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Liability for “Delegated Design” – Understanding and Avoiding Risks to Design Professionals

A Webinar for Hall & Company, July 15, 2014

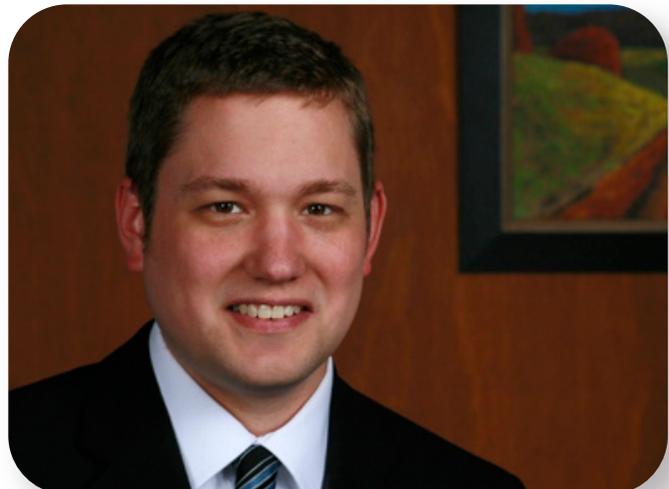
WILLIAM S. THOMAS



William S. Thomas is a principal at Pitzer Snodgrass, P.C., in St. Louis, Missouri where he focuses his practice on handling matters involving the construction process, from up-front contract reviews, commercial litigation, professional liability defense and trial work. He has represented owners, contractors, subcontractors, architects, engineers, land surveyors and landscape architects in all phases of construction claims. He also handles product liability claims, other general commercial disputes and general liability claims. He is licensed to practice law in Missouri and Illinois, and several Federal Courts. He is involved in many professional organizations, and is a past president of the Lawyers Association of St. Louis, the local trial bar, and is active in the Missouri Organization of Defense Lawyers, the Defense Research Institute and its Construction Law Committee, Product Liability Committee, and Building Products - Substantive Litigation Group, and Professional Liability Committee,

where he served on the Steering Committee, and Design Professional Subcommittee. Bill is an associate member of the ASCE and the AIA. He is a frequent lecturer and writer on a number of issues, from product liability to construction law.

ANTHONY W. HAFNER



Anthony W. Hafner is an associate at Pitzer Snodgrass, P.C., in St. Louis, Missouri where he focuses his practice on construction law and the construction process, including commercial litigation, professional liability defense, and trial work. He has represented owners, contractors, subcontractors, architects, and engineers in all aspects of construction claims. He also handles premises liability claims, product liability claims, and general insurance defense liability claims. He is licensed to practice law in Missouri and Illinois and is a member of Lawyers Association of St. Louis.

I. Introduction

Today's construction projects are more complicated than in any other time in our history. While construction means and methods may have become more efficient, aided by technology and innovation, those same drivers have made building components and products more complex. Any project, from a new home to high rise office building, involves highly specialized components and systems which all require an incredible amount of technical knowledge and coordination.

The modern design professional may not be equipped to keep up with the state of the art, and leans more heavily on the construction products industry, manufacturers and dealers, to provide design input on critical building elements. In this role as a "delegated designer," building product manufacturers take on an increasing amount of responsibility, and with it, and increasing amount of potential liabilities to parties to the process.

This article and the accompanying presentation will examine the legal underpinnings for delegated design liability, and how the industry has reacted through changes to form contract language, specifications and building codes to address the issue. We also review several case authorities which show the practical application of the theories to common fact patterns. We examine and elucidate the guiding principles behind liability for design professionals for delegated design.

II. Definitions

Before getting into the material, it may aid understanding to provide a few definitions and some discussion about the terms of art frequently used in the practice of design delegation.

A. Design Professional Lead

On most projects, there is typically a design professional firm which serves as the lead designer, or as will sometimes be referred to in the technical industry as the "Designer" Of Record, whether architect or engineer.

B. Specialty Designer

The entity who performs the delegated design, and who is not a part of the design professional lead's team, is oftentimes referred to as the delegated designer, or specialty designer.

C. Delegated Design

Oftentimes, the design professional lead will delegate the technical design of some element of a project to the contractor, who in turn would delegate that design down to their subcontractor or material supplier. As we note, this practice is currently commonplace in the industry, and has been for some time. However, the influx of highly specialized systems and products into the construction arena has also created a surge in components of construction elements that are subject to delegated design.

When design of a specific construction element is delegated from the design professional lead, both the contractor and subcontractor/material supplier must rely on the designer to furnish to the "specialty designers" clearly defined design concepts and criteria necessary to coordinate their designs with other components and materials.

Also affectionately referred to as: "Design Assist," "Deferred Approval," "Design/Build Element," among other terms.

D. Project Delivery Systems

i. Design-bid-build

Design-bid-build is the standard, linear design delivery system, where the design professional prepares and completes the design of the entire project, the plans are let for bid, and on the basis of the design, a contractor is selected to perform the work. This system presumes the design professional has ultimate responsibility for project design. Also, the owner has two main contracts, one with the design professional for design work, and the other with a general contractor, for construction work.

ii. Design/Build

The other widely used system, design-build, allows the owner to hire only one party, a "design builder," who is charged with creating the design and completing the construction work. Additionally, even under a traditional design-bid-build system, certain elements of the project can be designated as design/build, and many often are. Both project delivery systems have benefits and risks, and both can effectively utilize a design delegation model.

iii. Integrated Design

Integrated Project Delivery (IPD) is a project delivery approach that integrates not only the designer, owner and constructor, but also allows for inclusion of major subcontractors early in the design process. With the major subcontractors involved early in the design they can contribute details to the architect, allowing more opportunity for collaboration.

