HRH A&E

DIFFERENT BY DESIGN®

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RISK SOLUTIONS

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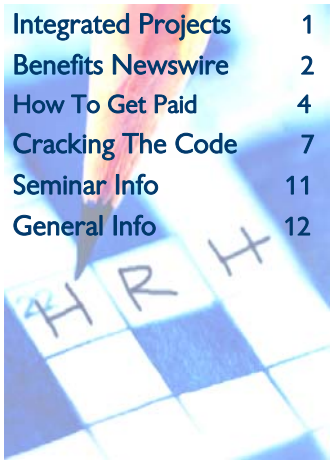

Risk Management Seminars
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See What's New

AIA Releases Integrated Project Delivery Documents

The AIA recently released its Integrated Project Delivery Documents. According to AIA, Integrated Project Delivery ("IPD") "is a project delivery approach that integrates people, systems, business structures and practices into a process that collaboratively harnesses the talents and insights of all participants to optimize project results, increase value to the owner, reduce waste, and maximize efficiency through all phases of design, fabrication, and construction." More information on IPD is available at: http://www.aiacontractdocuments.org/ipd/agreements.cfm

On a nuts and bolts level, this means earlier involvement of the contractor for more collaborative decision making. As the cost of making changes to the design increases the further the project progresses, the goal is to reduce costs by involving all decision makers in the design development phase. *The new documents, (B195 Agreement Between Owner and Architect for Integrated Project Delivery, A195 Agreement Between Owner and Contractor for Integrated Project*

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Turn to Page 4 to learn more about "How To Get Paid Without Getting Sued"
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Presidential Candidates: Health Care Initiatives

Senator John McCain and Senator Barack Obama have each proposed a number of initiatives that would impact employer health plans, insurers, and administrators and providers of health care services. Selected features of the candidates' proposals are set forth below.

Senator McCain

Senator McCain's proposals include the following:

Portability. Increase portability and choice in health insurance. Individuals could continue to obtain insurance through employer-provided plans but would be offered incentives for purchase of private insurance through refundable tax credits of $2,500 per individual and $5,000 for families. The credit would be sent directly to the insurer selected by the taxpayer. Any excess could be deposited in a Health Savings Account. Consumers should be able to purchase health insurance nationwide, across state lines.

Health Savings Accounts. Expand the benefits of HSAs as a means of giving consumers more control over the use of their health care dollars and encouraging portability.

Insurability. Create guaranteed access to health insurance for those with preexisting conditions or who are otherwise denied coverage.

Coordinated, Preventative Care: Reform insurance payment structures to encourage preventative care and collaboration among a patient's various health care providers.

Retail Health Care: Promote more access to walk-in clinics and retail health care outlets.

Long-Term Care: Study and model state-based programs, such as those offering seniors a monthly stipend to purchase in-home care or assistance with personal health care bookkeeping.

Promote Optimal Use of Information Technology: Support increased use of information systems and technology to allow doctors to practice across state lines.

Senator Obama

Senator Obama's proposal provides the following:

Universal Coverage: Allow individuals to purchase insurance through a national health plan similar to the plan available to members of Congress without preexisting conditions or illness exclusion.

Mandatory Coverage for Children: Require all children to have health coverage, and assist young adults in obtaining coverage. Young people up to age 25 can continue coverage through their parents' health plans.

Affordability. Make premiums, copays, and deductibles affordable. Lower-income individuals who do not qualify for Medicaid or State Children's Health Insurance Program (SCHIP) may receive financial assistance.

National Insurance Exchange. Facilitate consumers' purchase of private insurance through a national insurance exchange by providing oversight for participating plans. The exchange would require all participating plans to be at least as generous as the new public plan and have the same standards for quality, transparency, and efficiency.

Support for State Initiatives: Encourage states to continue with creative strategies already in place, where those strategies meet or exceed federal standards.

Employer Contributions: Require employers not making a meaningful contribution to health coverage of their employees to contribute a percentage of payroll to the national plan.

(Cont'd. on Page 3)

AIA Releases Integrated Project Delivery Documents (Cont'd.)

