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CRITICAL ANALYSIS OF THE NEW AIA-B141-1997 EDITION (PART II)

By: Michael K. De Chiara

This is Part II of a multi-part series of articles critically analyzing the new 1997 edition of the American Institute of Architects Standard Form of Agreement Between Owner and Architect with Standard Form of Architects' Services, AIA-B141-1997 Edition ("B-141-1997").

Continuing with my analysis of new Section 1.3.8.5, it states, as you may recall: "This Agreement may be terminated by the Owner upon not less than seven days written notice to the Architect for the Owner's convenience and without cause." Since I was not involved in drafting this new agreement, I can only speculate that the rational explanation for the inclusion of this provision, which only hurts Architects, in the new B141-1997 is that a very significant concession has been made to Owners. Why this concession was made is a mystery. There is also a new related provision, Section 1.3.8.7 which provides that in the event that the Architect is terminated for Owner's convenience the Architect shall be entitled to "Termination Expenses" which are defined to "include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect. On its face, this separate but related paragraph appears to be an attempt to ameliorate the effect of Section 1.3.8.5 by giving the Architect its profit on the value of services not performed by Architect as of the date of its termination. Unfortunately, this provision is, in my opinion, inadequate compensation for the inexcusable concession contained in Section 1.3.8.5 for several reasons. First, depending upon when, in the progress of the project, the Architect is terminated, they may be no "profit" on the remaining work. It is also quite possible that although there is no "profit" left in the job at the time the Architect is terminated by the Owner purely for the Owner's convenience, the Architect is still dependent on the cash flow from the rest of the job and this will no longer be available. Second, the issue of whether there was a profit on remaining work and how much profit there was is the type of issue that will create a dispute and resultant factual issues that will probably require the involvement of lawyers for both the Owner and the Architect. Often, the lawyers get involved, the cost of resolving the dispute might well escalate beyond the costs of the disputed profits. Also, a dispute between an Owner and an Architect over lost profits for the Architect is generally not covered by the Architect's professional malpractice insurance and hence is something the Architect will have to fund out of personal assets. As between a recalcitrant Owner and an Architect, the Owner is usually in a better position to absorb lawyers fees. This is a provision that looks better on paper than in the light of the practical realities of architectural practice. Finally, any sophisticated Owner, if it even uses a modified

version of B-141-1997, will simply cross-out the provisions of Section 1.3.8.7 and leave untouched Section 1.3.8.5.

The next portion of the new AIA-B141-1997 addressed by this analysis is the new Article 2. Generally, it appears that the new Article 2 is an attempt to restore the Architect to the status of “Master Builder” by recapturing some responsibilities which, since World War II, have been gradually conceded to Construction Managers, General Contractors, and more recently to Owner’s Representatives. While the goal is laudable, the attempt is fundamentally flawed and will create additional new burdens, risks and liabilities for Architects for which they will not be adequately compensated.

Gone is the integrated form of agreement which followed a pattern from Article 1-“Architect’s Responsibilities” to Article 2- “Scope of Architect’s Basic Services” to Article 3-“Additional Services” and so on. Now there is a document entitled “Standard Form of Agreement between Owner and Architect with Standard Form of Architect’s Services,” this ten page document, contains a cross-reference in Article 1.4 - “Scope of Services and other Special Terms and Conditions,” then incorporates another nine page supplemental document which describes the Architect’s services entitled “Standard Form of Architect’s Services: Design and Contract Administration.”

This new supplemental document breaks the Architect’s services into nine distinct categories – Section 2.1-“Project Administration Services”; Section 2.2-“Supporting Services”; Section 2.3-“Evaluation and Planning Services”; Section 2.4-“Design Services”; Section 2.5-“Construction Procurement Services”; Section 2.6-“Contract Administration Services”; Section 2.7-“Facility Operation Services”; Section 2.8-“Schedule of Services”; and Section 2.9-“Modifications.”

New Section 2.1 – “Project Administration Services” contains several new and problematic provisions which create added responsibilities. These added responsibilities equate to increased liability without commensurate economic gain in proportion to and as proper compensation for such added responsibilities and risks.

For example, the first sentence of new Article 2.1.1 states: “The Architect shall manage the Architect’s services and administer the Project.” What does “administer the Project” mean. Does it mean that the Architect will now be responsible for the proper buy-out of the project? Perhaps. Does it mean that the Architect may have increased liability if the project fails to follow its scheduled construction path, that is for delay in completion of the Project? Probably, especially in light of the new Article 2.2 (discussed below). Does it mean that the Architect will be responsible for cost over-runs? Again perhaps. The point is, this new language has created loopholes large enough for even marginally competent lawyers representing Owners, contractors and Construction Managers to shift liability to Architects for these types of things.