E. Types of Specifications

i. Design Specifications

Specifications detailing the specific manner or method of performance are often treated as “design specifications.” Design specifications set forth precise measurements, tolerances, materials, processes and finished products, quality control, inspection requirements, drawings and other specific information. These generally do not involve any “delegated design,” as everything is already designed by the design professional lead.

ii. Performance Specifications

Performance specifications dictate the performance of the end product, not how the contractor will do the work, and leave the details of performance, and generally the details of design, to the contractor's discretion. Performance specifications generally require some “substantiation method,” such as engineering drawings, signed and sealed, with calculations. Another substantiation method is the submission of drawings, with more subjective measure of whether the end result meets the design intent, such as a mock up or models. These performance requirements are those criteria that can be verified through testing, such as structural related concerns like seismic, wind load, and deflection; energy related concerns like insulation value, glazing performance criteria; and building envelope related concerns like water air and penetration.

iii. Basis of Design

Basis of design specifying identifies one specific product as the “basis of design” by listing a product or system by manufacturer name, brand name, model number to

uniquely identify the specific product. The design professional lead must identify “salient characteristics” of the product important in keeping the design intent, so that comparable products can be substituted if appropriate. This method often provides a coordination issue if there are substitutions because unless the contractor provides the BOD product, the drawings will need to be correctly coordinated. This method often relies on the product supplier providing up-front design input to the design professional lead.

III. What is “Delegated Design?”

Delegated design is not a new concept in construction. Fire suppression systems and roof trusses are the classic example of an element that is generally a “design/build” or delegated design element. However, more and more, manufacturers of certain construction products can design elements more efficiently and effectively than a generalist design professional. The manufacturers know their products, and will not “over-design” the necessary details.

Many items are specified and designed in this fashion already, including items like:

- Casework;
- Fire suppression and sprinkler systems;
- Axial and wind load bearing cold formed metal framing;
- Curtain wall;
- Window wall;
- Premanufactured drop in steel stairs;
- Guardrails and glass partitions;
- Fire alarm, detection, and monitoring;
- Spas and swimming pools;
- Fountains;
- Wind-powered energy;
- Solar panels.

The design professional lead simply cannot design every detail of every component of every system. It would be impossible to keep up with all the changes and improvements made in these complex components. The Construction Specification Institute's (CSI) Project Resource Manual refers to the delegation of design as “delegate[ing] technical design responsibilities to industry specialists.”

IV. Standard Industry Form Documents React to Design Delegation

In response to the growing trend of design delegation, many of the standard industry form contract docu-

ments have seen revisions and additions which address the issue on a more formal basis. These revisions are an early attempt to place liability where it should rightfully be placed, but have not been tested in many decided opinions.

A. American Institute of Architects Form Document Series

For quite some time, the construction industry has expected that elements of a completed project be designed, provided and constructed by the contractor with little input from the design team other than performance specifications that provide design and performance criteria. Anything from sprinkler systems to temporary shoring or erection systems have been completely within the design responsibility of contractors, the former as a true “design/build” component, the latter as an element of the contractor’s means and methods of construction.

These elements are not truly “delegated design,” however, as the architect has no contractual relationships with the contractor or its subcontractors such that it could “delegate” anything to them. Thus, some commentators refer to this as more “allocated design” by the owner to the contractor team. Nonetheless, the AIA A201 now addresses the issue of delegated design with the following provisions:

AIA A201-2007, Section 3.12.10

The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to prove such services in order to carry out the Contractor’s responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by

such professional.

This section deals with a few things at once. It addresses those issues that are traditionally done by the contractor as part of their means and methods, but also adds language addressing design delegated elements. These delegated designs must bear the signature and seal of a properly licensed design professional, and the design professional lead shall be entitled to “rely upon the adequacy, assurance and completeness” of the documents so provided by the contractor’s specialty designer. Further, the design professional lead’s action on those submittals is only for the limited purpose of checking for conformance with the information provided on the design criteria and the design concept. The provision does go on to state that the contractor is not responsible for the adequacy of the performance or design criteria provided in the Contract Documents.

The issue is also addressed in the MasterSpec series of documents, also produced by the AIA, in Section 013300, Article 2.2. In that Article, the contractor is to provide to the design professional lead a submittal “signed and sealed by the responsible design professional, for each product and system specifically assigned to Contractor to be designed or certified by a design professional.” Hand in hand with the AIA A201, this language makes clear the design professional lead has shifted liability for these designs to the delegated designer, but unfortunately for him, the documents still require some level of review and coordination of these designs into the overall project, and thus, not all liability can be avoided.

B. ConsensusDOCS 300 “Standard Tri-Party Agreement for Integrated Project Delivery”

This document creates a multi-party agreement involving the owner, designer and contractor, and also allows for the joinder of major sub contractors. The idea is to involve key players in the process early on in design, such as major subcontractors to assist with the design and development of the construction details and budget. Through collaborative decision making, all parties including major subcontractors are involved in building consensus with the owner. They also contain the following specific provisions related to delegated design issues:

6.7 DESIGN-BUILD WORK The Management Group shall specify all applicable performance

and design criteria for any work that is performed on a design-build basis. The Constructor shall retain appropriately licensed design professionals to provide all design services related to the Design-Build Work.

12.6 DESIGN-BUILD WORK To the extent any of the Work is to be performed by the Constructor or a Trade Contractor on a Design-Build or Design-Assist basis, the Designer shall specify all applicable performance and design criteria. The Constructor and Trade Contractors shall retain appropriately licensed design professionals to provide design services related to the Design-Build Work. Work to be performed on a design-build or design-assist basis shall be fully designed during preconstruction and shall be fully integrated into the Construction Documents that are submitted for permit or other governmental approvals. Designer shall be responsible for coordinating the design of the Design-Build Work with the design being provided pursuant to the terms of this Agreement.