Delivery and A295 General Conditions of the Contract for Integrated Project Delivery) are the "transitional" forms between the traditional approach, and the fully integrated approach where it is contemplated that the three parties to the project will form a Single Purpose Entity ("SPE") for the purpose of sharing the risks and rewards using the C195.. The recommended form of the SPE is a Limited Liability Company ("LLC"). This form of incorporation is available in all 50 states, and the intent is to avoid unintended joint and several liability (this may not be a benefit in Illinois or other states that provide joint and several liability by law).

The major step in the transitional documents is that the A295 is now the general conditions for both the contract of construction and the owner/architect agreement (as opposed to the A201, which was the general conditions for the contract of construction). There are still separate contracts between the owner and architect and owner and contractor based on roles defined in the 2007 AIA documents. The contractor now assumes fiduciary duties toward the owner, and the arbitration is the default means of dispute resolution in the owner/architect agreement. The architect still retains intellectual property rights, and can terminate the owner's license if the owner breaches the contract.

It is expected that Building Information Modeling ("BIM") technology will play an important role in the IPD process. The A195 and B195 specifically incorporate the AIA Document E201™–2007, Digital Data Protocol Exhibit by reference. This document is also intended to be attached to any downstream design or construction contracts. While not specifically referenced in the documents, the AIA Document C106™–2007, Digital Data Licensing Agreement should be used when electronic files are transferred.

While the "transitional" forms do not present any new insurance issues, the ultimate goal of fully integrated project delivery represents a significant departure from the traditional approach and will pose some insurance challenges. First, the Single Purpose Entity (SPE) will be required to purchase insurance, which is described by the AIA as a CCIP, or "Cost Controlled Insurance Program". The term CCIP has previously been used by insurance professionals to mean "Contractor Controlled Insurance Program". Second, the single purpose LLC will not qualify as an automatic insured under any policy, so it will have to purchase separate policies or be added to existing practice policies. Due to the limited availability and high cost of project insurance today, we will likely face the challenge of convincing underwriters to add an LLC (where the architect is likely a minority partner) to the architect's professional liability practice policy. Third, there will be "other insurance" issues to work out. Last, but not least, increased participation in the risks and rewards may lead to assumption of contractual liabilities beyond the coverage provided by E&O policies, which generally cover damages to the extent caused by professional negligence. Consultant with knowledgeable insurance professionals recommended at the contracting phase is in order to maximize the value of the SPE.

Presidential Candidates: Health Care Initiatives (Cont'd.)

Reimbursement to Employer Plans: Reimburse employer health plans for a portion of the plans' catastrophic costs, if the plans use the reimbursements to reduce workers' premiums.

Coordinated, Transparent Care: Support coordinated care among various medical professionals providing care to a single patient. Health care plans would be required to disclose the percentage of premiums that go to patient care as opposed to administrative costs.

How To Get Paid Without Getting Sued

Architects, consultants, contractors, subcontractors, and material suppliers are experiencing increasing problems collecting payments for the services or materials they supply for construction projects. Many states have created statutes designed to promote prompt payments to the parties above. This particular article will discuss the impact of the *Illinois Public Act 095-0567,* commonly referred to as the *Contractor Prompt Payment Act* (the "Act"), which became effective as of August 31, 2007. Any licensed architect who ever practices in Illinois will benefit in fee collection attempts from an understanding of the Act. Other states have dealt with payment problems by enacting statutes that provide similar help to the steadily growing body of unpaid individuals or entities.

Please note, that the word "Architect" is not used within the Act. However, the Act is applicable to all work performed by architects. General contractors, subcontractors and material suppliers spearheaded the lobbying efforts for the passage of the Act. The language contained in the Act refers to the normal processes used in the construction of privately funded projects.

The Act contains the following provisions:

Section 5. Definitions. In this Act:

(a) "Payment application" means, in accordance with the terms and definitions if the applicable contract, any invoice, bill or other request for periodic payment, final payment, payment of change order or request for release of retainage from the contractor to the owner.

(b) "Construction contract" means a contract or subcontract, entered into after the effective date of this Act, for the design, construction, alteration, improvement, or repair of Illinois real property, except for contracts that require the expenditure of public funds and contracts for the design, construction, alteration, improvement, or repair of single family residences or multiple family residences with 12 or fewer units in single building.

