

## **Know Your Risks: Professional Liability for Engineers Under Kentucky Law**

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Every year, scores — if not hundreds — of cases are filed in Kentucky courts asserting claims involving construction projects. As players on the construction team, civil, structural and mechanical engineers face significant potential liability when a project goes bad. Such liability can easily exceed the fee earned for a given job, and any firm's long-term business success depends on understanding and managing the risks.

An engineers' professional liability can arise from one of two basic legal theories: claims in contract or claims in tort. These two types of claims have a Jekyll-and-Hyde quality about them. Contract claims tend to be much more predictable and manageable, while tort claims are the contract claim's wilder cousin. With such claims come a slew of unknowns, such as the maximum potential liability and even the identity of the parties who may have standing to bring an action.

Generally, with a contract claim only parties to the contract can sue one another. Accordingly, a party can limit the risk of frivolous litigation by contracting only with other trusted parties. There are situations in which a third party to a contract can bring a claim as a "third party beneficiary," but parties to the contract can avoid the risk of such claims by including an appropriate provision expressly stating that only they are intended as the beneficiaries of that contract. The AIA C401--2007 Standard Form of Agreement Between Architect and Consultant, for example, contains such a provision.

Moreover, with a contract, parties can include provisions requiring mediation before a claim can be initiated, thereby requiring at least a good-faith effort at resolving a disagreement before serious attorneys' fees accrue. Parties can also include an arbitration clause, thereby protecting themselves from the uncertainty of a jury trial and ensuring (at least theoretically) that the ultimate decision maker will have some familiarity with construction and engineering issues.

In addition, with a proper contract, parties can limit potential damages (to the amount of the professional fee, for example), ensure that the other parties have adequate insurance coverage, and provide for indemnity should another party's fault lead to litigation expenses. Additional comfort comes from the fact that Kentucky law does not allow for the recovery of punitive damages on a contract claim.

In contrast, tort claims are substantially less predictable than contract claims. A "tort" is not a breach of a contractual duty, which is assumed voluntarily through an agreement between parties. Rather, a tort is a violation of a duty imposed by law. Tort claims generally arise either from an intentional wrongdoing, such as in the case of a fraud claim, or they arise from an accidental breach of a duty of care, such as a claim for negligence. A fraud claim generally requires a misrepresentation (i.e. a lie) made with the intention and effect of misleading someone into taking some action to that party's detriment. Negligence claims against a professional requires an allegation that the professional has failed to provide the level of expertise of a

"reasonable" professional "under the same or similar circumstances."

In 2004, in the case of *Presnell Construction Manager, Inc. v. EH Construction, LLC*, the Kentucky Supreme Court expanded the breadth of the negligence claim under Kentucky law to include claims of "negligent misrepresentation." Although the *Presnell* case did not involve a claim against an engineer, it could have very significant ramifications for the engineering profession.

In the *Presnell* case, the owner had hired a construction manager to coordinate among the various contractors. The construction manager had a contract with the owner that expressly stated that it did not create a contractual relationship with, nor did it confer any benefits or rights on, any third party. A contractor hired by the owner nonetheless sued the construction manager for its economic loss, alleging in part that the construction manager had "supplied faulty information." The Supreme Court allowed the contractor's claim to go forward, adopting the following rule:

One who, in the course of his ... profession ... supplies false information for the guidance of others ... is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The Supreme Court further explained that parties who could bring a negligent misrepresentation claim against the professional communicating the allegedly faulty information (which could include, for example, mechanical specifications and designs) included not just the original recipient of the information. Rather, anyone to whom the professional "knows that the recipient intends to provide" the information could also assert a claim for any loss sustained.

Plainly, this development in the law has potentially huge consequences for engineers involved in the construction industry. Engineers typically have a very limited contractual relationship with a project, generally in the form of a consulting agreement with an architect with whom the engineer is familiar and, one would hope, with whom a substantial level of trust exists. The recipient of the information, however, can reasonably be expected to share the information provided by the engineer with any one of a number of others with whom the engineer has no familiarity. These various parties could include the owner, the general or construction manager, as well as the subcontractors providing the plumbing, mechanicals and electric.

Although contractual liability can be effectively limited through those provisions noted above, the limitation of tort liability is a trickier proposition. Accordingly, errors and omissions policies covering claims for negligent misrepresentation are a must. Typical GL policies may not cover such claims. Consulting contracts that expressly identify and limit the persons to whom the recipient of a professional's work product can give the work product may also reduce exposure, although the effectiveness of such provisions under Kentucky law is uncertain.