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From Car Accidents to HVAC Installation Mishaps: Is the Fault "Comparative"?

From Car Accidents to HVAC Installation Mishaps:
Is the Fault "Comparative"?

At first glance, car accidents and HVAC installation errors have nothing in common. Car accidents involve ambulances and tow trucks, whereas HVAC installations involve air flow and duct systems. However, the American Institute of Architects (AIA) documents can show the similarities by incorporating the concept of "comparative fault." Comparative fault is a theory typically used in tort cases (like car accidents) for dividing damages between two or more parties. "Fault," and in turn damages, is compared among the parties and divided based upon their comparative responsibility for the incident.

HVAC contractors can limit their liability by including comparative fault provisions in their contracts. Thus, when it comes to awarding damages, the courts may begin examining construction contract claims using the same "comparative fault" logic used in car accident lawsuits.

Comparative Fault Defined

When applying comparative fault, courts divide the damages according to each party's percentage of fault. The theory is that one party's negligence should not completely relieve the other of liability, but rather should limit the damages that party is responsible for paying. For example, if a plaintiff sues a defendant for car accident injuries, the jury may decide that the defendant is 80% at fault and that the remaining 20% of fault is attributable to the plaintiff or to other persons not part of the lawsuit. If the recoverable damages totaled $100,000, the defendant would pay plaintiff $80,000. Comparative fault can also be used when there are two or more defendants. Assume there were two defendants in the hypothetical case above. If the jury determined defendant #1 was 20% at fault and defendant #2 was 80% at fault, defendant #1 would pay $20,000 and defendant #2 would pay $80,000. For some involved parties, the concept of comparative fault is attractive.

There is an inherent fairness in the comparative fault concept – each party should be responsible for the harm it caused, and no party should be liable for the mistakes of others. However, the comparative fault concept is generally associated with tort law (cases involving property damage and personal injury – like car accidents), and not contract law. This explains why some courts are reluctant to apply comparative fault to contract claims.

Contract damages are usually measured by the "benefit of the bargain" rule—that is, the breaching party must pay damages equal to the amount the other party would have received if the contract had been fully performed, regardless of whether another party is also at fault. The contractual measure of damages can lead

to harsh results. Under this method, a contractor can end up paying for damages caused by another party. However, under a comparative fault scheme, the contractor is only required to pay for the damages it caused.

Comparative Fault Language in AIA Documents

Several AIA documents include provisions that can be interpreted as "comparative fault" clauses which divide damages according to each party's percentage of fault. The AIA provisions recognize that contractors and architects work together and attempt to define each party's role and limit each party's responsibility.

Contractors may wonder, "How will I know whether the AIA document I sign contains a comparative fault provision?" One clue to look for is whether the AIA provision divides the duties of the architect and contractor. If such a division of duties is included, the provision is probably a "comparative fault" agreement. In essence, when the architect's and contractor's duties are separate, they are agreeing to take responsibility for their own mistakes. The AIA encourages separation of duties, noting that "[a] clear allocation of responsibility is in the interests of all participants in the construction project." American Institute of Architects, Commentary on AIA Document A201−1997 35 (1999) (available at http://www.aia.org/SiteObjects/files/A201−1997Commentary.pdf). Examples of AIA provisions dividing responsibilities include the following:

The Architect…will visit the site at intervals appropriate to the stage of the Contractor's operations [to guard against defects, keep Owner informed with progress, and determine if the Work is being performed in accordance with the Contract Documents]. . . . However, the Architect will not be required to make exhaustive or continuous on−site inspections to check the quality or quantity of the work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities[.] AIA Document A201−1997, Art. 4, ¶ 4.2.2.
* * *
The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are required by the Contract Documents. . . . The contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents. AIA Document A201−1997, Art. 3 ¶ 3.12.10.
* * *
The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the contractor. AIA Document B141, Art. 2.6.2 ¶ 2.6.2.2.
* * *
Any design errors or omissions noted by the Contractor during this review [of the Contract Documents] shall be reported promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as contractor and not as a licensed design professional. . . . The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect. AIA Document A201−1997, Art. 3 ¶ 3.2.2.
In some instances, the clues as to whether the provision is a "comparative fault" agreement are more obvious. Several AIA provisions include express language limiting the contractor's and architect's responsibilities. Examples include:

The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for the acts or omissions of the Contractor, Subcontractors, or their agents or employees[.] AIA Document A201−1997, Art. 4 ¶ 4.2.3.
* * *
The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or

conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect. AIA Document A201−1997, Art. 3 ¶ 3.2.3.

* * *

The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for the omissions of the Contractor, Subcontractors, or their agents or employees[.] AIA Document B141, Art. 2.6.2 ¶ 2.6.2.2.