Shifting our analysis to new Article 2.1.2, it states: “When Project requirements have been sufficiently identified, the Architect shall prepare, and periodically update, a Project schedule that shall identify milestone dates for decisions required of the owner, design services furnished by the Architect, completion of documentation provided by the Architect, commencement of construction and Substantial Completion of the Work.” This language literally requires that the Architect now provide a project schedule which,

from the Owner's perspective, will mirror and should be as complete as any schedule which any competent Construction Manager would prepare for the same project. The phrase "shall identify milestone dates for decisions required by the Owner" is not limited to design decisions. This broad language, together with the self imposed mandate to pinpoint for the Owner when construction will commence and when "Substantial Completion" will occur has created huge potential liability for architects who are ill-equipped to enable them to properly assess, schedule, calculate and target when these events will occur. In this age of specialization, large construction management firms employ scores of specialists in critical path analysis, scheduling, purchasing, accounting and project management in order to perform these same services. It makes little sense for Architects to embrace such responsibilities with no assurance, and little chance, that they will be compensated sufficiently to properly staff their projects to adequately and completely provide these services. This addition of Article 2.12 to the "Standard" agreement will create significant new liability for the uninformed. The next several parts of this analysis will continue to focus on the new pitfalls and liability created by the new form of B-141.

Good News/ Bad News: the Supreme Court's Recent Rulings on Sexual Harassment

By: Carol J. Patterson, Esq.

In some cases, employers may find that what they don't know can hurt them. Even though top management is not aware of a supervisor's harassment of employees, a firm may face liability to the complaining individuals. Two opinions issued by the Supreme Court last summer clarify the parameters for employer liability for sexual harassment by supervisory personnel. These two decisions were particularly important because both address situations in which the employees did not complain to higher management. Instead, they resigned, consulted counsel and sued.

Aware that employment-related claims are on the rise, most employers have adopted policies prohibiting illegal discrimination and sexual harassment. It is important to recognize that once a policy is adopted, it should be subject to period review so that it is up to date and consistent with any changes in the law or clarifications regarding its interpretation.

Many firms should review their policies on sexual harassment as a result of these two Supreme Court opinions last summer. While these decisions might be viewed as an expansion of potential employer liability, the court provided valuable guidance regarding actions that can be taken by management to reduce the risks of successful claims. Employers should confirm that their policies and procedures are consistent with applicable guidelines.

Both cases send a clear message to employees: they must have *and* effectively enforce policies prohibiting sexual harassment. In Faragher v. City of Boca Raton, the Supreme Court held that an employer could not avoid liability for a supervisor's sexual harassment of an employee if the misconduct resulted in a "tangible employment action" such as discharge, demotion or undesirable reassignment. The

plaintiff in Faragher was a female lifeguard who was driven to resign because of the hostile work environment created by her supervisors. She alleged numerous incidents of blatant discriminatory conduct over a period of five years. The employer, the City of Boca Raton, had not distributed its anti-harassment employees to plaintiff's direct supervisors and they were unaware of it. She told a manager who was one of her supervisors' peers about the problem, but they both believed that this discussion was off the record and he did report her allegations. Although she never complained about the misconduct to higher management and city authorities were unaware of the supervisors' conduct, Boca Raton still faced liability.

In the other case, Burlington Industries v. Ellerth, the plaintiff, a saleswoman, alleged that she was forced to resign because a supervisor harassed her by insisting that she socialize with him. Nevertheless, she was promoted and never suffered any adverse employment action. Even though she was aware of the employer's policy against sexual harassment, she did not complaint about the supervisor's conduct to higher management before leaving the company. The court decided that the employer could avoid liability if it could demonstrate that it exercised "reasonable care to prevent and correct" any sexual harassing behavior and the employee failed to take advantage of available corrective opportunities.

In both of these cases employers faced potential liability for the misconduct of supervisory personnel, despite higher management's lack of knowledge of the circumstances. Clearly, employers are expected to have strong anti-harassment policies which are disseminated to all employees and enforced. The firm's policies should clearly communicate intolerance for sexual harassment and include procedures designed to encourage employees to report misconduct so that prompt remedial action can be taken.

