

QUARTERLY REVIEW

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Liability Exposure After September 11

By Raymond T. Mellon, Esq. and Noelle Lilien, Esq.

THE DEVASTATING TERRORIST attacks at the World Trade Center and Lower Manhattan in 2001 transformed operations within the American business arena, the workplace, and especially within the design and construction community. Before 9/11, security was not a priority for most design professionals, except for those designing government and civic buildings, where security has long been included in project planning, design and specifications. Since then, design professionals, especially those practicing within the commercial and institutional markets, must adapt to the changing environment and incorporate security features into facility planning and design.

The challenge facing design professionals is determining what measures should be taken

to protect them from liability after 9/11. Governments, trade organizations, academics and the media have focused on security features to be included in building design projects. With major national studies in different stages of completion, and with the courts yet to provide guidance on the responsibilities of architects and engineers following 9/11, however, the design community is largely operating in a zone of uncertainty, especially in the sphere of potential liability.

Liability Sources

Although multiple areas of potential liability exist for design professionals, including breach of contract and negligent misrepresentation, claims based on negligent design pose the greatest litigation risk to design

professionals after 9/11. Indeed, family members of victims killed in the attacks of 9/11 have already begun to initiate claims against the professionals who designed the World Trade Center towers.¹

The key determinant for establishing liability for negligent design is whether the architect or engineer has met the requisite "standard of care" in performing his or her services, especially whether the services were performed in a manner consistent with the training, experience, and skill of similar design professionals operating under similar circumstances. The standard of care is a fluid and amorphous concept, and not easily defined. The standard of care is based on reasonable foreseeability of a risk, which is measured by the risk of an

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An Interview with James Kallstrom, Senior Advisor to Governor Pataki

With Michael S. Zetlin, Esq.

Partner Michael S. Zetlin recently interviewed James Kallstrom, Senior Advisor to Governor Pataki for counter-terrorism. Mr. Kallstrom previously acted as the Director of Public Security for New York State, Chief of the NYC Division of the FBI and a USMC officer who served in Vietnam. In addition to his advisory post to Governor Pataki, Mr. Kallstrom is Senior Executive Vice President of MBNA America Bank.

MSZ: Mr. Kallstrom, thank you for talking with us today. You are still a Senior Advisor to Governor Pataki on counter-terrorism issues after having been the Director of the Office of Public Security for New York State. Can you give us an overview of the mission of the Office?

JK: From an historical perspective, countering terrorism in the U.S. has been the sole domain of the federal government through the FBI, CIA and other federal agencies. Their mission has been to keep terrorists

out of the U.S. using the assets of the INS and the FAA at borders and gateway airports. In the last 20 years we have had a string of attacks with 9/11 being the exclamation point. At that time, Governor

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Second Circuit U.S. Court of Appeals held that for purposes of insurance policies, the destruction of the two towers at the World Trade Center was "one occurrence". This number will determine how much insurers will pay to building owners for the property damage sustained on 9/11. *World Trade Center Properties, LLC, et al. v. Hartford Fire Insurance Co., et al.*, No. 02-9440, September 16, 2003.

The Southern District of New York permits lawsuits against airlines, Port Authority, Etc. in relation to the September 11th terrorist attacks. Court allows suit against airlines relating to negligent design of cockpit doors. *In Re September 11 Litigation*, 21 MC 97 (AKH), September 9, 2003.

The Southern District of New York ruled a district court that compels parties to arbitrate may confirm an award "despite the absence of an agreement as to confirmation". *Shaw Group, Stone & Webster, Inc. v. Tripleline International Corp.*, No. 01-Civ. 273, S.D.N.Y.; 2003 U.S. Dist. Lexis 15578 (2003).

Court finds that a nonsignatory to a contract can enforce an arbitration agreement and compel a signatory to arbitrate. *HG Estate LLC v. Corporation Durango S.A. De C.V.*, No. 02 Civ. 1059 (CHS), S.D.N.Y.; 2003 U.S. Dist. Lexis 12554 (2003).

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Pataki asked me to come back into the security business to find out what the State could do to help the federal government protect our citizens, buildings and infrastructure.

September 12, 2001 marks the beginning of state involvement in countering terrorism, and at that time, the Governor gave me two priorities as a starting point for the State Office of Public Security:

1. Do everything humanly possible in NYS to stop the next event by assisting the FBI's terrorism task force with information and by making state and local law enforcement officers more effective eyes and ears by increasing their ability to see the indications and warnings of terrorist activity in order to stop any new attacks;

2. Look across the range of State departments and divisions, the public sector, and corporate America, including the building industry, and communicate more effectively with those sectors. Our mission was to integrate information regarding countering terrorism into planning processes to mitigate and minimize loss of life. Simply put, if we can keep terrorists out of the country, find the ones that are here, and harden the targets, we can eliminate attacks.

MSZ: Prior to 9/11, if a developer or designer were looking at a new project, terrorist activity was not a security concern. Now, the building industry is facing a new standard that is evolving and imposes a duty to guard the public. How do we define what developers and designers should be doing with respect to potential terrorist threats?

JK: That is a big question so let me start with background. First and foremost, it is the responsibility of the federal government to protect the citizens of this country, but today it is a gray area, or at least an overlapping field of responsibility. Why is that? My first priority on assuming the leadership of the Office of Public Security

was to look at our infrastructure: power grids, the communication grid, water and food supply, the transportation network of tunnels and bridges and critical real estate like the New York Stock Exchange and the Federal Reserve Bank, were they to be destroyed, would have a massive impact on our economy.



