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Litigating Professional Liability Claims in Construction Projects

Emerging Theories of Recovery, Insurance Coverage, Best Practices for Pursuing and Defending Claims

THURSDAY, DECEMBER 20, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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PROFESSIONAL LIABILITY CLAIMS IN CONSTRUCTION

How to pursue professional liability claims?

How to defend professional liability claims?

How do you deal with E&O insurance considerations?

What are practical considerations?

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I. ANATOMY OF A PROFESSIONAL LIABILITY CLAIM

A. THE PARTIES - DELIVERY METHODS

Everything beings with the project delivery method:

A method to **deliver a project to an owner** that factors in risks associated w/ project size, complexity, scope, contractor input, budgetary constraints, lean construction principles, risk-allocation such as dispute resolution, sustainability (LEED), emerging technology (BIM), collaboration, owner control…

After considering these factors/ risks, owner selects project delivery method that provides it the best value **allocating the responsibility of the design and the construction** of the project

A. THE PARTIES - DELIVERY METHODS

Traditional project delivery methods

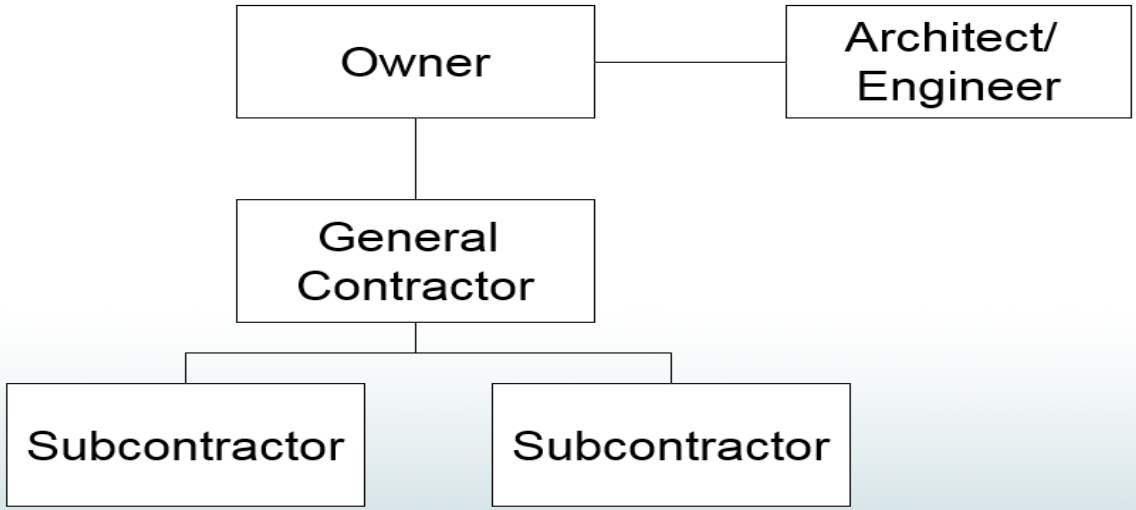
- Design-Bid-Build
- Multi-Prime
- Design-Build
- CM-Agency
- CM-At-Risk

Emerging delivery methods (that may include more integrated design roles):

- Integrated Project Delivery (IPD)
- Green – Sustainable Projects (SP)
- Public-Private-Partnership (P3)

