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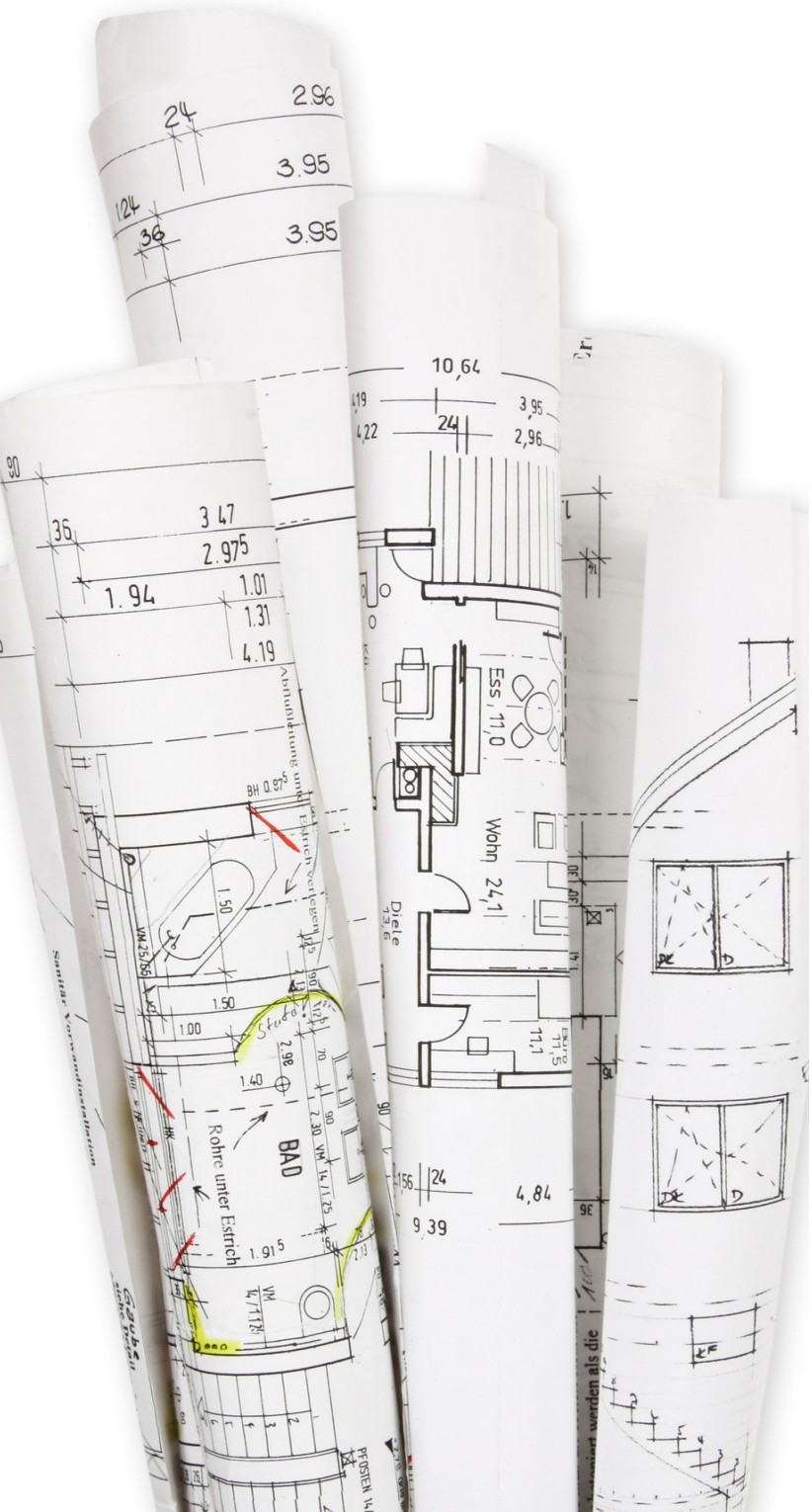

CONTRA PROFERENTEM, RESPONDEAT SUPERIOR & FORCE MAJEURE DOCTRINES

Latin for: "Against the Offeror," "Let the Master Answer" & "Superior

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Three Latin contractual terms that occur in design professional agreements, are the age old Contra Proferentem, Respondeat Superior and Force Majeure doctrines. Agreements may be long and technical, and Latin is hard, so maybe you breezed past them, but it is better to have an understanding of how they apply to professional design contexts. (Is there a doctrine in the house—or in your contract?)

THE CONTRA PROFERENTEM DOCTRINE

This legal doctrine in contract law which states that any clause considered to be ambiguous should be interpreted against the interests of the party that created, introduced, or requested that a clause be included. It guides the interpretation of an agreement in a legal sense. As an example of a contract clause unfavorable to an architect or engineer (A/E) is as follows:

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CONTRA PROFERENTEM*: The Parties agree that in the event this Agreement is subject to interpretation by a third party or legal tribunal, such third party or legal tribunal* ***shall not*** *construe this Agreement or any part of it against the party as the drafter of this Agreement.*

In all fairness, when an A/E is presented an agreement with the above clause, any ambiguous term should be construe against the person who drafted the agreement. That is usually an attorney who wrote the Contra Proferentem clause above in order to protect his or her client—the project owner. However, it is good A/E risk management to strike this clause out of a prospective client proposed agreement, or change the "shall not" to "shall."