James Kallstrom

A good portion of that critical infrastructure is in private hands; companies that have responsibilities to boards of directors and shareholders. The gray area encompasses hard issues such as what percentage of the corporate revenue should be allocated to doing something that is the primary responsibility of the federal government. This matrix of public and private stakeholders requires balancing the cost of protection for incipient and continuing potential catastrophic occurrences against the antipathy of the investing public toward those necessary investments; and the investment that the federal government contributes or doesn't contribute to that protection.

In light of 9/11, the issue of public security versus corporate investment has changed the paradigm of thinking for

commercial real estate and the design and construction sectors. Let me describe the ramifications. If you are building an apartment building or office complex, you have to consider not only the efficiency and effectiveness of the HVAC for example, but you also have to think about how the system is balanced to keep chemical, biological and other agents of mass destruction out, and how the filtering of that system does this. At the same time, design and construction participants have to consider egress, how the water supply enters and how it filters. This is a whole new day for the construction industry; the rules are being written and will be written for a long time.

MSZ: This evolving responsibility is a big question. Terrorism insurance is expensive, and as you know, the federal government is involved only until 2005. You've been quoted as saying that the FBI trained you to think like a terrorist. What advice would you give the development and construction industry if you were to train its members to think along those lines?

JK: I'm not one to propose that they should all build Ft. Knox because I am not ready to give up on perimeter security at our borders, and finding the terrorists that are here. However, there are common sense things that designers and builders should consider and they do add costs. Here is my list of "Best Practices":

As an overriding principle, consider things that go in and out of buildings and their locations: air, water, sewer, electricity, people for identification, egress and evacuation, and the potential effects and penetration of blasts from outside the building. All of these can be improved without adding geometrically to costs and should be thought out in the planning stages. Of these items, my first priority would be the air supply and how it is balanced and how it can be controlled. I would want to spend some dollars on an airflow study that would demonstrate how to keep bad things out of buildings if necessary, where

Scott Francis, Esq. Photographs

Is Terrorism Insurance Available in the Wake of 9/11?

By Timothy F. Hegarty, Esq.¹

PRIOR TO 9/11, insurance policies generally excluded losses arising from war, but did not expressly exclude terrorism. As a result, the insurance industry was forced to absorb the estimated \$40-\$70 billion in losses from the attacks. While the September 11th terrorist attacks were not categorized as an act of war, the reality was that many experts then recognized that terrorism constituted a significant risk to insurers. In the aftermath of 9/11, many insurers decided to exclude terrorism coverage from their plans,² citing their inability to calculate or withstand repeated losses from a future attack. The few insurance companies that continued to include terrorism coverage raised their premiums to a point where it became unaffordable to many businesses. Thus, a heightened need existed for a terrorism insurance plan that was financially feasible for both the insurer and insured.

INDUSTRY IMPLICATIONS

THE SHORTAGE of adequate and affordable terrorism insurance severely complicated and restricted commercial real estate transactions, making it increasingly difficult to operate and acquire properties and build new projects.³ For example, Moody's Investor Service, a leading bond rating agency, put a leading hotel chain on credit watch because eight of its hotels in New York did not carry adequate coverage against a terrorist attack.

In addition, the lack of terrorism insurance coverage caused banks to curtail their financing of new projects or the refinancing of existing ones, making many potential owners reluctant to move forward with future endeavors. The limitation of insurance coverage and resulting implications for the construction and real estate industries, among others, had a negative effect on the economy of New York, in particular, and the United States as a whole.

TERRORISM RISK INSURANCE ACT

ON NOVEMBER 27, 2002, President George W. Bush signed into law the Terrorism Risk Insurance Act ("TRIA"), after the Senate voted 86-11 in favor of the bill. The purpose of TRIA was to establish a temporary federal program that provides for a system of shared public and private compensation for losses resulting from acts of terrorism in order to: (1) protect consumers by addressing market disruptions, and ensure the continued widespread availability and affordability of commercial property and casualty insurance for terrorism risk; and (2) allow for a transitional period for the private markets to stabilize, resume pricing of insurance and build capacity to absorb any future losses, while preserving state insurance regulation and consumer protections. This is accomplished by having the federal government partially subsidize the insurance industry from the risk of loss in connection with future attacks.

WHILE THE EXACT TERMS and conditions of TRIA are quite complex, these are the key points:

- All insurance companies that provide commercial property and casualty insurance must participate in the program;
- Exclusions for "terrorism" in property and casualty policies are automatically nullified;
- Life, accident and health, and medical malpractice insurance are specifically exempted;
- A government fund was created to reimburse insurers for 90 percent of their losses above certain deductibles, which are based on a percentage of direct earned premiums from the previous calendar year;

- Damages suffered by a business as a result of terrorism must be at least \$5 million to be included in the plan; and

- Neither the federal government nor the insurers are liable under TRIA for losses that exceed \$100 billion.

ALTHOUGH ONE of the primary purposes of TRIA was to take away the ability of the insurers to exclude terrorism from the policies, which it did accomplish, it also contained a mechanism to reinstate such exclusions. Specifically, TRIA allows the insurers to reinstate exclusions for terrorism provided the insured consents in writing or if the insured declines to pay for the coverage.

THE NEED for this law was evident in the data. At the time of the September 11th attacks, commercial construction in the U.S. was at a six-year low. According to one survey, over \$15.5 billion worth of real estate projects in nearly twenty states were placed on hold or canceled due to lack of terrorism insurance.⁴ In addition to minimizing the impact of future attacks on our economy, proponents of the law argue that it is likely to spur billions in new investment in construction projects across the country and create new jobs in the construction industry.

