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Comparative Fault For Construction Project Claims

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It is perhaps intuitively obvious that the person or entity actually responsible for causing problems on a construction project should also be responsible for the damage directly resulting from that problem. Unfortunately, despite existing legislation, New Jersey law does not always allow a fair allocation of fault. The purpose of this article is to frame the issue, discuss the current state of the law and suggest alternative means for ensuring that fault is fairly allocated in construction disputes.

Who Should Be Held Accountable for Losses at a Construction Project and to What Extent? Generally, construction disputes involve claims by owners, contractors, subcontractors, suppliers, tenants, third parties and, in cases of work-place injuries, by employees of one of the entities working on the project or a third party who became injured while at the project site. The claim could relate to money that is owed, for services or materials provided, defects in the work, breaches of warranty and contract or injury to people or property. Regardless of the claim, it is almost inevitable that more than one person or party involved with the project will be asked to accept some responsibility for the claimed damage. In the event the claim is not resolved and is presented before a judge or a jury in a courtroom setting, or an arbitrator if alternative dispute resolution was selected by the project participants, it is important to understand the risks that such procedures entail. It is possible that a single party could be required to initially and solely respond to a claimant despite multiple contributors. The single party would then have to "run and chase" the other responsible parties for contribution in accordance with their allocated share of the total liability. The obvious question is whether that is fair. The answer is, based on existing New Jersey law, "it depends." In some cases it would be fair and in other cases in would not be fair. The answer turns on the percentage of liability each of the contributing defendants bears to the total fault in the claim.

What Does New Jersey Law Say About Allocating Fault for Losses at a Construction Project? It is the opinion of this author that the answer is found in the New Jersey Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to 5.3.

The act speaks directly to how liability should be allocated for damages to plaintiffs resulting from the combined fault of multiple parties. The act provides that where a plaintiff has been damaged as a result of the fault of multiple defendants, that plaintiff may recover from each defendant "only that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60 percent responsible for the total damages."

While the title of the act and the act's references to "tortfeasors" and "injury to person or property" might superficially appear to indicate that the act was intended to apply to the allocation of damages for negligence claims, the language of the act itself indicates that its application is not so limited. The act defines "negli-

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gence actions," to which the act applies, as follows:

"Negligence actions" includes, but is not limited to, civil actions for damages based upon theories of negligence, products liability, professional malpractice whether couched in terms of contract or tort and like theories. In determining whether a case falls within the term "negligence actions," the court shall look to the substance of the action and not the conclusory terms used by the parties.

Available judicial decisions all interpret the act broadly to cover both tort and contract claims, and not just negligence, products liability, and professional malpractice claims. However, the definition, while "unlimited," nevertheless does not expressly include all the various types of claims that could be asserted in connection with a construction project. As a result, it is possible that a court or arbitrator could refuse to apply the act to claims asserted in a dispute arising out of a construction project. Instead, the court or arbitrator could limit the application of the act to only negligence, products liability and professional malpractice claims. While this is possible, it does not appear to be the intention or the practice of the Legislature or the courts that have spoken to the issue.

The language of the act evidences the intent of the Legislature that the act's provisions should apply to apportion damages equitably among responsible parties regardless of the theories upon which a particular plaintiff proceeds. The intent appears to this author to have been to create a system of allocating fault among multiple parties to avoid the placement of unfair burdens on individual defendants. The available cases all appear to advance the position of a broad interpretation that would make the act apply to all "fault" regardless of how the fault is broken into legal claims in a particular plaintiff's complaint or a particular claimant's arbitration demand. Unfortunately, neither the language of the act nor the rulings of the courts to date applying the act to actual claims have been explicit enough to prevent the possibility that certain courts or arbitrators could refuse to apply the act to certain contract-based claims, which are often at the root of construction project disputes. Accordingly, there remains some doubt as to the act's applicability in all construction cases.

What Can Be Done To Clarify the Issue Moving Forward? As previously indicated, all the available case law and the language of the act itself suggest that the act should apply to all construction claims. If so, then only a contractor who is found to be in excess of 60 percent liable on a construction claim would be forced to (i) initially pay 100 percent of the damages relating to the claim to a plaintiff and (ii) then run and chase the other contributing contractors, suppliers, or other third parties for their share of whatever percentage of fault a trier of fact allocated to them. Because neither the act nor the available cases state unequivocally that the act was intended to apply to all claims, including but limited to, "negligence, products' liability professional malpractice," . . . as well as contract, warranty (express or implied) and all manner of other claims that could be asserted by a plaintiff in a construction dispute.

There are at least three ways to resolve the open question to create some level of certainty. The first is for the appellate courts to squarely address the issue when it arises in a lower court case and expressly enunciate either the breadth of the act's application or its limitations.

Secondly, the Legislature could revisit the definitions section of the act and amend the definition of " negligent action" to eliminate the risk that the act could be limited to only negligence, professional malpractice and product's liability claims. Although the act already states that the definition is not limited to these three categories of claims, it nevertheless leaves it up to the trial courts to determine if a cause of action not expressly named is subject to the act.

Unfortunately, a significant number of contractors in our current economy are no longer viable. A contractor who is continuing to operate and is able to work through this economic downturn, could be hit with the straw that broke the proverbial camel's back should they be named as a defendant in a case where that contractor is held to be perhaps only one percent liable for a large claim. That contractor's 1 percent liability in a million-dollar claim would normally to a liability of $10,000 dollars. If the act is not applied to its case, because a plaintiff chooses to call his or her claims something other than negligence, professional malpractice or products liability, then that once-viable contractor will be forced to pay over $1 million dollars for a claim that at most should have cost the contractor $10,000. While the contractor, after paying $1 million, could pursue all the other contractors, suppliers and third parties who contributed to the liability, it is certainly possible that many of those contractors would be unable to contribute their share of liability.

A third possible solution is for parties engaged in the construction industry to specifically define in their contracts how fault should be allocated in their contracts. A simple provision could be inserted in each contract mandating application of the act or, alternatively, a contractual provision could be included establishing that in the event of dispute resolution the parties expressly agree to have fault allocated and obligations for payment to be made in accordance with the assessed share of responsibility for the asserted claim. Obviously, if a party does not want such an allocation to occur, then the contract negotiations and contract preparation would be the forum in which to make that clear. Such provisions are largely untested, so care would have to be taken in drafting the necessary language to ensure the greatest chance for having the contractual provision pertaining to the allocation of fault enforceable and consistent with the parties' intentions. ■