RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

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Issue	**Citation**	**Summary**	**Contract Document Implications**
1. Engineer's duty to defend owner in defective conditions case	*UDC-Universal Development v. CH2M Hill*, California Court of Appeals, 2010	Residential condominium project. CH2M Hill provided engineering services to owner (developer). Homeowners Association (HOA) sued developer, alleging defective conditions including drainage problems, soil instability, erosion, and settling. HOA did not name engineer as defendant, and ultimately jury found that engineer had not been negligent and had not breached its contract. Owner-Engineer agreement contained a custom indemnification clause that included a defense obligation requiring engineer to defend owner with respect to "any claim or demand covered herein." Engineer rejected owner's tender of defense. After the trial, the Court of Appeals held that the duty to defend must be determined based on situation at the outset of the case, not at the end; whereas the actual indemnification duty does depend on the outcome of the case. Here, the allegations in the HOA complaint did not name CH2M, but the description of the defects did implicate the engineering work. Therefore a duty to defend existed at the outset, engineer should not have rejected the tender of defense, and subsequent jury findings were irrelevant.	EJCDC intentionally does not include a duty to defend in its indemnification clauses. This case has sparked some outcry, but the court was on solid ground in emphasizing the difference between a defense duty and an indemnity duty. The case stands out because it is rare for any member of the design and construction team to receive a clear, 100% exoneration from a jury. The wording of the custom clause was somewhat confusing and contributed to the engineer's hope that it could escape the defense obligation if engineer could prove it was without fault.

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2. Engineer's duty to defend Owner from claims other than "vicarious" claims	*City of Albuquerque v. BPLW Architects and Engineers*, New Mexico Court of Appeals, 2009	Engineering contract included design and construction supervision of curbs at airport rental car area. Curb was eleven inches tall; visitor to airport fell and sustained injuries. Lawsuit alleged that City's design and construction of curb was faulty. City called upon engineer to defend City, based on defense duty in indemnification clause. Engineer resisted on various legalistic grounds, including the theory that its only duty was to defend City against "vicarious" claims, where City's culpability was completely derived from engineer's. Trial court and appellate court rejected this theory, pointing out that indemnity clause broadly requires BPLW to defend the City from any action "arising out of or resulting from any negligent act, error, or omission of [BPLW]." The phrase "arising out of" is given a broad interpretation and is generally "understood to mean `originating from,' `having its origin in,' `growing out of' or `flowing from.'" The allegations against the City ultimately arose from BPLW's allegedly negligent performance of the contract and therefore fell within the duty to defend.	As indicated above, EJCDC does not include a duty to defend in its indemnification clauses. Note that the results of contractually taking on a duty to defend may not be covered by professional liability insurance. The arguments made by the attorneys for engineer in this case were clever but hollow.

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3. Enforceability of Limitation of Liability clause in engineering services contract.	*Precision Planning, Inc. v. Richmark Communities, Inc.*, Court of Appeals of Georgia, 2009	Professional services agreement contained limitation of liability clause—limited engineer's liability to $50,000, or the amount of its fees, whichever was greater. Retaining wall designed by engineer failed. Appellate court supported the freedom of contracting parties to establish limits of this type, and did not find any public policy that would be violated by such a clause. Court also rejected the notion that an indemnity clause in the same contract, requiring owner to indemnify engineer for third-party losses exceeding $50,000, except in cases of engineer's sole liability, "infected" the L of L clause.	EJCDC professional services agreements contain Limitation of Liability clauses, usually as options rather than as standard terms. Not all states will enforce these clauses, but overall trend is for enforcement, according to a recent ABA Forum on Construction seminar. Some skilled contract negotiation by engineer here, getting the L of L **and** a favorable indemnity from owner.

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4. Admitting testimony from expert witness	*ExxonMobil Oil Corporation v Amex Construction Co., Inc.*, U.S. District Court, Northern District of Illinois, 2009	Contract for installation of High Density Polyethylene (HDPE) pipe at Exxon's Joliet refinery. While in service, the HDPE pipe failed, resulting in extensive damage and shutdown of the refinery. Exxon alleged that Amex failed to use reasonable care in its selection and installation of materials; Amex named the pipe supplier and the pipe designer as third party defendants. Amex's expert, Biery, offered various opinions that the third party defendants challenged as inadmissible. Court noted that in its role as "gatekeeper," it must "keep experts within their proper scope, lest apparently scientific testimony carry more weight with the jury than it deserves." An expert must "substantiate opinions… Providing only an ultimate conclusion with no analysis is meaningless." On this ground much of Biery's testimony was rejected.	For design professionals, serving as expert witnesses is challenging work. EJCDC professional services agreements are not designed to address the issues that arise in providing expert services. Federal courts have become especially tough on expert testimony, as the result of U.S. Supreme Court decisions requiring scientific rigor in expert opinions.

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5. In claim for ineffective advice regarding repairs to structure, which statute of limitation applied, contract (ten years) or tort (one year)?	*Kroger Company v. L.G. Barcus & Sons*, Court of Appeal of Louisiana, 2009	After construction, floor of Kroger grocery store settled. Owner sought damages from constructors and geotechnical engineers, and also against a firm retained to assist in determining repairs needed, SCA. SCA filed an "exception of prescription" seeking dismissal of Kroger's repair phase claim based on a one-year statutory limitation period. In response, Kroger asserted that its claim did not sound in tort, but in contract, and was thus subject to a ten-year prescriptive period. SCA argued that Kroger's claim "was delictual and had prescribed, since the claim was not filed within the applicable one-year prescriptive period." Court held that Kroger did not allege that a specific contract provision was breached, but that SCA's services were ineffective and negligently performed. Thus, Kroger's petition stated a cause of action for breach of a person's general duty to perform repair work in a non-negligent, prudent and skillful manner. Liability for breach of this duty arises "ex delicto" and thus Kroger's cause of action was in tort and subject to the one-year "liberative prescriptive period."	The decision does not address any of the terms of the 3-page professional services contract. The case included a dissent in which the result was criticized as ignoring the rule (true in many jurisdictions) that the failure to perform under a contract may be characterized both as a breach of contract and as a tort. The case appears to be scheduled for rehearing.