(c) "Contractor" and "subcontractor" shall have the meanings ascribed to them by the Illinois Mechanics Lien Act and cases decided under that Act.

Section 10. Construction contracts. All construction contracts shall be deemed to provide the following:

(1) If a contractor has performed in accordance with the provisions of a construction contract and the payment application has been approved by the owner or the owner's agent, the owner shall pay the amount due to the contractor pursuant to the payment application not more than 15 calendar days after the approval. The payment application shall be deemed approved 25 days after the owner receives it unless the owner provides, before the end of the 25-day period, a written statement of the amount withheld and the reason for withholding payment. If the owner finds that a portion of the work is not in accordance with the contract, payment may be withheld for the reasonable value of that portion only. Payment shall be made for any portion of the contract for which the work has been performed in accordance with the provisions of the contract. Instructions or notification from an owner to his or her lender or architect to process or pay a payment application does not constitute approval of the payment application under this Act.

(2) If a subcontractor has performed in accordance with the provisions of his or her contract with the contractor or subcontractor and the work has been accepted by the owner, the owner's agent, or the contractor, the contractor shall pay to his or her subcontractor and the subcontractor shall pay to his or her subcontractor, within 15 calendar days of the contractor's receipt from the owner or the subcontractor's receipt from the contractor of each periodic payment, final payment, or receipt of retainage monies, the full amount received for the work of the subcontractor based on the work completed or the services rendered under the construction contract.

Section 15. Interest; suspension of performance.

(a) If a payment due pursuant to the provisions of this Act is not made in a timely manner, the delinquent party shall be liable for the amount of that payment, plus interest at a rate equal to 10% per annum.

(b) A contractor or subcontractor who is not paid as required by this Act may, after providing 7 calendar days" written notice to the party failing to make the required payment, suspend performance of a construction contract without penalty for breach of contract, until the payment required pursuant to this Act is made.

(c) The interest imposed by this Act shall not be duplicative of the interest charged under the Mechanics Lien Act.

Section 99. Effective date. This Act shall take effect upon becoming law.

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Cracking the Code: Insurance-Related Contract Terms Explained

When I first began representing design professionals, I found that I was not familiar with the jargon that they used so casually. What is an HVAC system? High Voltage Air Conditioning? When I first heard the term "punch list", I thought: what am I supposed to do, make a list of people I would like to punch?

1. 

2. 

3. 

No one is born knowing these things, so don't feel bad if you are uncomfortable reviewing contract insurance requirements. In fact, I find that many clients' lawyers do not fully understand the insurance terms they put into contracts. For the most part, they are copying things out of books, and some of them are using very old books. For instance, back in the 1980's, some insurance companies excluded coverage in the General Liability policy for claims arising from "explosion, collapse and underground" hazards. These became known as "X, C ,U" exclusions. These exclusions were removed when the insurance industry got competitive again in the late 1980's, but we still see insurance requirements stating that "X, C, U" exclusions shall be deleted. These are anachronistic requirements. If any lawyers are reading this, please, please get some new books, and while you are at it, could you turn down that Duran Duran music!

4. 

The following are responses to frequently asked questions from design professionals based on actual contract requirements. We will start with more general concepts and then examine Workers Compensation, General Liability, Commercial Auto and Umbrella issues.

Contract Terms

Who is the **Client**?

The client is the party to the contract who is responsible for paying you. If the client is doing business through an agent, we only want indemnify the client, not the agent. In Illinois, as in most states, only the client can sue the design professional for purely economic loss.

What does **Indemnify** mean?

Indemnify means to compensate a person or organization for loss or damage incurred. You have liability insurance to indemnify parties for damages to the extent caused by your negligence. Lawyers will often ask you to indemnify for all damages arising out of your services. This can be construed to require you to pay for damages caused by other parties who jointly contributed to the loss. Any contractual obligation to assume the liability of others would not be covered by Professional Liability insurance.

What does **Defend** mean?

This is a duty to pay for defense costs, such as attorney's fees and expert witness costs, regardless of fault. You are not required by the law to make any payment on a claim until you have had your day in court and been adjudicated to be liable. A contractual duty to defend means that you have to start paying your client's legal fees from day one, and you do not get you money back, even if you are found to be not at fault. As we cannot add additional insureds to a Professional Liability policy, this obligation will not be covered under such a policy. Design professionals should strive to delete any duty to "defend" found in an indemnification agreement.