THE DRAWBACKS OF TRIA

TRIA IS NOT without drawbacks. Many consumer groups oppose the law, asserting that the federal government is simply reinsuring a rich and politically powerful insurance industry while neglecting to help small businesses that cannot afford terrorism insurance coverage.⁵ While one of the government's goals is to make terrorism insurance affordable to all businesses, TRIA does not limit the premiums that can be charged by the insurers. Various industry surveys have reported that premiums for terrorism insurance are being set at the range of between 10 and 30 percent of a

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property's overall property casualty premiums. Thus, it is still unlikely that all businesses will be able to afford terrorism insurance. This will have the greatest impact on new companies, which often start small before expanding, but are just as susceptible to terrorist attacks as larger businesses. Another limitation of TRIA is that the government will not step in on any claims of less than \$5 million, which means a potential exists for insureds to exaggerate claims in order to meet the threshold to qualify for coverage.

THE IMPACT OF TRIA

THE ACT HAS NOW been in place for over a year. The majority of companies seeking terrorism coverage are in lower and mid Manhattan, but overall, few companies have opted to include the coverage in their insurance plan. The reality appears that many of the businesses in Manhattan participate in the plan only because their lenders insist upon it. Although the government is now supporting the insurance industry, many businesses are still unable to afford the premiums. According to Marsh Inc., the world's largest insurance broker, fewer than one in five of its major corporate customers have purchased terrorism coverage. Hartford, another one of the largest commercial insurers, states that only about one in six of its customers have purchased the coverage.⁶ While one might think that the events of 9/11 would make companies realize that nearly every business is susceptible to attack, many companies feel that it is unlikely a terrorist attack would affect them. In other words, these companies do not believe it makes sense to spend a substantial amount of money to protect their assets against what they perceive as a remote risk.

"Acts of terrorism committed by domestic groups, such as an Oklahoma City style attack, for instance, are not covered."

OTHER INDUSTRY SPECIALISTS, like insurance broker Alan Geisenheimer, President of the Geisenheimer Agency in Fair Lawn, New Jersey, echo these sentiments. Geisenheimer notes that TRIA's prohibition of terrorism exclusions in insurance policies is not as good as it first appeared. The legislation allowed insurance companies to price the coverage and send the insured a bill, Geisenheimer explains. If paid, terrorism coverage would be in place. But the pricing calculations, made without underwriting precedent, may be somewhat questionable. "Also," says Geisenheimer, "the coverage that was granted through TRIA was not great coverage." He notes that acts of terrorism committed by domestic groups, such as an Oklahoma City style attack, for instance, are not covered. Instead of taking the easy route and going with terrorism coverage added to an already existing policy, Geisenheimer suggests buying new coverage. "One can find stand alone terrorism coverage that might actually be less money and include broader coverage."

"Improved security features... should result in less damage following an attack, which means less of a financial burden on the insurance companies."

BUILDING OWNERS' NEED for affordable terrorism coverage is compounded by pressure to increase spending in order to comply with an evolving standard of care. Since 9/11, building design professionals have suggested implementing new and additional security features, including features connected with increased structural design and the ability to respond to a disaster. While the precise security design features required continue to be debated across the country, what is known is that these features come at a cost to building owners and occupants. The bottom line, however, is that owners and occupants would like to protect their investments in their buildings by making sure they are covered in the event of a terrorist attack.

On the positive side, improved security features, such as a more impact resistant design, should result in less damage following an attack, which means less of a financial burden on the insurance companies.

WHERE DO WE GO FROM HERE?

THE PROGRAM CREATED under TRIA is currently set to terminate on December 31, 2005. Unless the need for America's leaders to issue alerts for new terrorist activity suddenly abates, the need for terrorism insurance will unfortunately continue to be an issue for years to come. While TRIA appears to have achieved its goal of being able to provide adequate support for the insurance industry in the event of additional terrorist attacks, it has only been partially successful in creating affordable coverage for the business sector. TRIA appropriately forces commercial property and casualty insurance companies to participate in the program, but may incorrectly assume that the fund set aside to help companies will necessarily result in more affordable premiums for those businesses seeking coverage. To achieve effectively both of the program's goals, if it is decided that TRIA must be continued at all, TRIA may need to be amended to require the insurance industry to charge premiums that are affordable to smaller businesses as well as larger ones. Similarly, smaller businesses would benefit if the threshold to participate in the program were reduced from the current \$5 million per loss even if it were on a prorated basis like the tax code. If this can be accomplished, the Terrorism Risk Insurance Act will come closer to achieving its original goals by instilling confidence in the insurance industry and the business sector.⁷

1. Zetlin & De Chiara thanks Sam Stark for his contribution to this article.

2. Mehlman, Wayne A., *Issue Brief: Terrorism Insurance* [online]. Available from World Wide Web: (<http://www.icsc.org/srch/government/TerrorismInsuranceJune2002.pdf>)

Proposed Post 9/11 Building Code Changes

By Michael J. Vardaro, Esq.¹

THE NEW YORK CITY BUILDING CODE (“NYCBC”) is considered one of the most stringent building codes in the world, and New York City’s high-rise buildings are generally considered the world’s safest. However, neither the NYCBC nor our buildings were prepared for the tragic events of September 11, 2001. The terrorist attack on the World Trade Center (“WTC”) and the subsequent collapse of the Twin Towers and 7 World Trade Center have caused the City to re-evaluate the NYCBC in an attempt to insure public safety while being cognizant of consequential economic effects.² First adopted in 1850, the NYCBC has continually evolved to reflect the economic demands and safety concerns experienced by New York City, although no major changes have been implemented since 1968.³ The current re-evaluation of the NYCBC, made possible by the diligent efforts of many, will likely provide sweeping changes to the NYCBC that will address concerns stemming from the events of 9/11 while simplifying the structure of the NYCBC to make it easier to use.

