The ConsensusDocs™ 300 Safe Harbor: Good Faith, Fair Dealing, and Fiduciary Duties

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A mutual waiver of liability is a central feature of a project alliance. This mutual waiver of liability commits alliance partners to release each other from all liability pursuant to project risks that arise from management decisions known as safe harbor decisions. Enforceability of the safe harbor clause has yet to be tested in any U.S. court of law. This legal research examines the safe harbor clause of ConsensusDocs 300™ Standard Tri-Party Agreement for Integrated Project Delivery in order to determine its potential for enforceability in the courts of the U.S. It adopts a classic legal research methodology focused upon primary and secondary legal research sources and designed to provide balanced findings in the form of a memorandum of law. U.S. courts have increasingly found implied duties of good faith and fair dealing in both design and construction contracts. U.S. courts have also found fiduciary relationships in cost-plus construction contracts. Enforceability of the safe harbor clause hinges upon the likelihood of courts finding fiduciary duties and duties of good faith and fair dealing within the express words of ConsensusDocs 300™. These findings suggest that the industry would benefit from a better understanding of the meaning and implications of both good faith and fair dealing and the expectations of a fiduciary.

Keywords: fiduciary, good faith and fair dealing, mutual waiver of liability, project alliance, multi-party agreement

Introduction

A multi-party agreement can be fashioned as an integrated project delivery agreement or it can be construed to form a project alliance. Integrated project delivery is distinguished from project alliances by the manner in which the parties allocate liabilities among themselves. When the parties agree to a conventional allocation of liabilities, their multi-party agreement is characterized as integrated project delivery. But when the parties agree to a mutual waiver of liability their multi-party agreement forms a project alliance. By stipulating a mutual waiver of liability in a multi-party agreement, the parties commit to release each other from all liability pursuant to project risks that arise from management decisions, except for willful misconduct (Sweet & Schneier, 2013, §14.13; see also AIA National | AIA California Council [AIACC], 2007, §6.1.1). These management decisions are known as safe harbor decisions. The enabling contract clause is known as the safe harbor clause.

The safe harbor clause has not yet been tested in any U.S. court. Does this safe harbor actually shield a party from liability? The goal of this inquiry is to explore that question. This will be accomplished by legal analysis adopting a classic legal research methodology focused upon primary and secondary legal research sources and designed to provide balanced findings in the form of a memorandum of law.

Background

ConsensusDocs™ 300

The ConsensusDocs™ 300 Standard Tri-Party Agreement for Integrated Project Delivery (CD300) is a multi-party form contract for owner, designer, and constructor (ConsensusDocs™ [CD300], 2007) First published in 2007, it was one of a comprehensive set of standard form contracts developed under the brand name ConsensusDocs™.

Twenty-two leading U.S. contractor, specialty subcontractor, owner, and academic organizations have endorsed this document suite. Two of the largest U.S. construction stakeholder organizations, the Associated General Contractors of America and the Construction Owners Association of America subscribe to ConsensusDocs™. The ConsensusDocs™ coalition claims to better protect the interests of all project participants while generating fewer disputes (ConsensusDocs™, n.d.).

Mr. Will Lichtig, a member of the Lean Construction Institute and construction management attorney with the firm of McDonough, Holland and Allen, PC, of Sacramento, California pioneered CD300. Mr. Lichtig's novel agreement was at first called the Integrated Form of Agreement. It later became CD300. This agreement was subsequently employed on several notable building construction programs, including the building program established by the Sutter Health Systems of California (AIA and AIA Minnesota, 2012).

Historical background of integrated project delivery

Owen Matthews of Westbrook Air Conditioning and Plumbing was the first use of the term "integrated project delivery." As used by Matthews, it depicted a team-based, lean project delivery methodology. Matthews' methodology was first used for a chiller plant installation project in Orlando, Florida (Matthews & Howell, 2005). A multi-party agreement was executed between Westbrook and its key subcontractors. The owner contract, however, was a typical design-build form of agreement between the owner and Westbrook (Forbes & Ahmed, 2011).

This first depiction of integrated project delivery did not conform to what is now generally recognized as the contractual model for integrated project delivery. Today's contractual model is a multi-party agreement between owner, contractor and design professional. The American Institute of Architects defines this type of integrated project delivery as "…a method of project delivery distinguished by a contractual arrangement among a minimum of owner, constructor and design professional that aligns business interests of all parties" (AIA National | AIA California Council [AIACC], 2007). Westbrook's multi-party agreement did not involve the owner. Therefore, it was not what we would today classify as pure integrated project delivery. Yet even the AIACC acknowledges that very few integrated project delivery projects are pure (AIA and AIA Minnesota, 2012). Many integrated project delivery projects adapt the collaborative relationships, management and organizational strategies while foregoing the multi-party agreement.