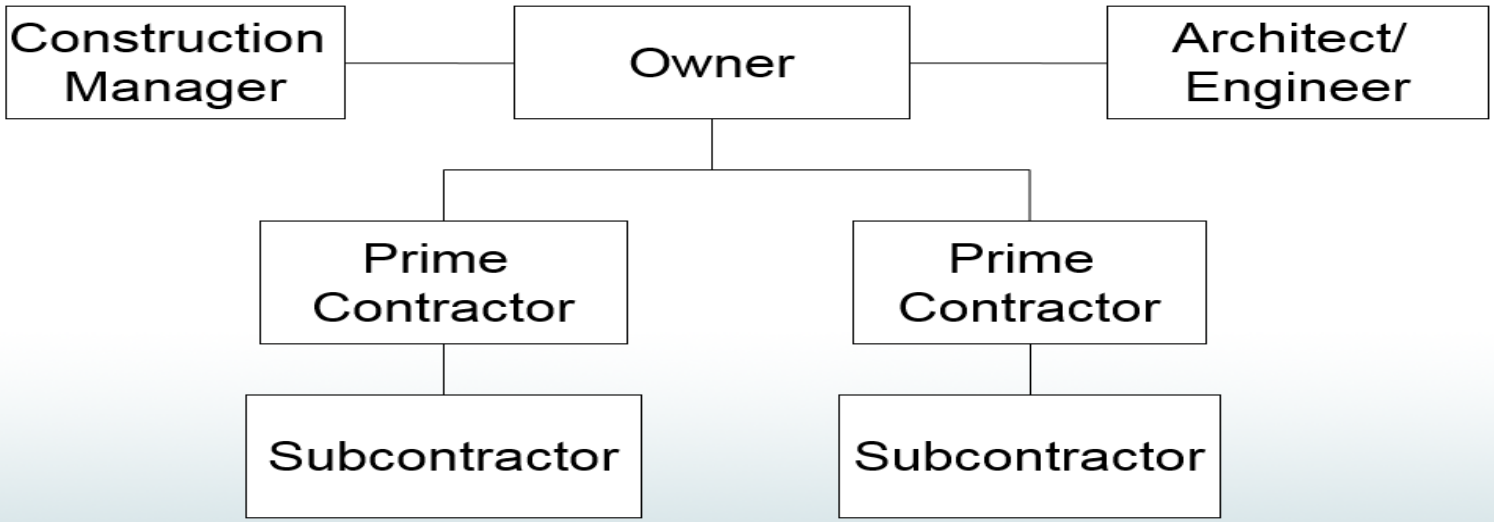
A. THE PARTIES - DELIVERY METHODS

Design-Bid-Build



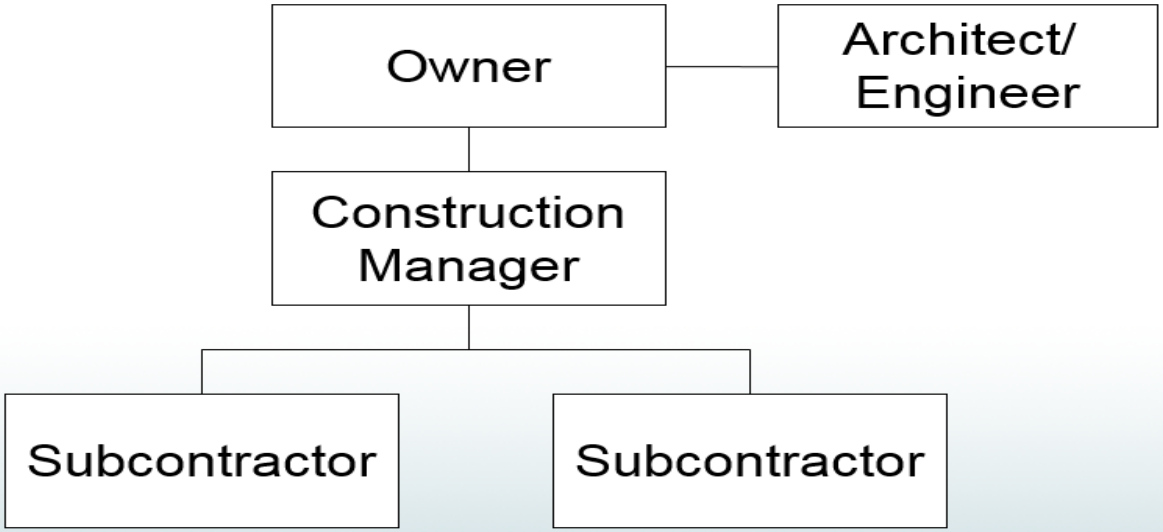
A. THE PARTIES - DELIVERY METHODS

Construction Manager—Agency With Multiple Prime Contractors



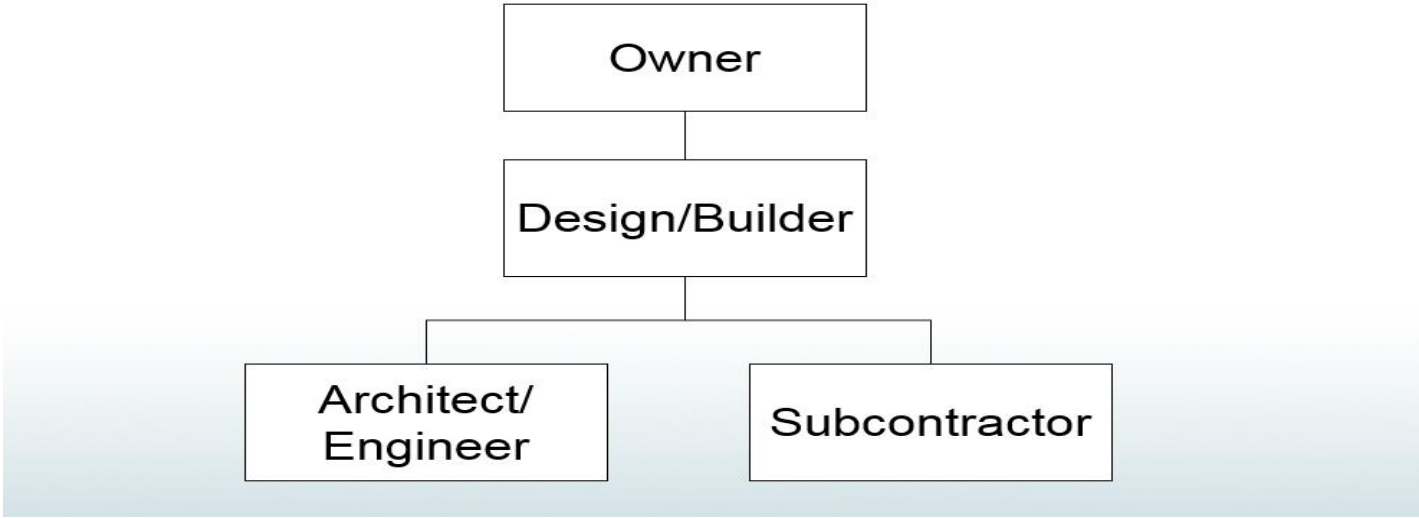
A. THE PARTIES - DELIVERY METHODS

Construction Manager—At Risk



A. THE PARTIES - DELIVERY METHODS

Design/Build



B. THEORIES OF LIABILITY

- **Contractual**. Privity of contract = contractual liability

- **Common law**. No privity of contract = tort / negligence-based liability

  - *Note*: Economic Loss Rule

- **Administrative**. More of a licensing issue

* Generally, everything will revolve around design professional's **STANDARD OF CARE**, either as defined by contract, by the law of the jurisdiction, or administrative / regulatory requirements for the license

B. THEORIES OF LIABILITY

Design professional's standard of care gaged under negligence theory (hence, importance of E&O coverage…)

- **Failure to use *reasonable / due care* which reasonable, careful design professional would use under like circumstances**

- **Failure to use *reasonable / due care* that conforms to acceptable standards that is detrimental to client or public**

B. THEORIES OF LIABILITY

What standard of care should apply?

A. Condo (anywhere) adjacent to Atlantic ocean?

B. Everglades restoration project in Florida?

C. Hospital project…anywhere?

D. Transportation project…anywhere?

E. Residential project in Texas?

*These are considerations for the contract. If not in contract with the design professional, you want to see the design professional's contractual standard of care for the project if considering asserting claim against design professional

B. THEORIES OF LIABILITY

Contractual:

- **EJCDC. E -500. 6.01.A.** The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services.

- **AIA. B-101. 2.2** The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

- **ConsensusDocs 240. 2.1** Design Professional shall furnish or provide the architectural and engineering Services necessary to design the Project in accordance with Owner's requirements….Services shall be performed in accordance with the standard of professional skill or care required for a project of similar size, location, scope, and complexity during the time in which the Services are provided.

B. THEORIES OF LIABILITY

Contractual:

Design Professional's common law duty of care can be extended / broadened by contract…WATCH OUT FOR THIS!

The School Board of Broward County, FL v. Pierce Goodwin Alexander & Linville, 137 So.3d 1059 (Fla. 4th DCA 2014)

> "[T]he Project Consultant [the architect] shall furnish services by experienced personnel and under the supervision of experienced professionals licensed in Florida and shall exercise a **degree of care and diligence in the performance of these services in accordance with the customary professional standards currently practiced by firms in Florida and in compliance with any and all applicable codes, laws, ordinances, etc. . . .**