Task Force Evaluates Safety Concerns

On March 19, 2002, the Department of Buildings commissioned the World Trade Center Building Code Task Force (the “Task Force”) to formally review the current design, construction and operating requirements of the NYCBC and recommend ways to bolster public safety without stifling the economic viability of projects. The Task Force of experts assembled from the government, real estate community, and construction and design professions studied and reported on five major areas of concern: (1) structural strength, (2) fire protection, (3) emergency evacuation, (4) mechanical systems, and (5) Department of Buildings operations. In February 2003, the Task Force

proffered 21 recommendations concerning various aspects of the NYCBC, including progressive collapse, the use of lightweight structural members, the hardening of stairwell and elevator shaft enclosures, capacity and location of stairwells, fire protection, HVAC intake positioning, and emergency generator fuel tanks. Thirteen of the 21 recommendations that have undergone technical review will be presented to the City Council for legislative action, while some of the remaining eight are still under technical review and others are being implemented by rule change.⁴

“...while New York City’s high-rise buildings are considered to be the world’s safest...neither the NYCBC nor our buildings were prepared for the tragic events of September 11, 2001.”

Task Force Recommendations

As many now know, the collapse of the Twin Towers resulted from progressive failure. Essentially, the floors at the point of impact failed and landed on top of the floors beneath, which then subsequently failed, causing a chain reaction in the lower floors of the towers to fail one after the other. This phenomenon of progressive collapse had been of concern to the City before the WTC was completed in 1973. In response to a building collapse in England in 1968, the City had adopted progressive collapse provisions into the NYCBC in 1973. Although the NYCBC provisions were found by the Task Force to be effective, the Structural Strength Working Group recommended and drafted proposed progressive collapse guidelines to augment the NYCBC for buildings “at risk of extraordinary events” such as those of 9/11. The draft of the proposed

guidelines suggests three different methods for providing structural resistance to progressive collapse: (1) the indirect design approach, (2) the direct design alternate path and (3) the direct design method of specific local resistance. The indirect approach is a prescriptive consideration of resistance to progressive collapse through the provision of minimal levels of strength, continuity and ductility. The alternate path method provides for intact structural members to distribute and bear the load of the compromised structural members. The direct design method of specific local resistance provides sufficient strength to resist failure, which requires that any single element essential to the stability of the structure should not fail under the loads stipulated in the Code after being subjected to abnormal or extreme local loading. These draft guidelines are meant to provide structural design options for more robust designs for buildings at risk of extraordinary events. The Task Force has suggested that these structural design options be published as an alternative to the current NYCBC sections.

One of the Twin Towers’ lightweight design features was the use of open web trusses as structural support for the floor plates in the buildings. The FEMA Building Performance Study released in July 2002 called into question the adherence of spray-on fireproofing to lightweight open web trusses. The Task Force recommended the prohibition of open web steel joists in all new, non-residential high-rise buildings until appropriate fireproofing standards are developed.⁵

A major concern of the Task Force was the location of the stairwells and elevator shafts, and their capacity and resistance to extreme impacts. Information from the Fire Department of New York suggests that stairwell and elevator shaft materials that satisfy the

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current ASTM 2-hour rating standard do not, in fact, successfully resist a firefighter's hose stream in the field,⁶ although such materials apparently have passed laboratory tests. The Task Force recommended that only currently available materials that resist a firefighter's hose stream as observed in the field be permitted. Additionally, the Task Force suggested that the NYCBC exempt the floor area of stairwells above the minimum size from zoning Floor-Area-Ratio calculations to encourage the inclusion of more or wider stairwells and prohibit scissor stairs in high-rise commercial buildings with a floor plate of over 10,000 square feet, since scissor stairs concentrate the number of exit stairs in one area of a building and may hinder occupants from being able to escape during an emergency. The Task Force also suggested the use of impact resistant material in the construction of elevator shafts and stairwells in all high-rise office buildings constructed or altered after January 1, 2006 and that the Commissioner of the Department of Buildings promulgate appropriate standards by July 1, 2005.⁷ Furthermore, buildings with elevators servicing four or more stories should be required to have smoke stop elevator vestibules to help prevent smoke from spreading throughout a building during a fire.⁸

The retrofitting of adequate sprinkler systems is of great importance to the Department of Buildings and the Fire Department, and both believe that fully outfitted sprinkler systems in high-rise buildings provide unmatched protection. As such, the Task Force recommended that all buildings over 100 feet tall without automatic sprinkler protection be fully equipped with sprinkler systems on or before January 1, 2019. The proposed recommendations also include a possibility for a deadline extension in cases of hardship or impracticability.⁹

The events of September 11, 2001 have raised concerns relating to potential acts of chemical terrorism, including the possibility that a terrorist attack may occur through the heating, ventilation, or air conditioning

("HVAC") system of a building. The Task Force addressed these concerns by recommending that all air intakes in new construction be located at least 20 feet above grade, rather than the current code minimum of 6 feet, and that the requirement that air intakes be located away from exhaust discharges or off street loading bays be clarified. The Task Force hopes this standard will limit potential terrorists' ability to disperse noxious materials via an HVAC system.

"The events of September 11, 2001 have raised concerns relating to potential acts of chemical terrorism, including the possibility that a terrorist attack may occur through the heating, ventilation or air conditioning system of a building."

