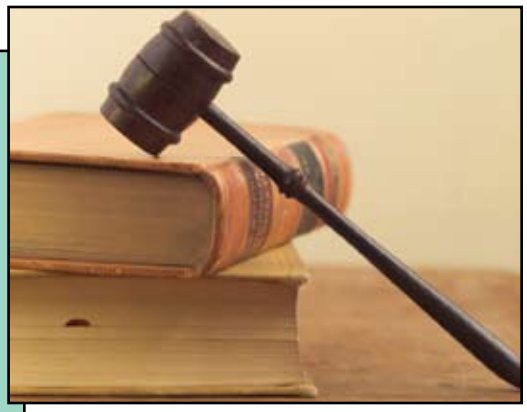
Liability Issues in the Professional Practice of Engineering

A Florida Example

By Doron Weiss

As the construction industry continues to play a major role in Florida's economy, there are a variety of entities involved in this industry that need to be concerned about liability issues in the event that a particular construction project does not proceed or is otherwise not completed according to plan. From the signing and sealing of plans to defects discovered after a project is completed, engineering firms and the professionals employed by them should be cognizant of their duties and liabilities. Although this article references cases based on Florida experiences and law, these liability issues can affect all engineers. Structural engineers faced with similar situations can learn from these examples, and are encouraged to seek legal advice about specific laws in their jurisdictions.



The general issues of liability with which an engineering firm should be concerned are the individual and vicarious liabilities of the firm and persons employed by the firm, the existence of a contract (and the terms thereof in the event a contract exists) and the parties thereto, claims by third-parties, the existence of defects (latent or patent) and the time periods contained in the applicable statutes of limitation. Unfortunately, under the present Florida law it is unclear whether a professional's duty extends to all people who may foreseeably be injured by its actions; people in a "close nexus" with the professional or people who have a "special relationship" with the professional as defined in the Restatement.

Statutory Basis for Liability

Fla. Stat. Chapter 471 governs the profession of engineering. In general, compliance with this section does not relieve a business organization of responsibility for the conduct of its agents, employees or officers. Moreover, an individual practicing engineering is not relieved of responsibility for professional services performed by virtue of his employment or relationship with a business organization.

As to the particular issue of liability, Fla. Stat. §471.023(3) specifically provides that:

> *- a licensed engineer practicing through a business organization does not relieve the licensee from personal liability for misconduct, negligence or wrongful acts committed by him or her.*
>
> *- partnerships and all partners are jointly and severally liable for the misconduct, negligence or wrongful acts committed by their agents, employees or partners while acting in a professional capacity.*
>
> *- any agent, employee or officer of a business organization (other than a partnership) is personally accountable and liable only for misconduct, negligent acts or wrongful acts committed: (1) by him; or (2) by any person under his direct control and supervision, in the course of rendering professional services on behalf of the business organization.*
>
> *- the personal liability of an owner or a shareholder in a business organization, in his capacity as owner or shareholder, is no greater than that of a shareholder-employee of a corporation incorporated under Chapter 607.*
>
> *- the business organization is liable up to the full value of its property for any misconduct, negligent acts or wrongful acts committed by any of its agents, employees or officers while they are engaged on its behalf in the rendering of professional services.*

If there is one lesson to be taken from the statutory framework laid out above, it is that the issue of liability should be taken seriously, as both the firm and an individual rendering services in the course of his employment with the firm may be liable for damages arising from their negligent or wrongful acts.

Signing and Sealing Plans

In general, a seal is meant to serve as an authentication of an instrument and as the badge of a specialty.

In particular, under this procedure all documents, final drawings, plans, reports or specifications issued or prepared by the licensee and being filed for public record, and all final documents provided to the owner or the owner's representative, are to be signed by the licensee, dated and sealed in a form prescribed by the Board of Professional Engineers.

The most direct (and, seemingly, only) case to directly address the issue of an engineer's liability for signing and sealing plans is *O.P. Corp. v. Lewis*, wherein the court declared that:

> The requirement that a registered engineer stand behind and be responsible for his structural plans and specifications is no idle precaution; most especially when dealing with a building some 12 stories high. The designer of such structures owes a duty of care not only to the owner of the property but to the public as well. **The signing and sealing of such plans fixes the responsibility for assistance during construction and ultimate liability for negligent design.** (emphasis added)

In the context of negligence, the signing and sealing of a plan would relate to establishment of the duty element. While a duty may be found to exist in the absence of signing and sealing, it would be difficult to argue that no duty exists when such is the case. While the *O.P Corp.* case broadly extends the scope of duty to the general public, the confusing and uncertain status of subsequent cases which discuss a professional's duty of care in the context of providing professional services makes it difficult to pinpoint with exactness the class of persons to whom such a duty is owed. At a minimum, and as discussed in depth further below, either general principles of foreseeability, the "close nexus" test or the "special relationship" test of Restatement Section 522 would provide some guidance as to the possible class of persons to whom such a duty would be owed.

General Professional Negligence and the Economic Loss Rule

The Existence of a Contract is Not Determinative of Tort Liability

Florida law imposes a duty upon a professional to "perform the requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances".

In the case of professionals, such as engineers, the existence of a contract will not necessarily preclude an action in tort by a third party The rationale for this is that public policy dictates that liability should not be limited to the terms of the contract. Thus, beyond any duties owed to an engineering firm's client with whom it is in privity, Florida courts recognize a common law action for negligence against professionals based on acts of negligence despite the absence of a direct contract between the professional and the complaining party.