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Cracking the Code: Insurance-Related Contract Terms Explained (Cont'd.)

General Insurance Terms

What is a **Limit of Liability**?

In an insurance policy, this is the maximum dollar amount that the insurance company will pay under that coverage.

Where do we find out what the current **Limit** is?

This is shown on the declarations page of the actual policy, and on the Certificate of Insurance issued by the insurance agent or insurance company. Usually there is a column on the left that identifies the type of policy, and a column on the right that identifies the limit of liability.

What are **Endorsements**?

Every insurance policy has at least two parts, a declarations page that identifies who the Insured is, the policy effective dates, and the limits of insurance, and a policy form that states the terms and conditions of the coverage. Usually there will be additional documents that are attached to the policy form that can expand or restrict the coverage, and these additional documents are called "endorsements". There is usually at least one endorsement that conforms the policy to laws of the state where the Insured resides.

What is an **A. M. Best rating** and where do I find it?

A.M. Best is a company that rates the financial strength of insurance companies. There is a letter grade, which is an opinion of an insurer's ability to meet its obligations to policyholders (A++ or A+ = Superior, A or A- = Excellent, B+ = Good, etc), followed by a roman numeral which rates size of the company (I to XV with VII indicating $50 million to $100 million in policyholder's surplus and XV indicating more than $2 billion in policyholder's surplus). The ratings of insurers usually posted on the insurance company's web site (if favorable), are available from insurance agents or ambest.com (for a fee).

Insurance requirements are stated in terms of "**not less than**" a certain dollar amount. Is there a maximum?

There is no legal maximum on the amount of insurance coverage you can buy. However, there are limits on what the insurance companies can or will provide. Usually underwriters are hesitant to offer multi-million dollar liability limits to small firms. They are concerned about the risk/reward equation and "painting a bulls-eye on your back".

What is **Subrogation**?

Subrogation means the substitution of one person in the place of another with reference to a lawful claim, demand or right. When an insurance company pays a claim, it assumes any rights that their policyholder may have to recover damages from third-parties who caused the loss. For instance, if I hit your car in the parking lot, and your insurance company pays to fix your car, they are "subrogated" to your rights and your insurance company will file a "subrogation" claim against me to recover the cost to fix the car.

What is a **Waiver of Subrogation**?

This is a contractual requirement that your insurance company give up the right to pursue subrogation claims. Some policies may not allow this. Most General Liability policies for design professionals allow the waiver as required by written contract. Workers Compensation policies must be endorsed and there is always a cost for the endorsement, and (most) Professional Liability policies will allow waivers of subrogation in favor of the client only without cost. Sound complicated? It is. Review waiver of subrogation requirements with your agent.

What is **Notice of Cancellation, Non-Renewal or Material Change**?

State laws say that insurance companies must send advance

(Cont'd. on Page 7)

Cracking the Code: Insurance-Related Contract Terms Explained (Cont'd.)

notice to the policyholder if they intend to cancel or non-renew a policy. This gives the policyholder a chance pay any past due premiums or secure replacement coverage. In Illinois, the notice requirements are: 60 days notice of intent to non-renew, 30 days advance notice for cancellation, except for 10 days notice of cancellation for non-payment of premium. There is no legal requirement that the insurance company send any notices to the policyholder's clients. Clients are concerned about your insurance coverage, and frequently ask that the policies be endorsed to provide notice to them in case of cancellation, non-renewal or material change such as reduction in limits.

The problem is that the only policy that can be endorsed to provide notice of cancellation to the client is the Professional Liability policy. This policy is relatively expensive and there is sufficient premium to support the administrative burden and additional risk assumed by the insurance company. However, the General Liability and Workers Compensation policies are processed on an assembly-line basis to keep costs down, and these insurers will not agree to send notice of cancellation to clients of the policyholder.

No insurance company will agree to send notice to your clients of intent to non-renew your policy, nor would you want them to. Furthermore, they cannot and will not endorse a policy to provide notice of "material change". Once a policy is issued, the insurance company cannot make changes to it, other than cancelling the policy. However, the policy holder can initiate changes without an advance notice period. Therefore, insurers could not comply with 30 day notice of material change requirements even if they wanted to.