Although it was not struck by the planes, the 7 World Trade Center building collapsed as a result of a fire caused by flaming debris from the collapse of the Twin Towers. While the fire was small by comparison and should have been contained by the fire protection systems, it burned for over six hours until the building's structural members failed under the intense heat and collapsed. The duration of the fire was, in part, attributed to the leaking of fuel from the fuel lines for the emergency generators, causing the fire to burn continually despite adequate fire protection. Consequently, the Task Force found it prudent to recommend a limitation on the amount of fuel stored in high rise buildings. While the current code does limit the amount of fuel stored in day tanks, many building owners bypass this rule by utilizing oversized transfer piping, creating a reservoir capacity exceeding the day tank limit. To remedy this loophole, the Task Force recommended a limit on the diameter of fuel oil transfer piping in the systems using day tanks as well as standards for piping that is utilized to distribute fuel oil to equipment without using day tanks. This

limitation and the subsequent standards will lower the amount of combustible fuel on each floor in all of the City's high-rise buildings.

Commission Examines Adoption of Model Code

In February 2003, Mayor Michael Bloomberg created an advisory commission ("Commission") to look into the adoption of a model code that would simplify the cumbersome 700 page NYCBC, address the issues raised by the Task Force and provide a mechanism for change to match that of the dynamic New York City environment. The Commission evaluated two model codes, the International Building Code ("IBC") and the National Fire Protection Association 5000 ("NFPA 5000") to determine which model code would be best for New York City. The Commission looked at, among other things, the codes' comprehensiveness, accessibility to users, services provided by the issuing organizations, and ease of adaptation. After four months of deliberation, the Commission determined that the IBC should be adopted. The Commission found that the IBC's ease of understanding, code development process, improvement in technology, ease of adaptability and performance history were all superior to that of NFPA 5000.

Implementing the Proposed Changes

On May 27, 2003, Mayor Michael Bloomberg accepted the Commission's recommendation to adopt the IBC. In September 2003, the Commission commenced a year long, line by line comparison of the NYCBC and the IBC. The Commission's goal is to determine the best process for intergrating the IBC with the current code.

On September 23, 2003, Mayor Bloomberg and the Department of Buildings Commissioner Patricia Lancaster, AIA, proposed legislation to implement 13 of the 21 recommendations offered by the Task Force.¹⁰ In addition to the aforementioned Task Force proposals included in the discussion

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Protecting New York's Good Samaritans

By John C. Deerkoski, P.E.¹ and Robert L. Honig, Esq.

The "Good Samaritan" doctrine is a legal principle that prevents a rescuer who has voluntarily helped a victim in distress from being liable for "wrongdoing". The purpose of the doctrine is to encourage people to help others by shielding them from any legal repercussions stemming from their actions. The Good Samaritan doctrine initially applied to first aid situations. Every state in the country has adopted its own version of the Good Samaritan doctrine.

Some states provide immunity for architects and engineers who volunteer in response to emergencies. Unfortunately, New York is not one of them. In the hours and days following the terrorist attacks at the World Trade Center, hundreds of engineers and architects volunteered in search and rescue efforts. These architects and engineers were summoned by overwhelmed government agencies to provide their professional opinions about the structural stability of buildings, roadways, tunnels and other major infrastructures. In the aftermath of the attacks, New York's engineers and architects have become justifiably concerned about the liability they may have faced, or will face, as a result of voluntarily providing these valuable and necessary services. These professionals subjected themselves to substantial physical risk due to the instability of the surrounding structures. In addition to the obvious physical dangers, the architects and engineers also subjected themselves to financial risk because they became liable for any claims that may have resulted from the services they provided.

New York's Good Samaritan Act covers off-duty firefighters, police, doctors, nurses and emergency medical technicians against such exposure, but not architects and engineers. These professionals answered the call in our time of need, only to find themselves subject to more risk than other volunteers. The tragedy of 9/11 shed light on the need for Good Samaritan protection for architects and engineers especially since, as volunteers, they were not covered by their employers' professional liability policies. Legislative action is necessary to protect the engineering

and architectural community in the future. Many of New York State's professional societies have already embarked on the campaign for protective legislation.

Legislative Efforts

During the 2002 legislative session, Assemblyman Samuel Colman introduced bill number A09544, which would include architects and engineers under the Good Samaritan Act and the bill was referred to the Governmental Operations Committee. Unfortunately, the bill never made it out of committee and was never reintroduced in the Assembly during the 2003 legislative session. A similar bill (number 501926), was introduced in 2003 by Senator Kemp Hannon, but this bill also "died in committee". This bill is similar to the previous one with one important exception. Pursuant to Bill 501926, architects and engineers would have liability protection:

Except in those instances where the personal injury, wrongful death, property damage or other loss results from the act, error or omission of the professional engineer or architect who has found that the structure, building, piping or other engineered system is fit for the purposes of occupancy or usages for which it was intended.

This exception has been criticized by members of the engineering and architectural communities because of its potential for abuse. This section of Bill 501926 would exempt engineers and architects from liability protection only if they certify that a building is *unsuitable for its intended use*. The intent of the law should be to encourage volunteers to perform the difficult tasks of identifying seriously damaged buildings, bridges and other structures and determining if they should continue to be used. This task is especially difficult when facilities have suffered minor or moderate damage, but are not in danger of imminent failure. The current version of the legislation, however, threatens to encourage non-paid, volunteer design professionals to classify structures as *unsuitable* for their intended use, merely to avoid

personal liability pursuant to the statute. This will have the negative effect of prohibiting building owners from making use of otherwise structurally sound buildings.

