent party to a party that otherwise would be blameless. On the other hand, an overly broad indemnification clause may be declared...
unenforceable under a state’s anti-indemnity law. For example, indemnifying a person’s loss from that person’s intentional or willful misconduct may be ruled unenforceable. State anti-indemnity legislation emerged to protect subcontractors and suppliers who are often in a much weaker bargaining position in the negotiation process. State anti-indemnity law may limit the powerful protections afforded by an indemnification provision.

Two common examples of indemnification clauses are contained in standard contract documents called the American Institute of Architects (AIA) A201 and ConsensusDocs 200. In section 3.18.1 of AIA A201-2007 (General Conditions), the indemnification provision states in pertinent part:

To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

In other words, under section 3.18.1, the contractor must indemnify and “hold harmless” the owner against claims arising out of the performance of the work by the contractor, a subcontractor, or anyone employed by them and covers the owner’s loss only to the extent that it was caused by such act or omission.

Another example of an indemnity clause in contained in ConsensusDocs 200 “Standard Agreement and General Conditions Between Owner and
ConsensusDocs 200, section 10.1.1 states:

To the fullest extent permitted by law, the Constructor shall indemnify and hold harmless the Owner, the Owner’s officers, directors, members, consultants, agents and employees, the Design Professional, and Others (the Indemnitees) from all claims for bodily injury and property damage, other than to the Work itself and other property insured, including reasonable attorney’s fees, costs and expenses, that may arise from the performance of the work, but only to the extent caused by the negligent acts or omissions of the Constructor, Subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Constructor shall be entitled to reimbursement of any defense costs paid above the Constructor’s percentage of liability for the underlying claim to the extent provided for by the subsection below.

10.1.2 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Constructor, its officers, directors, members, consultants, agents, and employees, Subcontractors or anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable from all claims for bodily injury and property damage, other than property insured, including reasonable attorneys fees, costs and expenses, that may arise from the performance of work by the Owner, the Design Professional, or Others, but only to the extent caused by the negligent acts or omissions of the Owner, the Design Professional, or Others. The Owner shall be entitled to reimbursement of any defense costs paid above the Owner’s percentage of liability for the underlying claim to the extent provided for by the subsection above.

The ConsensusDocs 200 indemnity obligation is vastly different from the indemnity clause 3.18.1 in AIA A201 in several ways. First, the duty to indemnify is reciprocal between the contractor and the owner. Contractors
and owners are responsible for their own negligence and it covers only insurable risks such as personal injury and property damage. Also, either party is entitled to reimbursement of defense costs paid in excess of that parties’ percentage of liability for their underlying claim.

Although often confused for each other, an obligation to provide “additional insured coverage” is not equivalent to an indemnity obligation. Since the ability to indemnify the indemnitee is tied to the indemnitor’s financial ability to pay such losses in the future, standard contract forms contain an added protection in detailed insurance clauses requiring a party to procure insurance coverage.

In AIA A201, Article 11 sets forth the contractor’s requirement to purchase and maintain insurance to protect the contractor from claims arising out of its operations and completed operations for which it may be legally liable. Article 11 also requires the contractor to provide commercial general liability (CGL) insurance and identify the owner, owner’s lender, owner’s landlord, the architect, and the architect’s consultants as “additional insureds” for claims caused in whole or in part by the contractor’s negligent acts or omissions. Obtaining additional insured status is accomplished by a written endorsement or amendment to the named insured’s policy. An additional insured may receive the benefits of the coverage and make a claim directly against the named insured’s insurance company. Companies who are named as additional insureds under a policy are subject to the same policy exclusions and exceptions as the policy holder.

In ConsensusDocs 200, the insurance clauses are found under Article 10 under “Indemnity, Insurance, and Bonds.” ConsensusDocs 200 requires that the parties purchase and maintain CGL insurance, employers’ liability insurance, and business automobile liability insurance. However, in contrast with A201, ConsensusDocs 200 contains no requirement to identify any party as an “additional insured.” Rather, the owner has the option to require that the contractor maintain additional liability coverage in the form of providing additional insured status under the CGL policy or an Owners’ and Contractors’ Protective Liability insurance policy at the owner’s expense.

Construction projects are risky financial endeavors for all project participants. Both indemnification clauses and additional insured status are a means to manage those risks. A party subject to either of these two
devices should consult an attorney to review the contractual language and the applicable insurance policies. An indemnity obligation may be restricted or deemed unenforceable by a state’s anti-indemnity law. Also, an additional insured may be unpleasantly surprised when a claim is denied under a policy exclusion or exception. One thing that is certain is that no one wants to be left holding the bag long after the project is over.

Practical Advice for General Contractors

- Check your owner contracts to see if there is an indemnification clause that requires you to indemnify for anything other than personal injury and property damage. Any indemnity obligation that goes beyond personal injury and property damage will probably not be covered by your comprehensive general liability insurance.

- Consider limiting the indemnity obligation in your standard form subcontracts to indemnification for your subcontractor’s negligence. Such a clause will not run afoul of anti-indemnity statutes. The ConsensusDocs 750 standard form subcontract Article 9.1 is a good example of such a clause.

- Consider requiring your subcontractors to add you as an additional insured on your subcontractors’ comprehensive general liability insurance policies. ConsensusDocs 750 Article 9.2.11 gives you the option of requiring additional insured coverage.

- If you require additional insured coverage, you should also require your subcontractors to provide you with a copy of the additional insured endorsement. Additional insured endorsements vary as to the extent of coverage provided.

Smith, Currie & Hancock LLP is a national boutique law firm that has provided sophisticated legal advice and strategic counsel to our construction industry and government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry “Common Sense Contract Law” that is available on our website: www.SmithCurrie.com.

