Article

Be Wary of Over-Reliance on AIA Form Contracts

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The construction industry is full with complex, multi-faceted, and multi-party transactions that often feature heavily negotiated legal documents. Typically, each party involved, whether the developer, designer, contractor, or construction lender, is represented by separate counsel to ensure their client's interests are protected. Purchase and sale contracts, construction loan documents, and all ancillary documentation can be meticulously crafted and often ferociously negotiated down to each penny at stake and each word in the instruments. Why is it, then, that so many construction, design, and real estate professionals (and their lawyers) rely so heavily on AIA contract forms when it's the contracts that actually govern the day-to-day relationship between developers and design professionals? These forms should be viewed merely as a starting place, not as final contracts that simply need the blanks filled in. Be wary of any attorney who relies too heavily on AIA forms. This over-reliance is rampant in the construction industry, but every deal is unique and requires its own deal-specific scrutiny and negotiation of the base forms.

Common deal-specific negotiation points include performance duties, scope of work, change orders, warranties, bonds, and delays. However, these points often largely fall into the "fill in the blank" category of contract drafting. What about all of that "boiler-plate" language? Have you and your counsel carefully read through each provision and discussed the implications on you or your company's exposure? Do you know who you are indemnifying, who is indemnifying you, and for exactly what? Are you certain your indemnification provisions are enforceable in the state in which they may be enforced? Most interestingly, are you sure you know who can and cannot sue you if something were to go awry during the construction process?

ANTI-ASSIGNMENT PROVISION

A prime example of over-reliance on "boiler-plate" form language is one that many professionals and their attorneys often overlook completely: the anti-assignment provision. This provision, found in most standard AIA contracts, reads: Neither Owner nor Architect [or Contractor] shall assign this Agreement as a whole without the written consent of the other, except that Owner may assign this Agreement to an institutional lender providing financing for the Project.

At first glance, this provision appears straightforward and fair: neither party can assign the contract without the other's consent. One might also logically conclude that, if a contract cannot be assigned without consent, any attempt to assign without consent must be void. It would also logically follow that if an assignment is void for lack of consent, the purported assignee clearly cannot sue the non-consenting party for failure to perform. One would make these assumptions at their peril.

First, the anti-assignment provision does not void an attempt to assign without consent. The case law on this issue is clear: any attempted assignment in violation of such a provision amounts to breach of contract, giving rise to a claim for damages for said breach of contract and nothing more. In other words, courts will enforce the provision in favor of the damaged party, but the assignment itself will still be valid. For example, if a contractor assigns its architectural contract to a developer without the architect's consent, the provision (as drafted above) will open the contractor up to potential breach of contract damages, but the developer will still validly

hold the contract. To avoid this outcome, language would need to be prepared and added to the anti-assignment provision clearly stating that any attempted assignment in violation of the provision will be automatically void and of no effect.

AUTOMATIC VOIDING

The automatic voiding of any attempted assignment without consent can be accomplished with a relatively simple add-on to the stock language. The more complicated question is what protection, if any, does the anti-assignment provision provide against an assignee being able to sue the non-consenting party for alleged defects in the work or design. If we stay with our developer and architect example, let's assume the architect's counsel noted the anti-assignment provision, and added language to automatically void any attempt to assign the contract without the architect's consent. Now that we know the assignment is void, surely this protects the architect from a claim for a design defect from an unknown assignee.

Unfortunately, this assumption is only half-correct because a prohibition on, and automatic voiding of, a post-performance assignment has no impact on a successor's ability to sue. Courts have consistently interpreted the amended anti-assignment provision (and others like it) as a prohibition on an assignment of performance under a contract, not the assignment of a post-performance cause of action related to said performance. (AIA contracts contain an explicit exception to the consent prerequisite for institutional lenders.) The simplest rationale for this distinction is that design professionals deserve to know who they are working for, while at the same time developers need to be able to sell their completed project with their causes of action against the contractors and design professionals for faulty work. For example, if a developer hires a contractor to build a hotel and subsequently following completion, sells the project to an end-user, the end-user will require the developer to assign its interest in the construction contract as a condition to the purchase. Typically, the causes of action are wrapped up within the definition of "intangible" property in the assignment and assumption agreement. The contractor or design professional, whose work is complete, may not even be aware of the sale, much less having consented to the assignment.

CONCLUSION

These are two issues each party should carefully consider when using AIA forms. If your company and your attorneys rely too heavily on the forms, you run the risk of missing simple solutions to real issues. Unless all forms are viewed with a critical eye, you may face exposure well after the project is complete, and it may come from a party you never worked for or knew.

ABOUT THE AUTHOR

Caleb Trotter is an attorney in the real estate section of Munsch Hardt. His practice includes representing commercial lenders and developers in the acquisition and disposition, development and leasing of office, industrial, and retail projects. Trotter also has a wide range of real estate-related litigation experience, including advising and representing clients in residential and commercial leasehold disputes, real estate lending disputes, and construction litigation.

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