The AIA identifies nine pure integrated project delivery projects: Sutter Health's Cathedral Hill Hospital of San Francisco and Fairfield Medical Office Building of Fairfield, California; the MERCY Master Plan Facility Remodel of Lorain, Ohio; the Lawrence & Schiller office remodel of Sioux Falls, South Dakota; the SpawGlass Regional Office of Austin, Texas; the Autodesk, Inc. interior renovation in Waltham, Massachusetts; Cardinal Glennon Children's Hospital Expansion of St. Louis, Missouri; the St. Clare Health Center of Fenton, Missouri; and Encircle Health Ambulatory Care Center in Appleton, Wisconsin (AIA and AIA Minnesota, 2012).

Historical background of the project alliance

A small offshore oil platform built in 1990 in the Andres field, a relatively small reservoir in the North Sea, about 230 km northeast of Aberdeen, was the first known project to use the term "alliance" to describe its contractual framework (Thomsen & Sanders, 2011, p. 199). Working to an initial budget of £450 million, the Andres project came in six months ahead of schedule at a cost of only £290 million (Thomsen & Sanders, 2011, p. 200). Clearly, Andres was a highly successful prototype. The second alliance contract, also from the oil and gas industry, was the Wandoo Oil Field project in Western Australia. According to Thomsen & Sanders, Wandoo "…was delivered $13 million under the target budget of $377 million, and in 26.5 months against an industry norm of 34 months" (2011, p. 200). The first major building project awarded in the alliance model was the National Museum of Australia, completed in 2001, (Hauck, Walker, Hampson & Peters, 2004). An award-winning project, it was brought in on schedule and under budget (Thomsen & Sanders, 2011, p. 200). The AIA has identified only three projects that could be classified as alliances: Sutter Health's Cathedral Hill Hospital; the SpawGlass Regional Office of Austin, Texas; and the Autodesk, Inc. interior renovation in Waltham, Massachusetts.

The safe harbor

The salient feature of the alliance framework is its stipulation of a mutual waiver of liability for project risks arising from safe harbor decisions. In an inquiry about the enforceability of this multi-party, mutual waiver of liability, Christopher Noble of Noble & Wickersham LLP in Cambridge, England, an internationally respected construction attorney and a negotiator of the project alliance framework for the Nation Museum of Australia, opined, "Who the hell knows? But it sure encourages people to work out problems." (Thomsen & Sanders, 2011, p. 163). But what if people do not work out their problems, despite this mutual waiver, we ask? Is this waiver enforceable in U.S. courts?

The safe harbor clause does not prohibit lawsuits between the parties to an alliance agreement. Public policy if not judicial temperament would militate against the barring of remedies at law or equity pursuant to any lawful contract. There are then two avenues of inquiry: 1) is a mutual waiver of liability clause lawful? and 2) are legal defenses available to an aggrieved party?

Lawfulness of the mutual waiver of liability clause – A mutual waiver of liability clause is a contractual expression of an indemnification agreement. Indemnity is a legal duty to make good any loss, damage, or liability incurred by another (Garner, 2006, p. 351). Simply put, an indemnification agreement reallocates the duty to pay for loss, damage or liability from one party to another. Contractual parties are free to reallocate in ways that better suit their purposes. They do not have an unbridled right to do so, however, as statutory laws in most states establish limitations. Broad-form indemnification – circumstances where one party is required to pay for losses caused by another where the paying party had absolutely no fault in the loss - is prohibited in most states. Every state, however, will allow either narrow form indemnification – circumstances where the party who pays is mostly at fault - or intermediate form indemnification - circumstances where the paying party has at least some degree of fault, be it ever so small. Each party in a multi-party agreement can be found to have some degree of fault for management decisions because these decisions are by definition collaboratively reached and mutually agreed upon. Therefore, the mutual waiver of liability is likely a valid indemnification agreement in every state.

Legal defenses - The focus of our inquiry thus distills into the hypothetical: What legal defenses would apply in a lawsuit that reaches the safe harbor clause?

Risk allocation

The CD300 contract drafter must elect either §3.8.2.2, a traditional risk allocation clause or §3.8.2.1, the safe harbor clause. This safe harbor clause is expressed as follows:

> "1. [ ] SAFE HARBOR DECISIONS For those Project risks arising from collaboratively reached and mutually agreed-upon Project decisions made by the Management Group (Safe Harbor Decisions), the Parties agree to release each other from any liability at law or in equity for any act, omission, mistake or error in judgment, whether negligent or not, acting in good faith, in performing its obligations under this Agreement except to the extent such act or omission amounts to a willful default of an obligation under this Agreement." (CD300, 2007).