The National Society of Professional Engineers Model Good Samaritan Act

Recognizing the inherent problems with Bill 501926's exception, professional groups, including the ASCE Metropolitan Section, have suggested more powerful language to protect their design professional members. The National Society of Professional Engineers' ("NSPE") policy includes a Model Engineers Good Samaritan Act which provides that:

A professional engineer who voluntarily provides engineering services in response to a natural disaster or other catastrophic event will not be liable for any personal injury, wrongful death, property damage, or other loss caused by a professional engineer's acts, errors or omissions in the performance of such services. Immunity from liability would not be applied in cases of wanton, willful, or intentional misconduct. The immunity applies to services that are provided during the emergency or within 90 days following the end of the period for an emergency, disaster, or catastrophic event, unless extended by an executive order issued by the Governor under the Governor's emergency executive powers.

This standard increases the protection afforded by Bill number 501926, currently before the Senate's Veterans, Home Security and Military Affairs Committee. Indeed, the NSPE standard provides for liability only when a good samaritan design professional *willfully or intentionally* causes harm to an individual or to the premises upon which they provide their services. The NSPE's proposed language will shield almost every effort by a good samaritan design professional providing engineering or architectural services.

Many states have enacted Good Samaritan statutes that resemble the NSPE's model statute and have immunized certified first

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on page 6, the proposed legislation incorporates the Task Force's recommendations that (1) all high-rise office buildings be required to have full building evacuation plans for events other than fire that may occur, which include glow-in-the-dark markings on all exit stairs and doors, (2) all new and existing high-rise office buildings of seventy five feet or greater should be required to install additional signs where exit stairs have horizontal extensions and where stairwell re-entry doors are recessed to assist egress, and (3) controlled inspections be employed to assess the integrity of spray-on fireproofing during building alterations when such fireproofing is exposed.¹¹

The Task Force proposals will be presented to the City Council for legislative action. Mayor Bloomberg stated in support of the Task Force proposals that "[t]his legislation represents our commitment to make certain that New York City is a safe place to live, work and build."¹²

The findings and recommendations of both the Task Force and the Commission will make buildings safer in light of the new and elevated risks of harm and reduce the complexity of the NYCBC to make it easier to use. These sweeping changes appear to be destined to take effect and all those involved in the design, construction and maintenance of buildings in New York City should analyze the proposed NYCBC changes to determine their impact on current and future projects.

1. The author wishes to thank Paul Roslyn and Brandi Klineberg for their assistance with the preparation of this article.

2. New York City Department of Buildings World Trade Center Building Code Task Force, *Findings and Recommendations*, February 2003.

3. The Mayor's Advisory Commission, *Report on the Adoption of a Model Building Code*, February 14, 2003.

4. Proposed legislation based upon *World Trade Center Building Code Task Force Recommendations on Improving Building Safety*, September 23, 2003.

5. *Id.*

6. See *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. See *supra* note 4.

11. *Id.*

12. *Id.*

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3. Johnson, Linda M., *NAR Applauds Passage of Terrorism Insurance Bill* [online]. Available from World Wide Web: (<http://www.realtor.org/publicaffairsweb.nsf/Pages/AplaudTerrInsBill?OpenDocument>)

4. Bush, George W. 2002. *Speech: President Signs Terrorism Insurance Act* [online]. Available from World Wide Web (<http://www.whitehouse.gov/news/releases/2002/11/20011126-1.html>)

5. Associated Press. *Congress Overwhelmingly Passes Terrorism Insurance Bill* [online]. Available from World Wide Web: (http://www.cmonitor.com/stories/market/biz-tori2002/terrorisminsurance_21y46y02_2002.html)

6. Treaster, Joseph B., *Insurance for Terrorism Still a Rarity* [online]. Available from World Wide Web: (<http://www.nytimes.com/2003/03/08/business/08INSU.html>)

Protecting New York's Good Samaritans ...Continued from Page 7

responders and emergency medical technicians, as well as doctors, nurses, dentists, physical therapists and physicians' assistants from liability if they render first aid or treatment in the event of an emergency like the attack on the World Trade Center. Until New York wakes up and enacts similarly powerful legislation, its design professionals should proceed with the utmost caution when providing any service as a good samaritan.

1. Mr. Deerkoski is a Principal of Parsons Brinckerhoff Quade & Douglas, Inc. and the current President of the Metropolitan Section of the American Society of Consulting Engineers.

Interview with James Kallstrom

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the intake and exchangers are located, how to isolate different zones of a building and how surrounding buildings affect airflow.

A second design priority would be blast considerations and minimization. A third priority in design and construction is improving the ease of recognizing activities outside the building and using up to date systems to monitor egress such as for parking areas, vendors, service and repair personnel.

If the design and construction of a building include these priorities, the dividends are big. Also, the federal government will have to continue the Terrorism Insurance Program well past 2005.

MSZ: We have heard pundits discuss the benefits of the public identification of individuals balanced against our privacy rights. What are your thoughts on this debate?

JK: Let me start with some background to answer your question. My most important role to the Governor is to keep him informed on these issues so he can use the bully pulpit of his office to amplify this discussion with the Congressional delegation and the public to insure that federal strategies, as they evolve, are logical and reasonable. The reality is that terrorism happens somewhere local, in some city and state. Although the state may not be capable of financing needed changes to the personal identification process, or in developing national standards, states should have a lot to say as to how this debate evolves in Washington.

Underscoring this debate, I find it perplexing that we have not used technology regarding identity issues. We have kept law enforcement deaf, dumb and blind, even though our whole economy is based on technology; we can't "connect the dots" in Washington because the databases have not been connected there. It is a challenge we need to think about and act on. Certainly we could use an "E-Z Pass" type system for individual identification. There are also opportunities to speed up the process of egress and movement through certain places if we start focusing on those opportunities. The use of biometrics

and anti-counterfeiting technology needs to be incorporated into our de facto National ID, such as the driver's license, as well as other base line documents like birth certificates, INS documents, etc.