V. A Number of Building Codes React to Design Delegation

The International Building Code, (IBC) section 107.3.4.1 defines “deferred submittals” generally as “those portions of the design that are not submitted at the time of application [for a building permit] and that are to be submitted to the *building official* within a specified period.” The deferral of any design element must still have the permission of the building official, and the design professional lead, (“registered design professional in responsible charge”), is to call out on the drawings those elements that will be deferred.

The Code also discusses the level of review of these delegated design elements by the design professional lead, and notes they shall be submitted to them and “reviewed and found to be in general conformance to the design of the building,” and “for compatibility with the design of the building.” The State of California has essentially adopted these same requirements in its own California Building Code 2013 (Effective January 1, 2014).

VI. Analysis of the Caselaw

A. Analogy to Existing Product Liability Law

A line of cases concerning the liability of component part manufacturers already exists under the Restatement of Torts (Third). These cases address the liability of original equipment or

finished product manufacturers (“manufacturers”) versus component part or raw material suppliers (“suppliers”). Sorting out the parties’ liability involves a fact intensive and case specific analysis focusing on the level of involvement of everyone in the chain of manufacture, production and distribution.

Section 5 of *Restatement (Third) of Torts: Products Liability* reads as follows:

Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Components Are Integrated

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

(a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or

(b) (1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and

(2) the integration of the component causes the product to be defective, as defined in this Chapter; and

(3) the defect in the product causes the harm.

Comment (e) to that section of the *Restatement* provides an interesting analysis of the subject at hand and reads:

e. Substantial participation in the integration of the component into the design of another product. When the component seller is substantially involved in the integration of the component into the design of the integrated product, the component seller is subject to liability when the integration results in a defective product and the defect causes harm to the plaintiff. Substantial participation can take various forms. The manufacturer or assembler of the integrated product may invite the component seller to design a component that will perform specifically as part of the integrated product or to assist in modifying the design of the integrated product to accept the seller's component. Or the component seller may play a substantial role in deciding which component

best serves the requirements of the integrated product. When the component seller substantially participates in the design of the integrated product, it is fair and reasonable to hold the component seller responsible for harm caused by the defective, integrated product. A component seller who simply designs a component to its buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable within the meaning of Subsection (b).

Determining "substantial participation" in the design is often a fact intensive and disputed issue. A number of defenses apply to aid "innocent" suppliers. If the component part or raw material is not itself defective and the supplier did not participate in its selection or integration into the final product, the "raw material supplier defense" or the "bulk sales/sophisticated purchaser rule" may apply. While not providing a complete avoidance, these rules assume the manufacturer is the expert in the use of the part or raw material, and therefore a "sophisticated purchaser." In many instances, the supplier may not know how the part or raw material is ultimately used.

B. Review of the Cases

With the exponential expansion of specialty manufacturers of sophisticated building products and systems, it is unrealistic to expect design professionals to maintain a sufficient base of knowledge about them all. Unavoidably, these construction products manufacturers must be involved in aspects of the technical design of their specific component in the overall construction project. The level of involvement and amount of coordination is often the decisive factor in the subsequent liability of the construction product manufacturer.

Often, these entities with design responsibility will be outside the chain of responsibility of the design professional lead, as they may either be direct consultants to the owner, general contractor or specialty subcontractor. These specialty designers outside of the architect's design team must still get their guidance from the design criteria and requirements for the specialty designs set out in the contract documents, plans and specifications, and in the process by which the specialty designs will be coordinated and integrated with the overall project design by the design professional lead.

i. Component-Part Doctrine Cases

CALIFORNIA

Artiglio, et al. v. General Electric Company, 61 Cal. App. 4th 830 (1998)

Plaintiffs were women who received silicone breast implants manufactured by McGhan Medical Corporation. GE was the manufacturer of silicone products and it supplied McGhan with the silicone compounds the manufacturer used in producing the implants. According to GE, McGhan presented particular specifications of the physical properties they wanted in the silicone and GE then produced products which met those specifications. GE merely supplied drums of silicone and argued that only the implant manufacturers had the ability to determine its suitability and safety for implants.

The Court held that although there is generally a duty of a manufacturer to warn about the potential hazards of its product, even when that product is only a component of an item manufactured or assembled by a third party, this duty is not unlimited. In quoting the 8th Circuit in *In re TMJ Implants Products Liability Litigation*, 97 F.3d 1050, 1067 (8th Cir.), the Court stated that "making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose an intolerable burden on the business world....Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components." Therefore, the factors that must be analyzed in such a case include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards.

The Court held that when a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. Further, a component seller who simply designs a component part to a buyer's specifications that does not substantially participate in the integration of the component into the design of the end product is not liable.

Thereby, although GE developed silicone to meet the specifications of manufacturers and consulted on a fairly regular basis about those specifications and problems the manufacturers were having, GE is not liable because it did not exercise any control over the design, testing or labeling of the implants.

See also *Temporomandibular Joint (TMJ) Implant Recipients v. E.I. DuPont De Nemours & Company*, 97 F.3d 1050 (8th Cir. 1996); *Crossfield v. Quality Control Equip. Co.*, 1 F.3d 701, 705 (8th Cir. 1993) (“[M]anufacturers of component parts which are not defective standing alone cannot be liable for accidents taking place after the part has been integrated into a larger system which they played no part in building.”)

FLORIDA

Kohler Co. v. Marcotte, et al., 907 So.2d 596 (Flo. Ct. App. 3rd Dist. 2005)

Plaintiff was injured when his hand came into contact with a rotating plastic air intake screen on the engine of a riding lawn mower. Kohler was the component manufacturer of the engine. The Court held that component sellers are only subject to liability when the components themselves are defective or when component providers substantially participate in the integration of components into the design of the other products.