Workers Compensation Insurance

What are **Workers Compensation Statutory Benefits**?

Every state has a Workers Compensation law which says that an employee who is injured on the job is entitled to have their reasonable and necessary medical expenses and disability benefits paid by their employer, regardless of fault. Workers compensation policies provide the benefits that the employer is required to pay for under the statute, thus the term "Statutory Benefits". There is no dollar limitation on the benefits payable.

What is the Workers Compensation Coverage Territory?

If an employee is working in a state for more than 30 days, this state must be identified as a state of operations on the policy. More than one state can be identified on a single policy, even though different states provide different levels of disability benefits. The first named insured is usually the corporate headquarters. Failure to report working in another state for more than 30 days can result in a loss of coverage.

What is **Voluntary Compensation**?

This is an endorsement to the Workers Compensation policy which provides benefits to persons whom an employer would not be required, by law, to cover, such as volunteers, domestic employees or farm workers.

What is a **Broad-form All-States Endorsement**?

This is an endorsement to the 1954 standard Workers Compensation policy to provide benefits to employees working in any state. Part Three of modern policies can be written to provide coverage in all states for employees who are temporarily working in other states. Therefore, this is an anachronistic requirement and the endorsement is not required. However, there are jurisdictions where an employer must obtain Workers Compensation insurance from a compulsory state fund or qualify as a self-insurer. These are North Dakota, Ohio, Washington, Wyoming, Puerto Rico, and the U.S. Virgin Islands. They are called "monopolistic" states.

What is **U.S. Longshoremen's and Harbor Workers' ("USL&H") Coverage**?

Workers Compensation coverage does not apply to injuries sustained on navigable bodies of water. Work on boats presents a unique exposure: drowning. The Longshore and Harbor Workers Compensation Act is a federal law that provides workers compensation benefits for employees other than masters or crew members of a vessel injured in maritime employment. A USL&H endorsement adds coverage for

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Cracking the Code: Insurance-Related Contract Terms Explained (Cont'd.)

injuries sustained while working on boats on navigable waters.

Commercial General Liability ("CGL") Insurance

Why is **Claims Made** not acceptable?

Does this mean we can NOT make any claims? At all? At anytime? No. General Liability insurance can be written on a "claims made" or an "occurrence" basis. "Claims made" coverage means that the policy only responds to claims that are made against the Insured and reported to the insurance company during the policy period. If "claims made" coverage is not renewed, there is no more insurance coverage for any new claims.

What is **Occurrence** coverage?

This means that the insurance policy that was in place when the "occurrence", or accident took place will respond to a claim, even if that claim is not made until after the policy expires. You can go back and report claims to expired "occurrence" policies, but you cannot report claims to expired "claims made" policies.

What does **Advertising Injury** mean?

Advertising injury is typically defined to include certain offenses, such as: oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or service; misappropriation of advertising ideas or style of doing business; or infringement of copyright, title, or slogan.

What is **Personal Injury Coverage with Fellow Employee Exclusion Deleted** (and why is it deleted) ?

Personal injury is often defined as: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction; or wrongful entry into or invasion of the right of private occupancy. While we do not expect to find coverage for claims by employees under a CGL policy, we also do not expect these types of claims from employees. There is no "Employee Exclusion" under the Advertising Injury and Personal Injury coverage section of the modern CGL policy, so the requirement to delete the "Employee Exclusion" is obsolete.

Why is the **General Aggregate** more than the other **Occurrence Limits**?

The occurrence limit is the most the insurance company will pay for one occurrence, regardless of the number of claims. The general aggregate refers to the maximum amount that the insurance company will pay for all claims reported against that policy. The aggregate limit is usually twice the per occurrence limit.

What is a **Per Project Aggregate**?

The General Liability policy can be endorsed so that the aggregate limits apply separately to each work site. This endorsement can be indicated on a certificate of insurance.

What is **Blanket Contractual Liability**?

There is some coverage for liability assumed under contract in a General Liability policy. The most important example of contractual liability coverage is for the tort liability of another that you assume in a written work agreement to pay damages resulting from bodily injury or property damage. Blanket contractual means that this coverage extends to all contracts into which the Insured enters, and the Insured does not need to list or schedule them. This is included in a modern Commercial General Liability policy.