Projects for which the alliance framework is not desired will choose a more traditional allocation of risks between the parties. The AIACC expresses this in §6.1.3 as follows:

> "…The parties [to a multi-party agreement that is not an alliance] may agree to limit their liability to each other, but it is not completely waived. If errors are made, conventional insurance is expected to respond. Thus, there is a measure of traditional accountability…" (AIACC, 2007).

§3.8.2.2, in pertinent part, activates traditional risk allocation as follows:

> "2. [ ] TRADITIONAL RISK ALLOCATION Each Party shall be fully liable for its own negligence and breaches of contract and warranty arising from the performance of this Agreement, to the extent provided for under the law of the jurisdiction in which the Project is located, except to the extent as otherwise limited as set forth below (Indicate Applicable Exception):…" (CDC300, 2007).

The collaborative relationship

The key to understanding safe harbor clause §3.8.2.1 is embedded in the phrase "…Project risks arising from **collaboratively reached** and mutually agreed-upon **Project decisions** made by the Management Group…(emphasis added)." (CDC300, 2007). Context for interpreting the meaning of "collaboratively reached…project decisions" is provided in Article 3 of CD300. §3.4, in pertinent part, asserts as follows:

> "3.4 COLLABORATIVE RELATIONSHIP The parties each accept the relationship of **mutual trust, good faith and fair dealing** established by the Agreement and covenants with each other to cooperate and exercise their skill and judgment in furthering the interest of the Project…The Owner, Constructor, Designer and all member of the [Collaborative Project Delivery] Team agree to adhere to principles of collaboration based on **mutual trust, confidence, good faith and fair dealing**…(emphasis added)" (2007).

The words "mutual trust and confidence" are words of the art in law, depicting a fiduciary relationship. "Good faith and fair dealing" are also words of art, describing implied duties that U.S. courts are increasingly finding in every construction contract. In these words or art we find the kernel of the safe harbor defense. If any of the parties can be shown to have breached a duty of good faith and fair dealing or to have breached a fiduciary duty in the making of a mutual decision, that party's decision will be construed as failing to adhere to contractually stipulated principles of collaboration. For steering out of the safe harbor, a breaching party's decision cannot be protected by the mutual waiver of liability. Personal liability would attach to a decision reached in bad faith or in breach of a fiduciary duty.

Good faith and fair dealing

Although the term "good faith and fair dealing" is construed in different contexts, its application in the enforcement of a contracts is generally understood to be as described in the Restatement (Second) of Contracts §205, as follows: "…faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." (American Law Institute, 1987, §205).

Perhaps in response to §205 but also heavily influenced by the Uniform Commercial Code, contemporary US courts are holding contracting parties to the covenant of good faith and fair dealing (American Law Institute & National Conference of Commissioners on Uniform State Laws, 2009, §2-304; see also Sweet & Schneier, 2013, §17.02D). The courts have found many different applications of good faith and fair dealing. An owner cannot delay or interfere with the work of its contractor (*Lewis-Nicholson v. U.S.*, 1977). Contractors must cooperate with the owner, the architect, and all other project participants including engineers other consulting professionals, other contractors, subcontractors and suppliers (*United States v. Flintco*, 1988; *Allied v. Dick*, 1995; and *Crawford v. Bateson*, 1988). Constructors must bring design problems to the attention of the architect (*American v. Bolt*, 1997; and *Eichberger v. Folliard*, 1988). The applications of the doctrine of good faith and fair dealing are many and varied. Professor Sweet expresses the vigor of the doctrine as follows: "The outpouring of cases dealing with [good faith and fair dealing] demonstrates that the doctrine will be an important component of the construction contract obligation" (2013, §17.02D).

The fiduciary

A fiduciary is someone with a legal duty to act in the best interests of another or suffer the consequences for not doing so. Common examples of fiduciaries include trustees, legal guardians, and attorneys. The fiduciary duty and the duty of good faith and fair dealing are similar in that they both require attention to the interest of another. They differ in that the duty of good faith and fair dealing does not require a party to subordinate its own self-interests whereas the fiduciary must completely subordinate its own self-interest to the interest of another. That this complete subordination may result in economic harm to the fiduciary is of no importance. The courts treat a fiduciary's legal duties quite seriously. The breach of a fiduciary duty can result in liability for damages, civil contempt and even jail sentences.