In the subject case, Kohler did not participate in the integration of its engine into the lawn mower, did not offer any design input or assistance into the design of the lawn mower, and did not assist in the installation of the engine in the lawn mower. Kohler was also not asked to review the design of the lawn mower for safety. Because Kohler had in fact designed a generic engine that could be used in various applications, it could not be found strictly liable unless the engine was itself defective.

MARYLAND

Village of Cross Keys, Inc. v. United States Gypsum Company, et al., 556 A.2d 1126 (Ct. App., Maryland 1989)

Developer and design architect of a condominium complex sought indemnity or contribution from USG, the designer of a brick veneer, curtain wall system, for water damages to the condominium complex arising from defective exterior walls. USG claimed that among other

things: it did not design a proprietary exterior wall system; any representations it made concerning a generic system shown in its brochure were accurate; it had not contracted with anyone in connection with the construction of the condominium; its materials were not involved in the construction of the exterior walls; and, it owed no legal duty to the developer or to the architect.

Court held that developer and architect could not recover based on alleged negligent misrepresentation contained in publication promoting use of USG's curtain wall system that specified use of USG's products, because it was undisputed that USG's products were not used in structural portions of condominium's curtain wall system.

In particular, the Court held that even though USG did not directly “sell” this system or any component parts of it to the developer or to the architect, it did develop a system under circumstances from which the trier of fact could find a specific intent that architects and perhaps engineers, builders, or developers would adopt it, as the USG publication and similar manufacturers' publications receive wide distribution in the trade by inclusion in *Sweet's Catalog*. Additionally, the system was directly available from USG or any of its sales staff. Therefore, although USG did not design the system for a fee from a particular client, or attempt to “sell” it for direct compensation, as one of a relatively few major manufacturers of the component parts of the system, it reasonably expected that acceptance and use of the system may be relied on by architects and structural engineers.

Because a trier of fact could find that the architects and engineers are the very persons whom USG intended to act on the information supplied, which consists of technical information from manufacturers, the Court held that projected liability for error may be great when technical information is published under these circumstances. However, the Court stopped short of deciding whether a manufacturer may, under certain circumstances, be responsible for negligent publication of technical information in this manner and held that the information published by USG clearly applied to USG products and that the specifications set forth in the USG publication called for the use of USG products “unless otherwise indicated.”

In the construction of the condominium, USG products were neither specified nor used in the structural portions of the curtain wall system

and therefore the Court held that developer/architect's claimed reliance upon the information contained in the USG publication was not reasonable within the meaning of the "reasonable reliance" requirement of the tort of negligent misrepresentation.

MISSOURI

Welsh v. Bowling Electric Machinery, 875 S.W.2d 569, (Mo. Ct. App. S.D. 1994)

Plaintiff brought suit against a manufacturer of component parts to a tram, Bowling Electric. These components consisted of a drive motor, electrical control box, electromagnetic brake, and a gearbox together with a wiring diagram. Plaintiff acknowledged that the tram designer designed all of the parts except those provided by Bowling Electric. Bowling did not design the parts, but apparently supplied the parts meeting the specifications requested by the tram designer.

In addition, there was no contention that any of the component parts supplied by Bowling Electric were defective. Instead, Plaintiff's claims against Bowling Electric were for negligent design, assembly, and sale of the component parts, among others. Plaintiff contended that Bowling Electric was liable for failing to design and include an independent safety mechanism in its component parts. In other words, arguing that Bowling Electric failed to safeguard against any dangers that may have been created by the tram designer's faulty design and construction of the tram.

In citing *Mayberry v. Akron Rubber Machinery Corp.*, 483 F.Supp. 407, 413 (D.C. Okla. 1979), the Court held that where a supplier furnishes a component part free of defects and without knowledge of the design of the end product, strict liability should not be imposed on the supplier for injury resulting from the end product design. The court held that the same reasons apply to a claim of negligence, stating that "the obligation that generates the duty to avoid injury to another which is reasonably foreseeable does not—at least yet—extend to the anticipation of how manufactured components not in and of themselves dangerous or defective can become potentially dangerous dependent upon the nature of their integration into a unit designed, assembled, installed, and sold by another." *Jordan v. Whiting Corp.*, 212 N.W.2d 324, 328 (Mi. Ct. App. 1973).

In recognizing that there was also no failure to

warn on the part of Bowling Electric, the court found that component parts suppliers "were not required to procure plans of the entire system, review those plans, and independently determine whether their respective component parts would function in a safe fashion" and therefore had no duty to warn Plaintiff of potentially dangerous or defective conditions.

NEW JERSEY

Zaza, et al. v. Marquess Nell, Inc., et al., 675 A.2d 620 (N.J. 1996)

Plaintiff was injured by a "quench-tank" overflow in a Maxwell Coffee House plant. The initial designs of the quench tank were prepared by Maxwell House and submitted to the engineering firm of Marquess & Nell, who prepared the final design plans. Marquess then contracted with Defendant International Sheet Metal for a fabricated quench tank. The specifications on which Defendant International Sheet Metal bid for the quench tank did not require the fabricator to prepare or install any safety devices. Rather, the specifications called for the fabricator to cut holes for the safety devices. Professional installers at the plant connected piping while the safety devices were to be installed by Maxwell House and others. However, such devices were not installed or in operation at the time of the accident.

Plaintiff's counsel argued that Defendant International Sheet Metal, whose only job was to fabricate sheet metal, owed a non-delegable duty to the injured party to see to it the installer puts in safety devices. The Court held that the fabricator, as a producer of a non-defective component part for an integrated manufacturing system in accordance with the designs and specifications of the owner, does not have a legal duty to ensure that the owner and installer properly integrate the component into the system. Further, the Court held that there is no failure to warn if the immediate purchaser is aware of the need to attach safety devices. To hold otherwise, the Court explained that "component manufacturers would become insurers for the mistakes and failures of the owners and installers to follow their own plans."