* * *

[T]he Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees…from and against claims, damages, losses and expenses…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 by a party indemnified hereunder. AIA Document A201−1997, Art. 3 ¶ 3.18.1 (emphasis added); Note AIA Document A401−1997, Art. 4.6 ¶ 4.6.1 contains an identical provision regarding Subcontractors agreeing to indemnify the Owner, Architect and Contractor.

The AIA has specifically noted that the phrase "only to the extent caused by the negligent acts or omissions of the Contractor" in Paragraph 3.18.1 is "comparative fault language: for example, if the indemnitee and all other third parties are found to be 20 percent responsible, the contractor's obligation to indemnify would extend to 80 percent of the loss." American Institute of Architects, Commentary on AIA Document A201−1997 32 (1999) (available at http://www.aia.org/SiteObjects/files/A201−1997Commentary.pdf).

The Jury Is Still Out

Courts are split in their recognition of comparative fault provisions in breach of contract actions. Some courts allow a jury to divide fault and damages in construction breach of contract claims. For example, in Moundsview Independent School District No. 621 v. Buetow & Associates, the Minnesota Supreme Court held that when the contract provision stating that the architect "shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents" is read in conjunction with the section that provides that "[t]he Architect shall not be responsible for the acts or omissions of the Contractor," the architect is clearly relieved of responsibility for any of the contractor's mistakes. 253 N.W.2d 836, 839 (Minn. 1977). Thus, fault between the architect and contractor were separated and apportioned based upon their relative responsibility.

Other courts have refused to apply comparative fault to contract claims, even if the contract contains explicit comparative fault provisions. For example, in Hunt v. Ellisor & Tanner, Inc., the Texas Court of Appeals declined to follow Moundsview and held that comparative fault cannot be applied in breach of contract actions. 739 S.W.2d 933 (Tex. App. Dallas 1987), writ denied. Hunt, the owner, brought a breach of contract lawsuit against Ellisor & Tanner, the architect, to recover $41,500 in damages. Because the contract contained many comparative fault provisions, the jury determined Ellisor & Tanner was only 5% at fault and that the general contractor, who was not a party to the lawsuit, was 95% at fault. Thus, Ellisor & Tanner was only required to pay $2,075 of the $41,500 assessed damages even though the general contractor was not a party to the lawsuit. The Texas Court of Appeals reversed, finding that comparative fault is not applicable in breach of contract claims. The Court of Appeals noted that there is no Texas case which "permits the jury to compare the general contractor's breach of contract against the architect's breach of contract and thereby determine what percentage of the injury is attributable to each breach." The Court of Appeals assessed the entire damages amount ($41,500) against the architect, Ellisor & Tanner.

Likewise, there has also been substantial debate in the legal community as to whether comparative fault should be permitted in breach of contract actions. Those who oppose the application of comparative fault in contract actions argue that doing so unnecessarily complicates the contract, resulting in an unreliable and unpredictable contract. (For a detailed discussion of issues covered in this Contracts Bulletin, see David H. Fisk & R. Carson Fisk, "Comparative Contract Fault: Using the AIA Documents to Apportion Contract Damages", 26 THE CONSTRUCTION LAWYER 23, 25 (Spring 2006)). Those who support using comparative fault in contract cases point out the fundamental fairness that comparative fault promotes.

Proponents note that, out of fairness, a party who is only partly at fault should not be responsible for the entire amount of damages. See Ariel Porat, Contributory Negligence in Contract Law: Toward a Principled Approach, 28 U. BRIT. COLUM. L. REV. 141, 143–44 (1994).

Conclusion

Comparative fault provisions can be attractive to contractors. For example, these agreements may relieve contractors from an architect's errors and liabilities. However, because the courts are split on whether or not comparative fault is recognized in contract claims, it is difficult to predict whether the comparative fault provisions would be enforceable; especially in jurisdictions that have not addressed this issue.

While preparing contracts that are enforced in jurisdictions that recognize comparative fault in breach of contract actions, it may be wise to include the relevant AIA provisions discussed in this Contracts Bulletin. In jurisdictions that do not recognize comparative fault in contract law, it would not hurt to include AIA comparative fault provisions in contracts. However, contractors should not rely on such provisions and should be aware they may not be upheld in some courts.

(This article contains a general discussion of the law. You should consult with your attorney on the law in your state, as well as the issues regarding your contract. This article does not constitute and should not be treated as legal advice as to any particular situation).

SMACNA wants the Contracts Bulletins to serve our members. Your feedback or topic suggestions are welcomed by contacting Steve Yoch (e–mail: syoch@felhaber.com; telephone 651/312–6040) or Tom Soles (e–mail: tsoles@smacna.org; telephone 703/803–2988).

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