"For \$100 you can be anyone you want to be, because of the thousands of places you can buy phony documents like drivers licenses."

However, even preceding the potential use of technology applied to the task of individual identification, we need to shut down the 300 plus websites and other phony identification mills, where you can get phony documents like a driver's license from any state. For \$100 you can be anyone you want to be, because of the thousands of places you can buy phony documents like driver's licenses. Remind yourself that you board airplanes and cross borders with that very document. We need to consider that today we issue birth certificates the same way we did in 1907. We have a total lack of security with regard to the technological verification of documents such as Social Security cards and INS documents. A ten year old with a computer can make them. Technology has to be put to use on the issue of identification, but the forgery issues should be a starting point. This is a baseline issue that enables crime of all types and is a tool used by criminals and terrorists alike. We can't allow the far left and the far right to continue to paralyze our government on this issue as they have done for a decade.

MSZ: A series of articles in a special supplement of the *Wall Street Journal* in September 2003 on the topic of workplace security noted, in part, a sense of complacency on the part of corporate security chiefs. Do you sense that?

JK: No, not in the NY metro area. Although I cannot speak for the rest of the country, I believe that our country as a whole has become complacent. The fact that we have not had a terrorist act since 9/11 has, in my view, been misinterpreted as a

measure of confidence. It should not be. I speak publicly on this issue as often as possible. This terrorist war is still raging, Al Qaeda and others who hate us, want to kill us in large numbers because of who we are, are still funded, have global reach and effective communications. They continue to conduct operations as we have seen in Turkey, Iraq, Bali and other parts of the world.

As citizens, we need to become more vocal and insist that certain common sense protections be put in place in the U.S. to protect us. The notion that we should fall back into the perimeter of a building for safety rather than relying on the security of our national borders and our dedicated counterterrorism agents is not a viable long-range plan.

"We have kept law enforcement deaf, dumb and blind, even though our whole economy is based on technology, we can't connect the dots in Washington..."

MSZ: Mr. Kallstrom, would you add a final message to the design and construction professions?

JK: Let me add one observation briefly. I suspect that members of the design and construction communities realize they can no longer focus on the four corners of a project. In fact, they have to participate in a different paradigm, that is, to think outside their normal domain and to utilize many other teams pulling together in a common direction to protect our society, not just a building project. I would challenge members of the community to participate in this lesson of democracy and civics and be very vocal about these issues we've discussed to protect our society so that our children enjoy the same life and freedoms we have.

MSZ: Thank you, Mr. Kallstrom, for sharing your thoughts today.

Liability Exposure After September 11

...Continued from Front Cover

accident occurring, the magnitude of the harm should the accident materialize and the availability of alternatives that would prevent the accident. Reasonable care is determined by taking into account the likelihood of harm, and the gravity of harm if it happens, balanced against the burden of the precaution that would be effective to avoid the harm.

For example, a design professional designing a grandstand for an outdoor event must consider the possibility that a thunderstorm could strike and high winds could topple the grandstand, causing serious injuries to visitors. In light of the risk that a thunderstorm could occur while the grandstand is occupied, the design professional is further required to consider ways to make the grandstand as safe as possible in light of the risk that is posed. If the design professional fails to identify the risk, and fails to take precautions to minimize the risk, the design professional will have breached the standard of care.²

Whether a design professional has met the standard of care is usually proven by expert witness testimony at trial. The experts will explain their views on the prevailing standards of safety and design in a geographic area, or practice specialty, and then demonstrate how the design professional being sued either met or failed to meet that standard.³

Navigating the Standard of Care Post 9/11

Although no consensus exists on the post-9/11 standard of care for design professionals, it appears that buildings designed in urban areas require greater attention to security details and design features because of greater terrorism risks. For guidance in determining the prevailing standards of safety, design professionals should consider building codes, proposed codes⁴ and recommendations, as well as the protective features other design professionals and government agencies are including in similar building types and design projects.

To minimize risk, an architect must consider building codes as the minimum baseline against which his or her actions will be measured. Failure to comply with building codes is considered to be negligence per se in some jurisdictions, meaning that the court will presume that the

design professional was negligent if he or she violated the building code. In certain cases, a design professional who ignores foreseeable risks or fails to make improvements that should have been made under the circumstances, however, may be exposed to liability for failing to meet the required standard of care, even if he or she follows the building code to the letter. In this situation, a court will measure the design professional's behavior against what a similarly situated design professional, with knowledge of the same risks, would have done under the same circumstances.

"If the design professional fails to identify the risk, and fails to take precautions to minimize the risk, the design professional will have breached the standard of care."

In *Francisco v. Manson, Jackson & Kane, Inc.*, 145 Mich. App. 255, 377 N.W.2d 313 (1985), the Michigan Court of Appeals decided that an architect breached the standard of care when designing a swimming facility, even though the architect complied with governmental and industry standards. The Court explained that while the diving boards specified by the architect complied with governmental safety standards, the architect acted negligently because the boards posed an unacceptable risk to young children who used the pool for recreational activities and safer alternatives could have been specified given the circumstances.