RHODE ISLAND

Buonanno v. Colmar Belting Co., et al., 733 A.2d 712 (R.I. 1999)

Plaintiff was injured when his arm was crushed

in a conveyor-belt system. Plaintiff alleged that the conveyor-belt system and particularly the “wing pulley” component were defectively designed, in that there was no guard/shield supplied with the wing pulley that would have prevented injury. Defendant Colmar was a distributor of conveyor-belt system parts, which apparently sold most, if not all, of the component parts to Plaintiff’s employer. However, Plaintiff’s employer decided the speed of the conveyor belt, the width of the pulley, and type of motor required. The wing pulley was manufactured by another company, EPT and sold to Plaintiff’s employer by Colmar. However, Colmar did not sell any protective shield for the wing pulley as these types of guards were usually custom-installed by a welder.

In line with the component parts doctrine, the Court held that as a general rule, component manufacturers or sellers should not be liable unless the component part itself was defective when it left the manufacturer. Liability may be extended, however, if the seller or distributor of the component *substantially participates* in the integration of the component into the design of the product. The Court found that Colmar may have substantially participated in the design of the conveyor belt system by supplying the component parts of the conveyor belt system to Plaintiff’s employer, by coming up with a formula to address the welder’s requests for how long the conveyor would be and how fast it was to go. Colmar also selected the component parts it supplied. The Court held that a fact finder may conclude, from the nature of this relationship that Colmar participated in the design of the product, which may create a reasonable inference that Colmar “substantially participated” in the design of the conveyor belt system, thereby creating a genuine issue of material fact and potential liability.

See also *Gray, et al. v. Derderian, et al.*, 365 F.Supp.2d 218 (D.C. R.I. 2005)

TENNESSEE

Davis v. Komatsu America Industries Corporation, et al., 42 S.W.3d 34 (Tenn. 2001)

Plaintiff suffered a crushing hand injury while operating a press line. He brought suit against Komatsu as the designer of the presses. Evidence reflected that the presses were not unreasonably dangerous or defective when they left the Komatsu factory and only became so when the press line company deactivated a safety light curtain. The court held that the

component parts doctrine provides that a manufacturer who supplies a non-defective and safe component part generally will not be held liable for a defective or unreasonably dangerous final product.

However, when a component manufacturer participates in designing a defective or unreasonably dangerous final product, the component manufacturer may be held liable for injuries caused by the final product even though the component itself was not defective or unreasonably dangerous. Substantial participation or involvement in the integration of the component in the design of the integrated product may subject the component supplier to liability if the integration results in a defective product and the defect causes injury.

In citing numerous cases, Tennessee thereby adopted the component parts doctrine, based on the premise that “the obligation that generates the duty to avoid injury to another which is reasonably foreseeable does not . . . extend to the anticipation of how manufactured components not in and of themselves dangerous or defective can become potentially dangerous dependent upon the nature of their integration into a unit designed, assembled, installed, and sold by another.” Citing *Zaza v. Marquess & Nell, Inc., et al.*, 675 A.2d 620 (N.J. 1996).

The Court further held that a component seller who simply designs a component to its buyer’s specifications and does not substantially participate in the integration of the component into the design of the product, is not liable. In citing Comment e to Section 5(b) of the *Restatement (Third) of Torts: Product Liability*, substantial participation, in the form of designing a component that will perform specifically as part of the integrated product or assisting in modifying the design of the integrated product to accept the seller’s component, may lead to increased liability. Further, presumably, if a component seller decides which component best serves the requirements of the integrated product, liability may attach. Conversely, a component seller who simply designs a component to its buyer’s specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable. Moreover, providing mechanical or technical services or advice concerning a component part does not, by itself, constitute substantial participation that would subject the component supplier to liability.

UTAH

Gudmundson v. Del Ozone, et al., 232 P.3d 1059 (Utah 2010)

Plaintiff experienced dizzy spells following the installation of an ozone-generating system in a laundry facility. Del-Ozone was the component manufacturer who supplied the ozone generator. At the trial court level, Del-Ozone was successful in obtaining summary judgment. However, in overruling the trial court, the Court indicated that Plaintiff produced sufficient evidence to create a genuine issue of material fact that the ozone generator was unreasonably dangerous due to a design defect, and even if the generator itself was not defective, Del Ozone could be liable for defects in the ozone-generating system as a whole.

The question posed to the Court was whether Del Ozone, as a component manufacturer of a non-defective product, may be held liable for any defects in the system. In following and adopting the component parts doctrine, the Court indicated that if a manufacturer of a component part participates (substantial participation) in the design of the final product or system, they may be held liable for injuries caused by the final product even if the component they made was not defective.

The Court held that liability for failure to install a safety device depends on whether the component manufacturer was in a position to control the decision making involved in the design of the integrated product; however, the act of simply designing a component to a buyer's specifications or providing technical services or advice about the component does not constitute substantial participation in the design of the integrated product. In citing *Zaza*, the Court held that if the specifications provided are obviously unreasonably dangerous, the component manufacturer may be deemed to have control over the integrated product and therefore be deemed to have substantially participated. Moreover, the integration of the non-defective product must also cause the integrated product to be defective

FEDERAL

Sperry v. Bauermeister, Inc., 4 F.3d 596 (8th Cir. 1993)

Plaintiff, in the course of performing maintenance work for a spice milling company,

suffered personal injury when his hand came into contact with a rotating auger located on a spice grinding mechanism. Bauermeister designs and sells grinding and mixing equipment, and did in fact supply the spice grinding mechanism that injured plaintiff. However, Bauermeister did not supply the subject auger connected to the mechanism.