Practical Guidelines for Employers

What is the practical impact of these recent Court decisions? Employers must be able to establish that they are taking reasonable precautions to prevent sexual harassment in the workplace. Appropriate measures include the following:

1. Adopt a written policy prohibiting sexual harassment and assure that all employees are aware of it. The policy should be included in the firm's policy manual. Posting the policy in the office increases the likelihood that employees will be aware of it. Unless the office is small, it should be posted in more than one location.
2. Maintain a record of distributing the anti-harassment policy. This can be accomplished by having employees sign to acknowledge receipt of the policy manual or an addendum describing the policy.
3. Educate supervisors about the importance of the prohibition against sexual harassment. Mandatory participation in training programs demonstrates management's commitment to enforcement of the policy and creates a record of its effort to prohibit illegal conduct.

4. Investigate claims promptly and thoroughly. Follow up with all potential witnesses identified by the complaining employee and the alleged harasser. Document the investigation.

5. Provide employees with alternative means of lodging a complaint so that there is no risk of an employee being forced to turn to the individual who is the alleged harasser.

6. Maintain confidentiality consistent with the need to conduct a thorough investigation. An employer cannot assure a complaining employee absolute confidentiality. An investigation will require some sharing of information.

7. If the investigation indicates that harassment has occurred, the employer must take prompt action to remedy the situation, up to and including discharge of the harasser. The severity of the sanction will depend upon the circumstances.

**WORK PERFORMED AFTER COMPLETION OF PROJECT MAY
EXTEND DESIGN PROFESSIONALS' LIABILITY THROUGH
APPLICATION OF "CONTINUOUS TREATMENT" DOCTRINE**

by
Matthew S. Quinn

Although a design professional's contract may (and typically does) provide that its services shall be complete upon the completion of construction, often an architect or engineer continues to provide services on a project, whether through actual additional design services or mere verbal consultation and advice, long after the official completion of construction and occupancy by the owner. Depending on the type and extent of work involved and the relationship between the parties, the design professional may perform these services free of charge. Gratuitous or not, however, even the most minor of services provided after completion of construction may result in an extension of a design professional's liability for claims arising from any of its work on the project.

New York and all other states impose restrictions on the amount of time a party has to commence a lawsuit. These time limitations are commonly referred to as statutes of limitations.

Statutes of limitations embody an important public policy of giving repose to human affairs. They are designed to protect litigants from stale claims because the passage of too much time between conduct and the assertion of claims arising from such conduct may prejudice a defendant's right to obtain a fair resolution of the dispute. In other words, statutes of limitations are designed to ensure fairness to defendants and to prevent surprises brought about by the attempt to breathe life into matters that have laid dormant so long that proof, witnesses and memories have disappeared.

As explained in a prior issue of the Quarterly Review, a recent amendment to the Civil Practices Laws and Rules of the State of New York ("CPLR") clarified the statute of limitations applicable to claims against certain professionals, including architects and engineers. CPLR §214(6) now provides that the statutory period

applicable to actions against these professionals is three years regardless of whether the plaintiff bases its lawsuit on allegations of negligence or breach of contract.

While the length of the statutory period applicable to actions against design professionals appears to have been finally settled by the amended statute, another question concerns when this three-year statute of limitations begins to run. In cases involving an owner's claims directly against an architect or engineer arising out of alleged defective design in connection with the construction of a building, the time period in which the owner may commence the lawsuit generally begins to run upon completion of construction.¹

An exception to this general rule, however, is the "continuous treatment" doctrine. Where applicable, the doctrine suspends accrual of the malpractice cause of action until all services are completed or the professional relationship is terminated.

The continuous treatment doctrine provides that when services provided by a professional which include wrongful acts or omissions have been continuous and are related to the original retention, the statutory period does not commence to run until the completion of all services. Although the doctrine was originally formulated in the context of medical malpractice actions, courts have applied it in actions against other professionals including attorneys, accountants, and architects.²

The rationale for the application of the continuous treatment doctrine again involves fairness although, in this case, fairness to plaintiffs. The doctrine developed as a result of the perception that a client cannot reasonably be expected to assess the quality of the professional service while the service is still in progress.