What is **Broad Form Property Damage**?

This usually means coverage for work done by subcontractors, which is included in the Commercial General Liability policy. Some use this term to describe to an endorsement to a General Liability policy that deletes the exclusion for damage to property in the care, custody, or control of the insured and replaces it with a less restrictive exclusion.

What do **Primary** and **Non-Contributory** mean?

"Primary" status means that the policy will respond to a loss immediately. If there is other insurance, it will share in the cost of the claim only if it is also primary. If other insurance is written on an "excess" basis it will only respond once the primary policy has been exhausted.

"Non-contributory" means that the policy of the additional insured will not share in the loss until policyholder's insurance is exhausted, even if the policy of the additional insured is also primary. General Liability policies can be endorsed to provide primary and non-contributory status for additional insureds. Commercial **(Cont'd. on Page 9)**

Cracking the Code: Insurance-Related Contract Terms Explained (Cont'd.)

Auto Liability policies will usually provide primary, but not non-contributory, status for additional insureds.

What is the **CG 2010 1185**?

This is a standard form additional insured endorsement that was issued back in November of 1985, also known as "Form B". It provides the broadest coverage ever offered to an additional insured. It is also the shortest form ever issued. In insurance contracts, fewer words mean fewer limitations and more coverage! It has been interpreted by some courts to provide coverage for the sole negligence of the named insured, which is why many companies will not use this form.

Commercial Auto Liability Insurance

What is a **Combined Single Limit** ("CSL")?

Auto Liability can be written with separate policy limits for bodily injury and property damage, or for one limit that applies to both claims for bodily injury and property damage. This is called a Combined Single Limit. Most insurance professionals believe that a $1,000,000 CSL policy provides better coverage than a policy with limits of $500,000 for Bodily Injury and $500,000 for Property Damage, even though the total amount of insurance is the same.

What does **Hired and Non-Owned** mean?

This is liability coverage for the use of cars that the insured rents or borrows. The "non-owned" part provides liability coverage for the employer if an employee has an accident while driving a personal automobile on business. If a business does not own any automobiles, then this coverage should be endorsed onto the General Liability policy.

Hungry For More?

Contact HRH A&E

How To Get Paid Without Getting Sued (Cont'd.)

This article will focus on Sections 5, 10 and 15 of the Act, and attempt to explain the meaning and intent of the language contained within those sections.

Section 5 establishes the legal definitions of "payment application," "construction contract," and "contractor and subcontractor."

In Sec. 5(a), we see that "payment application" includes "*any invoice, bill or other request for periodic payment, final payment, payment of change order or request for release of retainage....*" An Architect's monthly or final invoices are requests for periodic payments, and are thus included in the above definition. (emphasis added)

Sec. 5(b), defines the legal meaning of a "construction contract" which is covered under the Act, which includes "*a contract or subcontract, entered into after the effective date of this Act, for the design, construction, alteration, improvement, or repair of Illinois real property....*" Not all Illinois property is included under the Act. The Act does not apply to "*contracts that require the expenditure of public funds and contracts for the design, construction, alteration, improvement, or repair of single family residences or multiple family residences with 12 or fewer units in a single building.*" (emphasis added)

Sec. 5(c), defines the legal meanings of "contractor" and "subcontractor" as being "*ascribed to them by the Illinois Mechanics Lien Act and cases decided under that Act.*" The definition of "contractor" in the Illinois Mechanics Lien Act specifically includes "an architect" within that definition. That is how we know architectural services are covered under this Act. Under this Act, an architect is either a "contractor" or "subcontractor", depending on whom the architect has its contract with. If the architect's contract is directly with the owner, the architect is a "contractor", using the legal term of art. If the architect has a contract with a design-builder for e xample, the architect is a subcontractor".