In applying the substantive law of Missouri with regard to negligent design, the court held that the plaintiff must prove that the defendant breached its duty of care in designing the product and that this breach was the proximate cause of the plaintiff's injury. Because there was no evidence that Bauermeister supplied or designed the alleged defective part, the auger, the court held that Bauermeister was not liable, as suppliers of non-defective component parts are not responsible for accidents that result when the parts are integrated into a larger system that the component part supplier did not design or build.

See also *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989) (under Michigan law component part supplier has no duty to analyze design of completed machine incorporating supplier's nondefective component part); *Koonce v. Quaker Safety Prods & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir. 1986) (under Texas law supplier of nondefective component part not liable when defect results from integration of part into another product); *Cropper v. Rego Distrib. Ctr., Inc.*, 542 F.Supp. 1142, 1156 (D. Del. 1982) (under Delaware law component part supplier not liable when incorporation of part creates a dangerous condition); *Wright v. Federal Mach. Co.*, 535 F.Supp. 645, 649 (E.D. Pa. 1982) (under Pennsylvania law supplier of component part not liable for injuries caused by defective design of machine into which part incorporated).

Travelers Property Casualty Company of America v. Saint-Gobain Technical Fabrics Canada Limited, 474 F.Supp.2d 1075 (D.C. Minn. 2007)

Travelers, as subrogee of general contractor, prime subcontractor, subcontractor, and architect, on behalf of themselves and as assignees of supplier's claims, brought action against the manufacturer of a defective glass fiber reinforcing mesh that caused delamination of the Pepsi Center's exterior insulation and finish system (EIFS). The Pepsi Center EIFS is a multi-layered, multi-component exterior cladding, consisting of a base coat, polystyrene insulation board, glass fiber reinforcing mesh embe-

added into the base coat, and a textured decorative finish coat (collectively “lamina”). The components used in the EIFS were supplied by a company known as TEC Specialty Products, who obtained the reinforcing mesh from a Canadian company, Saint-Gobain. After its construction, portions of the EIFS failed, in that the lamina de-bonded from the polystyrene board, necessitating repairs. Plaintiff brought claims seeking repair costs, among them a claim for implied warranty of fitness for a particular purpose. In arguing for summary judgment, Saint-Gobain indicated that such a claim should fail because Saint-Gobain had no knowledge that TEC ordered its mesh for use with the particular EIFS and Saint-Gobain had no input into TEC’s selection of the mesh for the particular EIFS. Plaintiffs claimed that there was sufficient evidence to show that TEC relied on Saint-Gobain to provide the proper mesh and that Saint-Gobain had reason to know of this reliance. Plaintiffs cited evidence that in the early 1990s, prior to the construction project, Saint-Gobain helped TEC develop general technical specifications for using the mesh and Saint-Gobain had notified TEC that the particular mesh used had certain drawbacks, without mentioning the presence of a chemical within the mesh that dissolves polystyrene board.

In granting summary judgment to Saint-Gobain on this claim, the Court held that such evidence was insufficient for a jury to find a breach of implied warranty of fitness for a particular purpose, as there was no evidence that Saint-Gobain had reason to know that the particular mesh would be used for TEC’s particular purpose – incorporation into the Pepsi Center EIFS. In addition, there was no evidence Saint-Gobain had reason to consider which particular mesh would be appropriate for the given use.

Plaintiffs also claimed negligence, among other claims, alleging there was a design defect within the mesh. Plaintiffs alleged that expert testimony had established that there was a defect related to the mesh’s composition and that Saint-Gobain manufactured reasonable alternative designs that did not utilize the chemical. Saint-Gobain, again arguing for summary judgment, argued the component-parts doctrine provided that “suppliers of inherently safe component parts are not responsible for accidents that result when the parts are integrated into a larger system that the component part supplier did not design or build.” However, the Court held that in appl-

ying the component parts doctrine, the focus is on why the component part was unsuitable for use in the finished product, and therefore, since there was evidence that the presence of the chemical within the mesh was a design defect, and there was evidence that an alternative design would have eliminated the known danger, and more specifically because the particular mesh was made only for the use with EIFS, the component parts doctrine did not apply. The Court denied summary judgment in this regard.

Venmar Ventilation, Inc. v. Von Wiese USA, Inc. f/k/a Fasco Industries, Inc., (D.C. Minn. 2009)

Heat recovery ventilator (HRV) caught fire and caused extensive damage to building. In a third-party action, the manufacturer of the HRV, Venmar, brought suit against Von Weise/Fasco, the manufacturer of a component part of the HRV. Venmar claimed that it has a close collaborative relationship with Fasco in the design of the HRVs and that Venmar relied on Fasco to design a custom motor for the HRVs and relied on Fasco’s recommendations for how to incorporate Fasco’s custom motors into the final, integrated HRV.

Fasco argued it was shielded from liability due to the component-part supplier doctrine, as a manufacturer of a non-defective multi-use component part is generally not liable for injuries caused by the finished product when its parts are integrated into a larger system. However, there is an exception to this general rule if the component part supplier exercised some control over the design of the final product, termed “substantial participation” in the integration of the component into the design of the product. The Eighth Circuit, in *Thompson v. Hirano Tecseed Co., Ltd.*, 456 F.3d 805 (8th Cir. 2006) found substantial participation when a component part supplier observed and assisted in the installation of its part into the whole system, it provided training for the whole system, tested the system, observed the subject-defect, instructed users on how to work around the defect, and a contract between the parties existed placing responsibility for the design of the system on [the component part supplier].