The impact of the continuous treatment doctrine can be significant. For example, under normal circumstances, an owner's action against an architect for negligent design of a building, the construction of which was completed on January 1, 1999, must be commenced on or before January 1, 2002. However, if the architect continues to provide advice or design services after the completion of construction, perhaps to address a minor problem which arose during construction, a continuing concern of the owner or merely to foster the relationship with the owner in the hope of future business, the time period in which the owner may commence the same claim in connection with the original design work may be extended until three years from the last date on which the architect provides consultation on the project.

The application of the continuous treatment doctrine is not boundless, however. In order to prevent a complete abrogation of the statute of limitations, the doctrine is limited in two important respects. First, there must be ongoing services for the same or related work after the alleged negligent act or omission. In other words, the

¹ If the engineer is retained by the architect, the architect's time to commence an action against the engineer for contribution or indemnification for claims asserted by the owner against the architect may not begin to run until the owner obtains a judgment against the architect and may be governed by a different statutory period.

² Although there does not appear to be any authority for application of the doctrine to professional engineers, there is no reason to believe that the doctrine would not be applied to claims against engineers under appropriate circumstances.

“continuous treatment” must involve services for the same or related scope of work originally provided continuing after the alleged acts of malpractice and not a mere continuity of a general professional relationship. Therefore, if the design professional continues to provide general consultation to an owner, but that consultation is unrelated to a project for which the design professional was previously retained, the continuous treatment doctrine will likely not apply and the statute of limitations applicable to claims arising from the prior project will not be extended.

The second requirement for application of the continuous treatment doctrine is that the services provided by the professional must, in fact, be ongoing and continuous. In other words, the existence of substantial gaps in time between the services provided after completion of construction will break the continuity essential for the application of the doctrine.

For example, a decision by a New York appellate court involved a plaintiff school district which asserted claims against architects it retained to provide administrative supervision of a building construction project.³ The court found that the statute of limitations applicable to the school district’s claims commenced upon the architects’ issuance of a letter confirming their opinion that the general contractor had completed all of its contractual obligations and was eligible to receive final payment. Although the architects were advised of a roof leakage problem at the building at or around the same time, they did not affirmatively address the roof leakage problem until three-and-a-half years later, at which time they undertook to conduct certain tests.

In rejecting the school district’s assertion of the continuous treatment doctrine, the appellate court found that, notwithstanding discussions between the architects and the school district regarding the roof leakage problems during the course of reviewing roof repair specifications for another building, “there was a three-and-one-half-year gap between the termination of the original professional relationship and the [a]rchitects’ subsequent attempt to diagnose the problem. Without continuity of treatment for the particular problem involved, the rationale for suspending accrual of the cause of action dissolves.”

Whether the continuous treatment doctrine will apply to extend the statute of limitations will, of course, always depend on the particular facts of each case. However, a design professional, often eager to provide continuing services to a client, should be aware that the extension of that relationship may also extend the client’s time to commence a malpractice action. An awareness of this possibility will assist the design professional in determining whether to continue services after completion of a project.

DESIGN PROFESSIONALS AND THE Y2K PROBLEM

Part II

³ Naetzer v. Broeton Cent. Sch. Dist., 50 A.D.2d 142 (4th Dep’t 1975), rev’d on other grounds, 41 N.Y.2d 929 (1977).

by

Raymond T. Mellon

While liability for specification of non-compliant Y2K systems in present and future projects is fairly clear for design professionals, completed projects represent a gray area that will be a fertile ground for litigation. Since recognition of the Y2K problem has been an evolving phenomenon, the analysis for potential negligence arising from the specification of non-compliant Y2K components in completed projects will, again, hinge upon what was the then prevailing standard of care in the design professional community. For projects substantially completed before 1990, the specification of non-compliant Y2K component systems will, in all likelihood, not be deemed negligent because of the community's ignorance of the issue.

The analysis of liability for projects completed in the early to mid-1990s may be different as recognition of the Y2K problem slowly increased. Additionally, designers that were involved with the design and specification of "smart" buildings or medical or computer facilities may face a higher standard of care. In such a situation, it may be determined that a design professional specializing in such design should have known of the Y2K problem and specified compliant systems. In any event, such projects will constitute difficult factual scenarios that will require a trial and a determination by the trier of fact as to whether the design professional was negligent.

Another important liability issue for completed projects concerns the scope of the design professional's current obligation to mitigate the potential damages that could occur from specified and installed component systems that are at risk of not being Y2K compliant. If a design professional is certain that such a failure will ultimately occur, it should promptly provide the client with all relevant information concerning the component system in question, as well as any information or technical data relating to remediation of the problem. At the same time, the design professional should also provide notice to its insurance carrier of the potential claim for damages that may result from this completed design project. As set forth further below, such a claim would be covered by most errors and omissions insurance policies.

