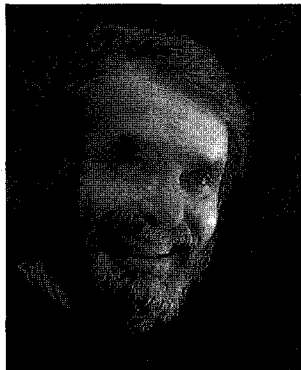


A VIEW FROM THE TOWER

When I started writing this column two years ago I vowed never to write about payment conditions or third party claims against construction participants for purely economic losses. I counted ten articles on this topic in *The Construction Lawyer* alone since 1990 and three since I started writing this column. But I wrote about payment conditions in October, 1996, and today I am tackling the economic loss rule.



Justin Sweet

What triggered breaking my vow were three recent cases¹ all of which allowed contractors to sue engineers in tort. Before I note my reactions let me do a quick historical sketch of the attempts of parties who participate in design and construction, architects, engineers and contractors, prime and sub, to sue each other, mostly claims by contractors against design professionals.

Early such claims met the defense that there was not privity between the plaintiff and the defendant. While the privity defense fell in injury cases, it hung around in a number of states in economic loss claims. Then the defense is shifted to the economic loss rule. The doctrine, which mainly grew out of manufacturer's liability, limited tort claims to those which involved claims for personal harm or harm to property. This defense was successful in many though not all cases.

Yet the trend in the construction participant cases began to go the other way and allow such claims to be brought. Some cases simply refused to apply the privity or economic loss rule defenses. Others finessed these defenses without directly attacking them, such as finding something like privity, recognizing a special duty among these actors or focusing on misrepresentation, often broadly defined. In any event, though I didn't like the outcome, I had to concede that the chances are that such claims will not be decided by summary judgment in favor of the defendant and would have to be defended on the merits.

We don't go much for legal defenses these days. We want to try the claims on the merits and give "victims" a chance to transfer their economic losses to the parties whose negligence may have caused them. And at least these claims were not like the mass disaster torts claims like hotel fires or those in railroad yards. The disputes were between a limited number of participants all of whom knew that their negligence could cause economic losses to other participants.

Despite the surface attractiveness to such justifications, those of you know who have read my writings know of my objections to such claims. My concern is over the wreckage

they make of planning and the unruly nature of tort law. But, as in many matters, I seem to be swimming upstream.

Were I design professional, how would I respond to such potential liability? I would try even harder to do my job well. Next, I would look carefully at any commission that a client has offered me. I would check out the contractor. Does he make a lot of claims. Did he make a "dirt low" bid on this job? Is he doing work that he's never done before. Does this project push the state of the art?

Next I would make sure I am covered by liability insurance. But I must also watch the deductibles and defense cost provisions.

Suppose I am a geotechnical engineer. If the owner wants to put the risk of unexpected subsurface conditions on the contractor (and maybe even if he intends to take that risk himself through a Differing Site Conditions Clause), I will try to persuade the owner to include an exculpatory provision in the prime contract for my protection. But will this be applied in a tort claim? I can also try to get an indemnity clause from the owner in my contract. These may not be easy to get. In any event there will be transaction costs and legal uncertainties, one reason why I have attacked such third party claims.

Were I the design professional performing the usual site services, I would worry if there were a "no damage" or "no pay for delay" clause in the prime contract. If the contractor can't sue the owner there is a good chance he will come after me. If there were such a clause I would try to get exculpation in the prime contract (again tort imponderables) or indemnification in my contract with the owner. Again, transaction costs and uncertainties. Will I be able to assert an exculpation defense based upon a contract to which I am not a party?

My final point. I have argued that the design professional should owe a duty to workers which would permit a tort claim against the design professional for negligence.² But courts have not listened, instead following boilerplate "The architect only owes a duty to his client" provisions. But if courts are finding a duty in the economic loss claims against design professionals, how can the courts have the chutzpah to conclude the design professional owes no duty to workers? Personal harm always received greater protection than economic harm. Try again, you lawyers for injured workers!

Clarification: I wrote in my January 1997 column that the AAA is "most" immune to market needs. It should have read, "The AAA is not immune to market needs."