The District Court held that this list enunciated in *Thompson* was not an exclusive list of facts that must be met in order to establish substantial participation, noting that it “can take various forms, including designing a component that will perform specifically as part of the inte-

grated product, or deciding which component best serves the requirements of the integrated product.”

ii. Delegated Design/Specification Cases

MISSOURI

Commercial Distribution Center, Inc. v. St. Regis Paper Company, et al., 689 S.W.2d 664 (Mo. Ct. App. S.D. 1985)

Plaintiff was owner of an underground refrigeration facility, which was equipped with brine lines suspended from the ceiling, carrying coolant to storage rooms. The support system of the brine lines collapsed resulting in destroyed merchandise and spilled brine. Plaintiff filed suit against Defendants St. Regis, Huxtable-Hammond, Crepaco, and Ramey alleging claims in strict liability for defective design, materials or manufacture of the refrigeration system, brine lines, and their component parts and in negligence based upon failure to design, manufacture, distribute, construct and install the refrigeration system, brine lines and component parts. In particular, U-shaped clevises broke allowing the brine pipes to fall. The Trial Court sustained Defendants’ motions for directed verdict and entered judgment against Plaintiff.

While affirming the directed verdicts for all Defendants but St. Regis and Huxtable-Hammond, the Court held that the evidence was clear that by Ramey's subcontract, St. Regis undertook the obligation to design, supply and install the clevis. Even though under the evidence, St. Regis delegated this duty, along with others, to its mechanical subcontractor, Huxtable-Hammond, the Court stated that when a duty is delegated, the delegating party continues to remain liable. Delegation involves the appointment by the obligor of another to render performance on his behalf, but it does not free the obligor from his duty to see to it that performance is rendered.

Thereby, a supplier is in the same position as a seller under the doctrine of strict liability in tort. There was also sufficient evidence for a jury to find that the collapse was proximately caused by the defective part under the negligence theory.

NEW YORK

Fruin-Colnon Corp., Traylor Bros., Inc. and

Onyx Const. & Equipment, Inc. v. Niagara Frontier Transportation Authority, 180 A.D.2d 222 (S.C. Appellate Division, N.Y. 1992)

Contractor sued transportation authority, claiming breach of contract to pay for municipal light rail transit system tunnel. Contractor was forced to provide remedial efforts to combat water infiltration. The Court held that the contract contained design specifications. As opposed to a design specification, which allows for no deviation, a performance specification requires a contractor to produce a specific result without specifying the particular method or means of achieving that result. Under a performance specification, only an objective or standard of performance is set forth, and the contractor is free to choose the materials, methods and design necessary to meet the objective or standard of performance. Thereby, the contractual risk of nonperformance is upon the contractor.

The Court held that whether a provision is a performance specification or a design specification depends upon the language of the contract as a whole. Other factors to consider include the nature and degree of the contractor's involvement in the specification process, and the degree to which the contractor is allowed to exercise discretion in carrying out its performance under the contract. Based on these factors, the Court held that contractor which had followed design specifications in building of tunnel was entitled to additional compensation for correction of water leakage.

Hayward-Baker, Inc. v. C.O. Falter Construction Corp., 104 A.D.3d 1253 (S.C. Appellate Division, N.Y. 2013)

Subcontractor brought action against general contractor and its sureties to recover for work it performed on a construction project. On cross-appeal, citing *Fruin-Colnon*, the Court held that there were issues of fact concerning whether the contract was one of performance or design specification, thus precluding summary judgment with respect to the additional expenses that Plaintiff allegedly incurred in remediating a jet grout bottom seal.

The Court indicated that the proper characterization of a construction contract as one of either performance or design specification "depends upon the language of the contract as a whole," and relevant factors in such an inquiry "include the nature and degree of the

contractor's involvement in the specification process, and the degree to which the contractor is allowed to exercise discretion in carrying out its performance" In this matter, the Court held that the unresolved issues of fact with respect to those factors, particularly as to Plaintiff's ability to change the design without Defendant's approval, precluded a determination whether as a matter of law the subject contract is one of either performance or design specification, and thus whether plaintiff may recover expenses incurred in remediating a jet grout bottom seal.

FEDERAL

Employers Mutual Casualty Company v. Collins & Aikman Floor Coverings, Not Reported in F.Supp.2d, (D.C.S.D. Iowa 2004)

Defendant Collins & Aikman ("C&A") manufactured carpet installed in buildings owned by Plaintiff. Plaintiff contracted to begin construction on a new office building. In the course of developing construction plans, Plaintiff held a competitive bid process for the sale and installation of carpet within the buildings. In particular, Plaintiff wanted carpet on which rolling chairs could be used without chair mats. Plaintiff's design team, which consisted of an architect and other subcontractor designers contacted select carpet manufacturers to obtain samples. C&A was one of the selected carpet manufacturers. The design team incorporated the performance specifications for the carpeting submitted by C&A and other carpet manufacturers in the Project Manual to all bidders, but the Project Manual and related contract documents did not specify the carpet must perform under rolling chairs without mats. C&A was selected to provide carpet for the buildings.

Following noticeable wear on the carpet, Plaintiff filed claims against C&A, including breach of an express warranty and breach of warranty of fitness for a particular purpose. Plaintiff alleges it informed C&A of the need for carpet that could be used without floor mats and that a C&A representative would sell carpet which met this specification. C&A, in arguing for summary judgment, stated that the *Spearin* doctrine applied because Plaintiff and its' architect failed to include the written specification within the Project Manual.

Essentially, in citing an Iowa case, *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216 (Iowa 1988), C&A argued that the owner

impliedly warranted the adequacy of the plans and specifications to contractors and suppliers on the project, meaning if the owner omits material information and the supplier conforms to the specifications given, the risk is on the owner. Among other holdings, the Court held that although *Midwest Dredging* cited *Spearin* approvingly, it was limited to the context of government contracts involving unforeseen, usually subsurface conditions and would not apply as a broad rule of implied warranty for the benefit of contractors and suppliers applicable generally to all sorts of construction contracts. Although the Court did not see any quarrel with the general proposition that a supplier of material to a building project cannot be held responsible for failing to satisfy the undisclosed requirements of the owner, because of the alleged evidence that a C&A representative said it would supply suitable carpet, summary judgment could not be granted.