Unfortunately, most design professionals will not be able to ascertain with any degree of certainty as to whether a particular component system will fail because of a potential Y2K problem. In such a circumstance, the design professional runs the risk of causing an Owner/Client to incur remedial costs for a problem that may never materialize. Of course, the Owner/Client will seek recovery of such costs from the design professional. While most professional malpractice policies will provide a defense and indemnity for such claims, the design professional's premature attempts at remediation will simply result in potential claims and lengthy litigation. Therefore, at

this time prudent design professionals should limit their remediation efforts on completed projects to those situations where component systems' failure is a certainty.

Insurance

As insurance companies face the prospect of billions of dollars worth of claims and litigation costs, efforts are being made to limit possible coverage and litigation costs. For example comprehensive general liability ("CGL") carriers may seek to limit liability by claiming that the loss is not covered. Inasmuch as CGL policies are designed to cover accidental or otherwise unforeseeable losses, the carriers may claim that losses arising from Y2K problems were clearly foreseeable and avoidable. Ultimately, such coverage disputes will be decided by the courts through extensive litigation.

The good news for design professionals is that, as of now, most malpractice insurance policies cover claims of negligence relating to Y2K issues. While some insurance carriers in other fields have recently issued policies with specific Y2K exclusions, it does not appear that this trend will extend to design professionals. Further, to the extent that design professionals have malpractice insurance policies for multiple years, such coverage will extend a few years into the new millennium, past the time when all Y2K problems should have already been discovered. Thus, to the extent that a design professional's malpractice policy is up for renewal it would be a prudent business practice to obtain a renewal for three years. In this way the design professional would obtain insurance coverage for this important issue through year 2002.

An additional insurance factor which should comfort design professionals is that most errors and omissions policies provide coverage on a "claims-made" basis, i.e., all negligence claims made during the term of the policy are covered. As a result, a designer's current malpractice policy will be applicable and provide coverage to projects completed years ago. To the extent Y2K liability arises from past projects, coverage will be provided through current insurance policies which do not have Y2K exclusions. Thus, even if a design professional's diligent efforts at Y2K compliance are unavailing, insurance coverage will be provided. An ancillary issue for design professionals is that policy limits be sufficient to cover the possible exposure. Since the Y2K issue is fraught with many uncertainties, design professionals should promptly contact their insurance agents to obtain advice on the appropriate policy limits for their malpractice policies.

Finally, some insurance carriers have stepped into the void and have offered a new product which specifically covers claims and damages arising from the Y2K problem. The downside to this coverage is that the policies are prohibitively expensive, essentially making the policyholder self-insured. Since the typical design professional's malpractice policy covers the Y2K problem, this additional insurance is not necessary.

Conclusion

The Y2K problem will manifest itself within one year whether or not design professionals take necessary remedial action to prevent liability. The prudent designers have already instituted the corrective action listed above and have attempted to mitigate their exposure. For the recalcitrant designer, it is not too late. However, immediate steps must be taken or else valuable clients will be lost, and crippling liability may result.

DESIGN PROFESSIONALS AND THE Y2K PROBLEM

Part I

by

Raymond T. Mellon

In the last two years, the term “Y2K”, also known as the “millennium bug”, has become a ubiquitous buzzword reported almost daily in the media. While an enlightened minority have been aware of this unique problem for a number of years, the media explosion on the subject has at least educated the public to its existence, witness the results of a recent Gallup poll showing that 80% of Americans are familiar with the term Y2K. However, public awareness of the scope of the problem, possible ramifications and remediation options available varies to a great degree. Similar to the general public, the reaction of the design professional community to this problem has varied greatly. This article represents Part I of an analysis of the possible effect of the Y2K problem upon the design professional community.

The genesis of the Y2K problem arose during the formative years of computer development when storage space for data was at a premium. In order to minimize memory demands, computer programmers utilized only two digits for entries relating to a specific year. Most early computer developers believed that future innovations in computers would resolve the recognition problem that would ultimately occur at the beginning of the new millennium. Unfortunately, while there were dramatic advancements in computer memory, power and speed, the industry retained the two digit system of designating years. The resulting Y2K problem will manifest itself in the year 2000 when, among other things, computers fail to recognize that year 2000 is greater than years 1999 and before.