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6. Property insurance for personal property items left out "in the open"	*Twenhafel v State Auto Property and Casualty Insurance Company*, U.S. Court of Appeals for the Seventh Circuit, 2009	A violent storm blew through Murphysboro, Illinois, where the insured's cabinet business was located. Before the storm, the insured had some of the wood inventory used to make cabinets stored outdoors under an industrial covering or tarp. The tarp was secured with six-by-six oak beams and large concrete blocks, which weighed about ninety pounds each and had been placed on top of the tarp. The storm lifted the tarp, along with the beams and blocks, and dropped them on the roof of a building about 150 feet away. Damage to the wood inventory was about $81,000. Federal trial and appeals courts rejected insurance company's contention that the inventory had been left "in the open" and thus was excluded from coverage. Court concluded that "in the open" implied "exposed to the elements," not merely outside.	Courts had little trouble in determining the reasonable definition of "in the open" but an express definition of the term in the policy might have removed the need for debate.

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7. Scope of engineer's work with respect to public safety	*Dukes v. Philip Johnson et al.*, Court of Appeals of Texas, 2008	Four people died in the Fort Worth Water Gardens, a public fountain. Fountain had been constructed in 1974, and there had never been any prior deaths or injuries. More recently the fountain had been studied with respect to the need for mechanical, lighting, electrical, and other renovation. A safety review was not a specific part of the undertaking of any of the various consultants retained in the renovation phase. Court held that professional ethics standards were not relevant to determining liability, and that defendants had "no legal duty arising from their profession as architects to report safety hazards that they may have discovered in their assessment of the Water Gardens." Court emphasized limited roles as defined by the scope terms of the consultant agreements.	Protecting public safety would be a duty in original design, regardless of stated scope of work. EJCDC contracts limit engineer's safety duties with respect to the construction process, but do not attempt to disclaim or narrow general public safety duty regarding the facilities as designed. Court's ruling is of interest with respect to renovation work, and more broadly to potential exposure when a hazard is observed and not reported. Statements about irrelevance of professional ethics standards to common law standard of care would seem to be of limited impact in most other situations.

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8. Contractor's right to bring direct claim against engineer that negligently conducted construction-phase soil testing	*Qore v. Bradford Building Company, Inc.*, Supreme Court of Alabama, 2009	Construction of a Walgreen's store on the site of a gas station. Underground tanks were to be removed by seller of property, and geotechnical report advised that the site should be backfilled with engineered fill and compacted prior to sale. Buyer noted questionable fill/compaction work, but went forward with purchase and instructed its construction materials testing firm to test adequacy of soils before construction. Test firm gave green light to construction, and general contractor proceeded to construct slab on grade. Soils in fact were not adequate, and slab fractured and had to be replaced, with general contractor footing the bill to keep the project on schedule. In subsequent lawsuit by general contractor against test firm, court confirmed that general had reasonably relied on soil testing and could proceed with negligence claim despite lack of privity of contract with test firm.	Court here appeared to put great stock on testimony that the test firm was hired "for the benefit of the construction project as a whole" and that "everyone that's working on the project is intended to benefit" from the CMT services performed by the firm hired to perform those services, whether they are a party to the contract or not, and "that it is reasonable and generally expected that all contractors working on the project will rely on that firm's CMT services rather than hire an independent firm to do the same work for the contractor's benefit." This is common sense but does not necessarily create a direct legal right. In some jurisdictions the general contractor's only recourse would have been against the owner, which in turn probably would have brought the test firm into the case as a third-party defendant.

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9. Application of the Economic Loss doctrine as a defense in a claim by an owner against an architect.	*Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc.*, Supreme Court of Arizona, 2010	Architectural firm had designed housing project. Several years later, after the contract statute of limitations had run (expired), the owner asserted a tort claim (professional negligence) against the firm based on determinations that the project did not meet federal accessibility requirements. The firm responded that the economic loss doctrine should apply to bar any tort claims, and the case was appealed to the Arizona Supreme Court. The court held in favor of the architects: "We conclude that in construction defect cases, 'the policies of the law generally will be best served by leaving the parties to their commercial remedies' [contract claims] when a contracting party has incurred only 'economic loss, in the form of repair costs, diminished value, or lost profits.'" The court explained that construction-related contracts generally have detailed provisions allocating risks and specifying remedies. That is a practice that the law should encourage, and allowing tort claims, when the parties have a carefully prepared contract to define their relationship, might undermine the public policy favoring contracts.	The decision makes clear that parties may assert tort claims when there are personal injuries, or physical damage to other property. And the decision clearly applies only when two parties are bound together by a contract; it does not affect tort claims by third parties, such as contractor claims against architects. There is substantial variation around the country in the approach taken to the economic loss doctrine. In some states third party claims are also limited by the economic loss doctrine. Elsewhere the doctrine applies only to product claims and does not apply at all to professional services.