Caddell Construction Co., Inc. v. United States, 78 Fed. Cl. 406 (U.S. Fed. Cl. 2007)

General contractor (Caddell) brought suit against the United States requesting an equitable adjustment on behalf of its steel fabrication subcontractor, based on a claim that contracting agency provided defective structural steel drawings that resulted in delays and additional costs.

Under the *Spearin doctrine*, *Spearin v. United States*, 248 U.S. 132 (1918), when the government includes detailed specifications (or design specifications) in a contract, it impliedly warrants that if the contractor follows those specifications, the resultant product will not be defective or unsafe. If the product does prove defective or unsafe, then the contractor will not be liable for the consequences. Therefore, the Court's first threshold question was deciding if the contract drawings were design specifications or performance specifications.

In order to determine whether a contract is a design or performance specification, the quality and quantity of the obligations the specifications impose must be examined. Although the Government argued that the contract was a performance specification in specifying the end product of the building which left construction entirely up to Caddell, the Court agreed with Caddell that the structural steel portion of the contract was a design specification.

However, even though these design specifica-

tions are provided to give a detailed guide to the contractor, they do not need to be perfect, but “reasonably accurate.” A defective specification is one that prevents or unreasonably delays completion of the contract performance. The number of RFIs does not automatically mean the specifications were defective as there was no evidence that the plans were unworkable. Any delays in conforming to the specifications were seemingly because Caddell held onto the steel fabricator’s RFIs for anywhere from a week to a month.

Therefore, the Court held that even though the structural steel component was a design specification rather than a performance specification, the contractor did not establish that the specifications were defective based on number and nature of contractor’s RFIs generated by the specifications.

Haehn Management Company v. United States, 15 Cl. Ct. 50 (U.S. Fed. Cl. 1988)

Prime contractor filed action on behalf of itself and its subcontractor, seeking damages in connection with contract for repairs at naval air station. Court held that specification for sealing compound was a design specification rather than performance specification. Further, a claim based on defective specifications can only be maintained if the contract incorporates design rather than performance specifications. Further, the Government’s warranty of specifications can be impaired by the involvement of industry or the contractor’s participation in the drafting and development of the specification absent superior knowledge on the part of the Government.

Acquest Government Holdings U.S. Geological, LLC v. General Services Administration, CBCA 439 (2007)

A dispute arose out of contract to construct a government facility. Acquest claimed that under the design specified in the bidding solicitation, it was impossible to meet the performance requirements for heating and ventilation of the rooms. Thereby, through these claimed design specifications, it was required to perform additional work and equipment in an attempt to meet the performance requirements and subsequent design changes made by the GSA. The GSA, contending that the specifications were performance specifications, argued that the design features in the solicitations and drawings were developed only to the 30% level and that Acquest was

ultimately responsible for designing the facility to a 100% level and that therefore the GSA is not liable for any extra costs.

In determining only if whether there are issues to be tried, the Civilian Board of Contract Appeals held that there was a genuine dispute of material fact over whether Acquest, in implementing its 50%, 90%, and 100% design requirements, and whether Acquest had the discretion to change the initial design criteria supplied by the GSA in constructing the subject rooms. Further, the GSA did not establish that the design defect was one that could not have been readily discovered by Acquest during its subsequent design development.

VII. Practice Pointers

Many participants will be involved in the review of contracts and possible liability issues in a delegated design project. The developer’s counsel should recognize that customary, standard industry professional services and construction contracts do not adequately address all the liability issues. Traditional construction contracting boilerplate, which places primary design responsibility on the design professional lead leaves too many open questions. The developer and the design professional lead will need to identify the services the design professional lead will provide in relation to the specialty designs, and the latter will need to be addressed adequately in the developer/contractor and subcontractor agreements. They will also need to agree on the level of responsibility of the design professional lead for reviewing, approving, or taking other action on design documents provided by the specialty designers.

The design professional lead, to avoid the possibility of shared liability for design, will need to prepare project design documents that establish appropriate design requirements and procedures for submittals. These procedures will require drawings and other design documents the specialty designers must prepared and which must be sealed by other licensed design professionals, who take professional responsibility for those designs. The design professional lead cannot avoid the need to coordinate specialty designs with other design elements because there are inevitably points of physical and functional connectivity. Also, the design professional lead will need to be concerned about its level of review and approval of any specialty designs.

General Contractors and specialty designers should insist that the contract documents define the roles of each design party, including the design professional lead’s responsibility to provide design criteria and performance standards, and there are adequate

protections for submitting and “approving” the specialty design documents. They will also want to limit, as much as they can, their liability exposure to a few parties. Subcontractors providing specialty designs will also need to be mindful of the specific state professional licensing requirements where the project is located.

All parties must pay special attention to how the team will coordinate design components for the project and incorporate them into the project design, including the final contract documents. They will also need to pay particular attention to the contracts’ insurance requirements, and will want to make sure they have proper coverages in place for the “professional design services” they are providing, which are often not part of a standard CGL policy.

VII. Conclusion

Delegated design places many parties in the middle of highly interdependent relationships, and the state of industry form agreements, and case law has not yet fully addressed what this will mean for the potential liabilities of the various parties to the process.

The trend is for design professional leads assigning more building components, beyond just the building envelope, to the contractor as delegated design. Ultimately, the move is toward having the contractor completely responsible for elements like the entire exterior of the building, from design of the materials, connections and assembly. The move is an effort to make the contractor take ownership of entire system interfaces because that is where problems will ultimately occur.

The “transitions” or connection points are always critical and ultimately where the crux of design exists. Making sure that parties pay special attention to these details and keeping someone responsible for them is the ultimate best practice.



Trial Tested.