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.
Misconceptions About Attorney-Client Privilege

Eric M. Gruzen, Peckar & Abramson P.C., Partner

A construction manager faces an issue on a project and seeks direction on how to proceed. He drafts an email and considers who to send it to at his company. The issue is contentious and he wants to ensure that if it ever evolves into a lawsuit, the email chain will not be subject to discovery. Hoping to trigger the attorney-client privilege, he addresses the email to a company Vice President, who happens also to be the company’s in-house counsel. As an additional safeguard, he also copies the company’s outside counsel. However, despite the construction manager’s best intentions, the email chain is not necessarily shielded from discovery.

The attorney-client privilege is a commonly misunderstood legal concept, especially in the context of email communication. Some misconceptions we often hear include:

- Copying counsel on an email renders the email privileged;
- Any email sent exclusively to counsel is always privileged; and
- In-house counsel may conduct non-legal tasks without jeopardizing the attorney-client privilege.

In truth, the existence of privilege turns largely on the role of the attorney and the nature of the correspondence.

The purpose of the attorney-client privilege is to "safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters."[i] Once a communication is deemed "privileged," it is undiscoverable even if it contains unprivileged information.[ii]

However, for a communication to be privileged, there must first exist an attorney-client relationship, and the communication must take place in the course of that relationship. Additionally, the transmission must occur “by a means which, so far as the client is aware, discloses the information to no
third persons other than [(a)] those who are present to further the interest of the client in the consultation or [(b)] those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted ....".[iii]

Establishing the existence of an attorney-client relationship:

In the context of attorney-client protection, a "client" is "a person who . . . consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity."[iv] No attorney-client relationship exists where the attorney's role is non-legal in nature. For instance, "it is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as business agent."[v]

Naturally, there are situations in which an attorney's legal and business purposes intertwine. In such instances, courts have shown a willingness to protect communications with a predominant law-related purpose, but to allow into evidence communications with a predominant business-related purpose.[vi] However, where an attorney's business and legal roles effectively merge, attorney-client protection may become entirely unavailable. This risk is especially prevalent in companies where in-house counsel also perform business tasks. For example, in one case, in-house counsel for a title company was responsible for monitoring funds entering and leaving escrow accounts. The court held that the counsel acted in such a substantial business capacity that the attorney and client effectively became "indistinguishable," and denied attorney-client protection over the subject communications.[vii]

Messages to or from outside counsel also are not categorically protected. While outside counsel is presumed to serve purely a legal services role, this presumption may be rebuttable in circumstances where the counsel deals primarily with the non-legal aspects of a transaction or operation.

Establishing that a message was transmitted in the course of the attorney-client relationship:

If a court determines that an attorney-client relationship exists, it will look at whether the communication in question was transmitted in the course of that relationship. Merely copying counsel on a communication does not create a privilege.[viii]
In determining whether a given communication is protected, courts may review various factors, including the parties to the message. For instance, in cases where a message was sent simultaneously to a lawyer and non-lawyer for both their consideration, courts have denied privilege on the basis that the primary purpose of the message could not have been to request legal advice.[ix] Even merely copying a non-attorney on a message to an attorney can jeopardize the "privileged" status of the message.[x] In some states, courts also scrutinize the contents of the message before ruling on privilege, whereas in California, for one, such an examination of contents is generally prohibited.

In theory, a privileged communication must be germane to the attorney-client relationship and must consist of "information transmitted between a client and his lawyer, advice given by the lawyer, or a legal opinion formed and given by the lawyer…"[xi] However, in practice, if a court may not review the contents of a communication (as is the case in California), determining whether the substance of the communication fulfills these criteria might not be possible, forcing the court to rely only on contextual factors, such as who partook in the communication.

**Practice tips:**

- Do not automatically assume that an email or other written communications are privileged merely because it was sent to or received by an attorney. If the context in which the message is sent suggests that the message does not pertain to a legal matter, it may very well be discoverable.

- Strictly limit the number of recipients of any message that contains potentially sensitive content. Where possible, include only attorneys in the communication, and particularly in the "To:" line of an email, while placing non-attorneys in the “cc:” line.

- If a company relies on its in-house counsel to perform significant non-legal business functions, it would be advisable to direct sensitive legally related communications to outside counsel for direction and advice.

[iii] This is the law in California, pursuant to statute, though the standard in other states may differ. Of course, facts are not deemed privileged merely by virtue of their being communicated in a privileged transmission.

[iii] Id. at 733, citing Cal. Evid. Code § 952.


Find Peckar & Abramson’s newsletter [here](#). Long known for leadership and innovation in construction law, Peckar & Abramson’s Results First℠ approach extends to a broad array of legal services — all delivered with a commitment to efficiency, value and client service since 1978. Now, with nearly 100 attorneys in nine U.S. offices and affiliations around the globe, our capabilities extend farther and deeper than ever.

---

**ConsensusDocs Tech Platform Provides Increased Security Feature and Flexibility**

A new security feature has been added. In addition to the unique security ID that has always appeared on finalized contracts, now contracts that don’t have the ConsensusDocs’ footer will not be able to be uploaded to the platform. If you attempt to finalize an older contract that was in draft format, or created a Favorite from an older contract version, the platform

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.
may alert you that it is not a valid ConsensusDocs document. In this case, please contact our support team (866-925-DOCS or support@consensusdocs.org), and they will help you get your document finalized. Note, this security feature does not apply to Supporting Documents within your project or for document comparisons or conversions via the Tools tab.

Additionally, in response to user feedback, ConsensusDocs has modified all standard documents to allow users to eliminate the instructions page from draft and final contracts. Not only will this new option allow customers to choose whether or not to include the instructions page on draft and final contracts, but should also save on printing and paper costs by eliminating this potentially extra page from the tens of thousands of contracts finalized each year.