Section 10 is where the fun begins. Section 10 establishes payment provisions that may surprise an owner, as well as many unknowing architects. "*All construction contracts shall be deemed to provide the following:*" This statement means, that contrary to

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How To Get Paid Without Getting Sued (Cont'd.)

what your contract with your client may state, all contracts (except those specifically exempted by Sec. 5(b) above) shall be governed by the requirements of this Act. Surprise, surprise, surprise! Nothing is stated in the Act that allows any parties to contractually eliminate the applicability of the Act, or to allow for certain requirements to be replaced by others as mutually agreed to by the contracting parties. Apparently the Act applies to all but the specifically exempted project types, period. There is no case law yet that tells us if owners can "contract around" requirements of the act. Time will tell.

Sec 10 (1) provides for stringent payment procedures. *"If a contractor has performed in accordance with the provisions of a construction contract and the payment application has been approved by the owner or the owner's agent, the owner shall pay the amount due to the contractor pursuant to the payment application not more than 15 calendar days after the approval.* This is an extremely helpful requirement for contractors constructing the project. Once the architect approves the contractor's application for payment, the owner is obligated to make the payment within 15 days. This requirement may give many an owner heartburn. The owner's lenders normally require longer time periods to process and authorize release of funds to make the payment. Title companies normally need more time to do their work to check for filed mechanics liens and process the actual payments to the contractor and various subs. The actual agreement entered into between the owner and contractor may call for different and longer time periods within which to process payments. Is this a reasonable requirement that the payment be made within 15 days after approval? Probably not, but it is what it is. The owner is required to make that payment or be in breach of the requirements of the Act.

Let's assume that the owner and the owner's agent ("architect") do not approve the contractor's application for payment. What happens then? The portion of 10(1) that addresses this scenario is as follows: *"The payment application shall be deemed approved 25 days after the owner receives it unless the owner provides, before the end of the 25-day period, a written statement of the amount withheld and the reason for withholding payment. If the owner finds that a portion of the work is not in accordance with the contract, payment may be withheld for the reasonable value of that portion only. Payment shall be made for any portion of the contract for which the work has been performed in accordance with the provisions of the contract.* If the owner fails to make a partial payment for properly performed work, and fails to provide a written explanation of why the remaining portion was withheld, after 25 days from the date of application for payment, the entire amount becomes approved and therefore due and owing under this Act. This is a very powerful payment provision for a contractor.

When reading Sec 10(1), do not forget that an architect with a direct agreement with the owner is a "contractor' under the legal definition of "contractor" in Sec.5(c) above.

Therefore, if an architect submits his monthly invoice to an owner and an owner does not pay the amount invoiced or fails to state the reasons for not paying it in writing, the entire amount invoiced is approved and becomes due and owing after 25 days. If the invoice is approved, the owner will find it difficult to argue later that the architect's work was faulty.

The owner had 25 days in which to make the argument that the services were faulty. This should cut down counter-claims of defective work made by the owner against the architect in fee collections cases brought by the architect against the owner.

Sec.10(2) attempts to address payments due subcontractors. The provision appears to be self-explanatory, but fails to address all potential situations concerning payments or lack of payments to subcontractors. In Sec.10(2), payment is due after acceptance of the work and 15 days after receipt of payment by the contractor from the owner. This is a "pay when paid" clause. No payment is due the subcontractor until payment is received by the contractor from the owner. If payment is eventually made to the contractor, the subcontractor will be paid. If payment is never received by the contractor from the owner, the subcontractor, while still having mechanics lien rights, may not be successful in a breach of contract action against the contractor, due to the "pay when paid" clause. The "pay when paid" clause is certainly not written in the interests of subcontractors. It benefits contractors, since they will have no legal obligation to pay for their subcontractor's services until after they first receive payment for those services from the owner. It remains to be seen if subcontractors can "contract around" this provision of the act.

Section 15 pertains to interest on late payments and suspension of work for lack of payment. The provisions are clear and understandable. Payments due and owing accrue interest at the rate or 10% per annum. After seven days written notice, a party may suspend work for lack of payments due and owing.

Hopefully, this new Act will help you in your efforts to collect any outstanding fees owed to you.

2008 HRH A&E's Online Seminar's

October 13
Scary Stories From Around the Campfire
Eric Singer, Esq.

October 31
Halloween Special—Contracts From Hell
Ann Blume, Esq.

November 10
Managing Sustainable Design
Dan Buelow & Mark Blankenship

December 8
Presents for Santa -Ownership Transition
David Erikson, Esq.

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