The court in *Moransais vs Heathman* held that: (1) where the purchaser of a home contracts with an engineering corporation, the purchaser has a cause of action for professional malpractice against an employee of the corporation who performed the engineering services; and (2) the economic loss rule does not bar a claim for professional malpractice against an individual engineer who performed the inspection of the residence, even though no personal injury or property damage resulted and the only damage alleged was undetected and undisclosed defects in the house. Thus, an employee-professional who actually renders the professional services may be liable for the negligent performance of such services. Not withstanding the *Moransais* decision, in general bodily injury or property damage continues to be an essential element of a negligence cause of action.

In another line of reasoning, where there is no contractual privity between the complaining party and the engineering firm, an action for purely economic losses is not barred by the economic loss rule where there is a "special relationship." A consulting engineering firm and its agents may be held liable in negligence for supervising construction resulting in personal injuries despite the absence of privity between the engineer and the injured person. However, the economic loss rule will bar a negligence action in the context of a third-party beneficiary of a professional consultant's contract when the plaintiff seeks only recovery for economic losses

In *Hewett-Kier Constr.*, which involved a suit by a general contractor against an architectural firm and its architect employee for professional malpractice, the court found that allegations that the architectural firm prepared erroneous design documents with the knowledge that its client (the school board) would supply them to the successful bidder, and that the successful bidder would be injured if the documents were inadequate, were sufficient to establish a "special relationship" between the general contractor and the architectural firm.

Claims by Contractors, Owners and Third Parties against Engineers in Further Detail

In addressing questions of Florida state law, the court in *A.R. Moyer, Inc. v. Graham* stated: (1) a third party general contractor has a cause of action against an allegedly negligent architect, notwithstanding absence of privity, where the contractor may foreseeably be injured or sustain an economic loss proximately caused by the negligent performance of the architect's contractual duty; and, (2) in the absence of a clear intent to the contrary manifested in the owner-architect or owner-engineer contract, a general contractor is not a third party beneficiary of a contract between the owner and the supervising architect or engineer where the general contractor, under his contract with the owner, is obligated to construct the project in accordance with the plans and specifications.

Relying on *Moyer* and *Luciani*, in *Southland Constr., Inc. v. Richeson Corp.,* the court stated that "As regards the tort liability of engineers, one who negligently performs a professional engineering service, knowing that another person will be injured if it is negligently performed, is liable in tort, even though there is no contract between the parties."

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Additionally, the underpinnings of *Moyer* have been dissected. In approving a cause of action for injury to a third person's economic interests by the negligent performance of a contract, *Moyer* did not develop new legal principles but rather extended products liability law to economic losses. See *E.C. Goldman*, wherein *E.C. Goldman* ultimately held that that an expert, who has no connection whatsoever with a construction project and is hired by the owner of the project for the sole purpose of evaluating the work of a subcontractor, may not be held liable to the subcontractor (with whom the expert is not in privity) for the negligent performance of its evaluations.

The Convoluted Status of the Proper Analysis to Use In Determining a Professional's Liability to a Non-Privity Third Party

To the extent that *Moyer* has not been explicitly overruled, there are basically three methods which may be used in determining the potential liability of an engineering firm to a third party in the absence of contractual privity. First, the test is whether the complaining third party may foreseeably be injured or sustain an economic loss proximately caused by the negligent performance of the professional's contractual duty. Second, under the "close nexus" analysis the factors to consider are: (a) the relationship or "nexus" between the third party and the firm; (b) the relationship between the firm and the product or service which caused the third party's alleged damages; and, (c) the level of the firm's supervisory responsibilities under the terms of the contract and level of the firm's control over the third party. Third, a professional's liability to a non-privity third party may also be determined by whether a "special relationship" exists. Still, courts have continued to be hesitant to extend protection to incidental third party beneficiaries, adhering to the rule that a contract benefits and binds only the parties themselves unless the contract has been entered into for the direct and substantial benefit of a third party.

Construction Defects

A contractor is relieved of liability caused by a patent defect after control of the completed premises has been turned over to the owner. However, the same does not apply where there has been no acceptance by the owner or if the defect is not discoverable by a reasonable inspection. In this type of scenario, the nature of the defect and the issue of control are key to a determination of liability.

The Florida Supreme Court precludes recovery against an engineer for personal injury to a third party caused by a patent design defect in a structure. However, an engineer is not insulated from liability if there is a latent defect in the structure.

Statute Of Limitations

Other than the basic five year period for actions on a written contract and the four year period for actions founded on negligence, there are several specific provisions in the Florida Statutes relating to statute of limitations for engineering-related causes of action.

Fla. Stat. §95.11(3)(c) provides a four year limitations period for an action founded on the construction, design or planning of an improvement to real property:

- the time runs from (1) the date of actual possession by the owner; (2) the date of issuance of a certificate of occupancy; (3) the date of abandonment (if construction is not completed); or (4) the date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his employer, whichever date is latest.

- exception: if the action involves a latent defect, the time runs from the time that the defect is discovered or should have been discovered with the exercise of due diligence.

- In any event, the action must be commenced within 15 years after (1) the date of actual possession by the owner; (2) the date of the issuance of a certificate of occupancy; (3) the date of abandonment of construction (if not completed); or (4) the date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his employer, whichever date is latest.

Fla. Stat. §95.11(3)(e) provides a four year limitations period for an action for injury to a person founded on the design, distribution, manufacture or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

Fla. Stat. §95.11(4)(a) provides a 2 year limitations period for an action for professional malpractice (other than medical malpractice), whether founded on contract or tort. The period of limitations runs from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. Note, however, that the limitation of actions for professional malpractice under this subsection is limited to persons in privity with the professional.

Finally, the respective one-year limitation periods for equitable lien claims and enforcement of payment bonds may be relevant in the professional practice of engineering as well.

General Conclusions

Under the present state of Florida law, it is possible that an engineering firm and engineers in their individual capacity may be held liable in tort to both privity and non-privity parties.▪

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