Endnotes

1. *Tommy L. Griffin Plumbing Co., v. Jordan, Jones & Goulding*, 463 S.E.2d (S.C. 1995); *Jim Excavating Service, Inc. v. HKM Assoc.*, 878 P.2d 248 (Mont. 1994); *Reliance Ins. Co. v. Morris Assoc.* 200 A.D.2d 728, 607 N.Y.S.2d 106 (1994).

2. *Site Architects and Construction Workers: Brothers and Keepers or Strangers?* 28 Emory L.J. 291 (1979).

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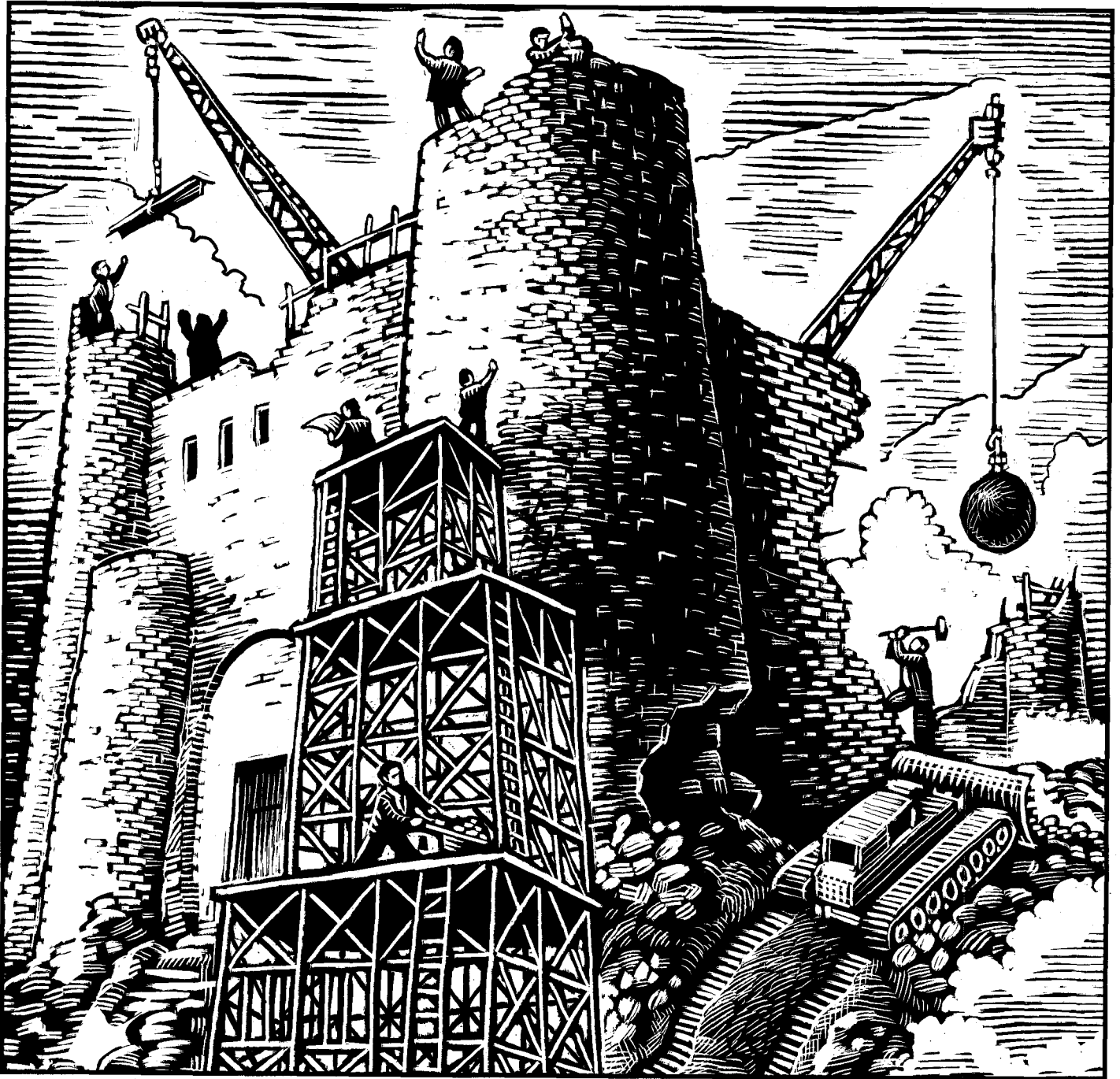
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