The fiduciary first appeared in common law in the English case of *Keech v. Sandford* (1726). Exploring the contours of fiduciary duty to a minor child, that case established that a trustee owes a strict duty of loyalty. More recently in the U.S., Chief Judge Cardozo established a strict standard of fiduciary conduct, asserting "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place" (*Meinhard v. Salmon*, 1928). The reasoning in Meinhard was very similar to the reasoning found in Keech: the fiduciary is bound by the rule of undivided loyalty that exists to reinforce the integrity of trusting relationships (*Keech v. Sandford,* 1726; *Meinhard v. Salmon*, 1928). According to Chief Judge Cardozo, this rule remains "relentless and supreme." (*Meinhard v. Salmon*, 1928).

Although fiduciary duties can be implied, they are more commonly expressed in the words of contract. In a fiduciary relationship, trust and confidence is the usual standard (Sweet & Schneier, 2013, §17.02B, p. 343). "…the relationship is fiduciary when one party has superior knowledge and authority and that party is in a position of trust and confidence over the weaker party." (Sweet & Schneier, 2013, §11.04B, p. 160).

A cost-plus contract can burden a contractor with a fiduciary duty. In a Maryland Appellate Court case an express provision in the parties' contract for the construction of a home established that the contractor "accepted a 'relationship of trust and confidence'" with the owners, "agreed to further their interests by performing 'the Work . . . in the most . . . economical manner consistent with' their interests," and promised "to 'keep . . . full and detailed accounts'" (*Jones v. Hiser*, 1984). The Maryland court found the contractor to have a fiduciary duty to keep the purchasers informed of the rising expenses of the home, especially because there was no explanation of the difference between the estimated cost and the final cost of the home. The contractor was found to have breached his fiduciary duty by admitting that he did not, until the end of construction, know what the cost of the home would be.

In the design and construction context, fiduciary duties generally revolve around the relationship between the architect and the owner (Sweet & Schneier, 2013, §10.02C). When an architect becomes the owner's agent, fiduciary duties may be subscribed to that agency. These duties are manifest as professional advice during preconstruction, during the bidding process, and during construction on matters involving cost and performance. The act of providing a design is not enough to make an architect the owner's fiduciary (*Incorporated Town of Bono v. Universal Tank*, 1965). To become the owner's fiduciary an architect must take on administrative services, usually as additional services to the basic services proscribed in the owner-architect agreement. As an administrator, the architect has superior knowledge and authority and is in a position of trust and confidence over a weaker owner (*Carlson v. SALA*, 2007).

In a project alliance, fiduciary duties are infused in the relationship between owner, architect and contractor. Alliance contracts typically provide for the sharing of bonuses, establishment of a profit pool, and various other financial incentives for designer and contractor. But alliance agreements may also install non-financial goals: community relations, user satisfaction, and brand reputation to name a few. Pursuing these non-financial goals may not be in the financial interest of the designer and contractor. But the fiduciary duty would compel the designer and contractor to subordinate their own financial interests to the project's non-financial goals. Failure to do could lead to liability for damages for breach of fiduciary duty and with that the loss of the safe harbor.

Conclusion

The doctrine of good faith and fair dealing and the establishment of fiduciary relationships are well established in U.S. common law. The CD300 safe harbor clause is enforceable in every state. In a lawsuit that reaches the safe harbor clause question, a party may avoid liability arising from the acts of another party by showing either breach of good faith and fair dealing or breach of fiduciary duty pursuant to those acts.

Epilogue

Good faith and fair dealing is not only an implied duty in every construction contract obligation but it is has been and will continue to be an important component of construction contract obligations. Contractors may be bound by fiduciary duties through cost-plus contracts. Architects may become fiduciaries when they take on administrative services as agents of an owner. Engineers may take on similar administrative services and fiduciary duties therefrom in the context of civil and engineering works. Finally, it should be recognized that construction managers are increasingly being cast in the role of owner's agent when providing preconstruction services. These services are increasingly being provided in the context of design-build, construction management agency, construction management at risk, integrated project delivery, and other new forms of project delivery that involve the construction manager much earlier in the design process. Thus, construction managers are being thrust into the role of the fiduciary with accelerating frequency.

Although project alliances have been few in number these few projects have been notable success stories. Collaboration is a core principle of these alliances. It has been shown that collaboration is activated in law by both the doctrine of good faith and fair dealing and the fiduciary relationship. Of course good faith and fair dealing is an implied duty of every construction contract and construction managers are being charged with fiduciary duties with accelerating frequency. One cannot escape the realization that collaboration, the core principle that is presumed to drive the success of project alliances is also an implied or express provision of construction contracts in every form of project delivery. Acknowledging the existence of these implied and express duties can serve to militate the adversarial excesses that still exist in our industry.

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