In addition to building codes and proposed codes, studies and recommendations made by governmental entities like the National Institute of Science and Technology or the New York Task Force on Building Codes, or associations, like the Skyscraper Safety Campaign, can help design professionals determine the appropriate standard of care. Even though the proposed codes, studies and recommendations lack the force of law,⁵ under certain

circumstances, they may help define prevailing industry practices and importantly, at trial, could provide support for expert witnesses concerning the proper standard of care.⁶

Design professionals should also appreciate that their colleagues, especially those working in urban markets, have responded to the heightened risk of terror attacks by incorporating security features into building designs, including enhanced fire protection, structural redundancy, and improved egress, as well as emergency communication systems.⁷

For example, the recently unveiled design for the Freedom Tower at the World Trade Center site contains numerous security features including: (a) an open air network of cables throughout and a diagonal structural grid in the glass tower for structural redundancy; (b) an air supply system with chemical and biological filters; (c) thick spray-on fireproofing; (d) extra wide staircases to expedite evacuation; (e) blast resistant glass and glazing; and (f) separate elevators and stairways for rescue personnel.⁸

Methods for Minimizing Risk

Every design professional knows that on any project, owners seek to minimize their costs. Design professionals, aware of evolving security standards and practices adopted by their colleagues, however, cannot allow an owner's financial concerns to dictate a project's design security components. While it is unrealistic to think that all the security features a design professional suggests will be incorporated into a project, ideally, from the design professional's perspective, the owner should be responsible for deciding which security features it should include in a design and bear the responsibility of making the wrong decisions.

The design professional can attempt to shift risks associated with security-based design components to the owner at the outset of the engagement, when the owner and the design professional are negotiating their contract. Though many factors will influence which party will bear a greater proportion of risk, including the project size, the sophistication of the parties and experience and negotiating skill of legal counsel, there are three contractual provisions that the design professional

should insist on prior to accepting an engagement. Incorporating these provisions will help clarify the allocation of risk between the owner and the design professional.

First, the design professional should recommend that the owner retain a protective design consultant to conduct a formal vulnerability assessment of the proposed building. To conduct a vulnerability assessment for a new project, the protective design consultant will analyze a number of factors, such as:

- *Profile of all building tenants;*
- *Building location, especially proximity to landmarks and government buildings;*
- *Actual threats received;*
- *Physical vulnerabilities, including underground parking garages and loading docks;*
- *Proximity to street and public access.*

“The design professional should recommend that the owner retain a protective design consultant to conduct a formal vulnerability assessment...”

Based on the findings and factors analyzed during the vulnerability assessment, the protective design consultant will work with the owner and the design team to recommend appropriate security features to be incorporated into the project design.

Conducting a vulnerability assessment and recommending security features will not completely shield a design professional from liability should the project he or she designed be damaged in a terror attack. After all, whether or not a vulnerability assessment is conducted, design professionals must always meet the standard of care. Recommending vulnerability assessments, however, may help a design professional minimize his or her liability exposure. If a design professional is sued for negligent

design and the owner agreed to include security features identified as a result of a vulnerability assessment in the design, the design professional can rely on the vulnerability assessment and the implementation of security features to prove that he or she met the standard of care, specifically, that he or she identified foreseeable risks and took reasonable precautions to prevent injuries.

Second, design professionals should negotiate an indemnity provision in their contracts whereby the owner will indemnify them for any claims arising out of the owner's failure to (a) conduct a risk assessment (b) include recommendations resulting from a risk assessment in the project design and (c) include recommendations from the design professional in lieu of a risk assessment. Third, since the owner's decision to incorporate recommended security features into a design will be determined after the contract has been executed and after the design professional has started developing the project, the design professional may want to have the right to terminate the contract if the owner ultimately decides not to incorporate recommended security features or if the design professional, in his or her judgment, believes that the failure to include such recommendations poses a substantial risk.

“...whether or not a vulnerability assessment is conducted, design professionals must always meet the standard of care.”

Whether or not the owner agrees to conduct a vulnerability assessment or include the indemnification or termination provisions in an agreement, the design professional should notify the owner in writing about security recommendations and document the owner's decision to forego a risk assessment or its decision not to incorporate security recommendations into the design.

September 11, 2001 had a profound impact on the design and construction community. Since then, design professionals have been forced to examine security issues and to evaluate how to minimize liability risks in light of the changing standard of care. Although it is difficult to predict with certainty how the courts will define the standard of care in the aftermath of 9/11, design professionals who are attuned to the changing standards can seek to minimize liability by understanding the sources of liability, appreciating the security features considered important by colleagues, keeping abreast of recommendations and studies conducted in the wake of 9/11 and focusing on risk allocation during contract negotiations.

1. *In Re September 11 Litigation*, 280 F. Supp. 2d 279, 2003 U.S. Dist. Lexis 15522 (2003).
2. *Cachick v. United States*, 161 F. Supp. 16 (S.D. Illinois, 1959) (explaining that a design professional breaches the standard of care if he or she fails to: (a) identify risk; and (b) take precautions to minimize risk.)
3. The formulation of the standard of care applicable in most jurisdictions can be traced back to the 1896 case *Coombs v. Beede*, in which the Supreme Judicial Court of Maine stated: “The undertaking of an architect implies that he possesses the skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, this skill and ability, judgment and taste, reasonably and without neglect.”
4. Legislation to enhance the New York City Building Code in light of the events of 9/11 was introduced in the New York City Council in 2003 and, according to an assistant to the Chairperson of the Housing and Building Committee, will likely be referred to the Council for a vote in 2004.
5. Daniel E. Feld, *Admissibility in Evidence, on Issues of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, *American Law Reports* (1974).
6. *Id.*
7. Eric Lipton and James Glanz, “9/11 Prompts New Caution in the Design of U.S. Skyscrapers,” *New York Times*, September 9, 2002, Section A, Pg. 1 (comprehensive discussion regarding trend toward incorporating security features in the wake of 9/11, focusing on Time Warner and CIBC Headquarters in Manhattan, among others).
8. For a discussion of the design of the Freedom Tower, see Lower Manhattan Development Corporation Press Release, December 19, 2003, available at www.renewnyc.org.

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