As the new millennium approaches, the computer industry (in fact, all industries using computers) has belatedly recognized the potential catastrophe that may occur from retention of the two digit system. Currently, businesses throughout the nation (and the world, to a lesser extent) are busily seeking to perform corrective action to avert

potential disaster. In order to effectively avoid Y2K problems, these remediation efforts are directed to internal office systems, as well as external computer systems that interface with the particular entity's computers.

The common approach to tackling Y2K problems involves a multi-tier strategy. First, an entity must inventory and assess its existing computer systems to determine whether they are Y2K compliant. Second, the entity must develop a comprehensive plan for implementing remediation. Such a plan may require the retention of outside consultants expert in this area. Third, and simultaneous with the second step, careful investigation must be made as to the Y2K compliance of the computer systems of outside companies (i.e. vendors, materialmen, manufacturers, etc.) essential to the entity's business. Fourth, the remediation plan must be extensively tested to ensure that it functions properly, both internally and externally.

Assessment and Remediation

While at first glance, many architects, engineers and other design professionals may believe that they are somewhat immune to the Y2K problem, nothing could be further from the truth. As an initial step, all design professionals must determine whether their office computer systems are Y2K compliant. Most computer hardware recently manufactured, particularly after May 1997, is Y2K compliant. However, some software programs require remediation, or a "patch", to make them Y2K compliant. This will have particular importance for project scheduling and management software, spread sheet programs and cost estimating software. Inquiry should be made of the software manufacturer as to whether a necessary "patch" is available. While most CAD systems are not vulnerable to the Y2K bug, careful designers will first verify this fact.

In order to properly analyze all potential Y2K problems that can effect internal office systems, design professionals must complete an inventory of all office systems, not just the computer system. In particular, all systems that utilize computer chips must be examined (especially embedded, or BIOS, computer chips). Such vulnerable systems include telephones, security, lighting, as well as HVAC systems. Once the inventory is complete, the remediation plan must be implemented as quickly as possible.

Simultaneous with the internal analysis of their computer systems, design professionals must assess the external threat to their business. First, to the extent that the design professional is dependent upon an important supplier of goods or services, prompt inquiry must be made to ascertain that supplier's efforts at Y2K compliance. Appropriate notices must be immediately sent demanding disclosure of these efforts. To the extent that an important supplier is not Y2K compliant, alternative (but Y2K compliant) sources must be immediately procured.

Inasmuch as design professionals are part of a service industry dependent upon clients' timely payment of invoices, inquiry should also be made of clients' Y2K compliance efforts. While such an inquiry must be appropriately (and delicately) addressed to the respective clients, this information is vitally important. If an important client's computer system is vulnerable to the Y2K bug, design professionals may encounter delayed payment for their services. Depending on the respective client's overall importance to the designer's business, the resulting cash flow problems could cause havoc or even financial ruin.

Liability

The predominant Y2K issue for design professionals, as well as many other businesses, is the possible liability arising from non-compliance. Unfortunately, for design professionals such liability can arise from construction projects, past, present and future. Thus, the need for a retroactive and prospective analysis of projects provides a further hurdle to design professionals seeking security in this uncertain arena.

The primary area of liability will concern the specification of building systems that have a non-Y2K compliant computer chip embedded within the component. Such a computer chip will affect any system that has an internal clock. In regard to building systems, some of the most vulnerable areas include (a) HVAC systems, (b) security systems, (c) elevators, (d) electrical supply, (e) sprinkler and fire control systems, (f) telephone and other communication systems, and (g) emergency lighting, to name a few. The failure of any of these systems could cause untold financial damage, as well as physical injury to the occupants of the affected building.

Inasmuch as the Y2K problem has become so pervasive and recognized in the last year or two, design professionals will be courting liability for present and future projects if they specify any system that is not Y2K compliant and eventually fails. Since a designer's conduct is measured by the prevailing standard of care in the design professional community, which community is now certainly aware of the Y2K problem, current design requires specification of Y2K compliant components. To the extent that a non-compliant system is specified, the designer will be responsible for the damages arising from the failure of such system. While the terms of the parties' contract can effect the specific type of damages recoverable, the spectrum of damages can include the remedial costs incurred in repairing the non-compliant system, loss of business resulting from the failure of the component system, as well as any damages suffered by individuals personally injured by the component failure.

Part II of my article will focus upon the design professional's potential liability arising from completed projects that are not Y2K compliant, as well as related insurance coverage issues.