https://www.lifeofpix.com/photo/business-people-discussing-contract/

The reasoning behind this doctrine is to encourage the drafter of a contract to be as clear and explicit as possible, and to take into account as many foreseeable situations as it can. Eric Posner (an American law professor at the University of Chicago Law School teaching international law, contract law, and bankruptcy, and as of 2014, the 4th most-cited legal scholar in the United States) stated:

> *The contra proferentem rule, for example, might encourage the drafter to be more explicit and to provide more details about obligations. This may reduce the chance that the other party will misunderstand the contract; it also may facilitate judicial interpretation of the contract.*

Dr. Uri Weiss (Fellow at the Polonsky Academy – Van Leer Institute, in Law & Economics, Legal Negotiation) stated:

> *The Contra Proferentem rule motivates the less risk-averse drafter to refrain from manipulating the other side by making the contract unclear. Thus, the two parties can agree that the less risk-averse side will formulate the contract, thus reducing the cost of the transaction. Without this rule, there might be a moral hazard problem.*

Additionally, the rule reflects our nation's court's inherent dislike of standard form "take-it-or-leave-it" contracts. The doctrine is often applied to situations involving standardized contracts, or where the parties are of unequal bargaining power. In the situation where design professional is presented with such an agreement, they may not be able negotiate onerous terms. A court may view such contracts to be the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, the doctrine may be applied, giving the benefit of any doubt in favor of the party that did not provide the contract to an A/E.

THE RESPONDEAT SUPERIOR DOCTRINE

This legal doctrine in contract law states that a party is responsible for (has vicarious liability for) acts of their agents. In the design professions, consultants to an A/E would be considered "agents" to the prime professional. In other words, initially the prime professional is responsible for their consultants' negligence on a project. First, the owner of the project would make a claim against the A/E that engaged the consultants. Of course, that is not where to trail ends, because the A/E as the prime professional then would make a claim against their consultant(s) that where responsible for their negligent errors or omissions.

An example of a Respondeat Superior clause in an owner-driven agreement would read something like the following, but it would be better risk management to strike the last 2 sentences:

> RESPONDEAT SUPERIOR*: A/E is responsible for coordination of all of its consultants, including the negligent acts, errors or omissions of its Consultants on this project.* ~~*Owner has relied upon A/E's and A/E's consultants' expertise when entering into this Agreement, and further relies upon A/E's and A/E's consultants' expertise for the performance of services for this project. However, such reliance shall not relieve the A/E to be responsible for its consultants' negligent acts, errors or omissions on this project.*~~

Words such as “expertise” and “reliance” would raise the A/E’s standard of care.

As another example, when a truck driver's negligence results in a truck accident, a person injured in the accident may be able to bring the truck driver's employer, usually a trucking company, into the lawsuit. In the context of truck driver and its employer, or an A/E and its consultants, there are three elements to this doctrine:

1.) the consultant committed a negligent act, error or omission on the project,

2.) the consultant did so within the scope of their services on the project, and

3.) the consultant did so to the benefit of the A/E for the project.

https://www.pigsels.com/en/public-domain-photo-zbrrx

Under Respondeat Superior, a consultant may not able to make the A/E’s client whole, within their limits of insurance. Thus, the negligence places the vicarious liability on the A/E that had the right and duty to control the individual who caused the act, error or omission.

THE FORCE MAJEURE DOCTRINE

Circumstances or events may occur that are outside the control of either party in a design professional agreement. This doctrine states that neither party shall be liable for loss arising from any cause beyond its reasonable control. It gives the parties a way to deal with unexpected disasters, like war, fire, earthquakes, hurricanes, terrorist acts, pandemics and the like. This doctrine is also sometimes referred to as an “act of God” clause.

https://www.thebluediamondgallery.com/wooden-tile/d/disaster.html

This doctrine is helpful to A/Es where there may be a strict schedule for preforming their professional services, so this clause is what a client should accept. Thus, it allocates the risk between the parties if an event occurs. A sample provision is as follows:

> FORCE MAJEURE*: Neither party shall not be deemed in default of this Agreement to the extent that any delay or failure in the performance of its obligations results from any cause beyond its reasonable control.*

IN CONCLUSION

These doctrines have been part of English contract law for over 600 years, and have carried over to our American jurisprudence to this day. And in all fairness, these doctrines make sense, if they are not twisted to burden an A/E with unreasonable expectations or legal exposures. (One more time—“Is there a doctrine in the house”—or in your contract?)

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 34 years. As a Fellow of the American Institute of Architects and Chair/Hearing Officer of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

MARK YOUR CALENDARS FOR ERIC'S UPCOMING CONTINUING EDUCATION PROGRAMS:

Speaking Engagements:

"Ethically Looking Outward – Architecture/Interior Design Perspectives"
The Alberta Association of Architects,
Banff Alberta, Canada
Virtual Kickoff event on April 23, 2021 followed by a month of professional development (PD) presentations from April 24, 2021 to May 24, 2021.

"Ohio Engineering Law & Ethics"
Virtual Presentation
7.5 CPD for Engineers – Includes 2.0 Ethics
June 21, 2021 – 8:30 am – 4:30 pm

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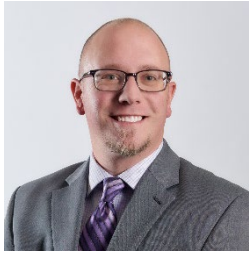

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