>
> **All professional design services…by the Project Consultant shall: .1 Be in accordance with all applicable codes, laws, and regulations of any governmental entity**…with the Owner serving as the interpreter of the intent and meaning of . . . any other applicable code."

→ In this contract, architect contracted to ***heightened standard of care*** and was contractually obligated to perform to more heightened standard of care than common law standard. Here, architect accepted risk of design plans not code-compliant (no matter what!)

B. THEORIES OF LIABILITY

Contractual:

The School Board of Broward County, FL v. Pierce Goodwin Alexander & Linville, 137 So.3d 1059 (Fla. 4th DCA 2014)

- First Cost Defense / Added First Cost Benefit Theory

Architect not responsible for costs of items left out of original design since owner would always be responsible for this cost based on cost of item if that item was included in original design;

"[I]f the school board would have paid a cost for construction in accordance with the code-compliant final design plans, an award of a COI [change order item] expense against the architect attributable to a change in the initial design plans for the same cost would put the school board in *a better position* than if the design services had been performed as agreed. Stated another way, if there had been no change between the initial plans drawn for bidding by contractors and the final construction plans, the school board would have been solely responsible for paying all construction expenses incurred for the renovation."

B. THEORIES OF LIABILITY

Common Law:

- *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd.*, 552 So.2d 228, 232 (Fla. 5th DCA 1989) –"However, the duty imposed by law upon professionals rendering professional services is to perform such services in accordance with the **standard of care used by similar professionals in the community under similar circumstances**."

  → *Note*: FL- duty of care of supervising design professional not extended to subs. *See Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*, 630 So.2d 1197 (Fla. 3d DCA 1994)

- *Overland Constructors, Inc. v. Millard School District, School District No. 17, Douglas County*, 369 N.W.2d 69, 76 (Neb. 1985) -"the test is whether the architect has exercised that degree of **skill and diligence ordinarily exercised under like circumstances by architects in good standing in the same or similar communities.**"

- *Martin v. Barge, Waggoner, Sumner & Cannon*, 894 S.W.2d 750 (Tenn.App. 1994) – "Tennessee courts have adopted the "**same or similar community" standard** of care with respect to professional negligence."

- **But see** *In re Parsons, Main, Inc.*, ASBCA No. 51355, 2002 WL 1307490, (June 10, 2002) – USACOE project near St. Louis; A/E argued that government must apply standard of care of geotechnical engineers in St. Louis; rejected local standard in favor of **national standard**

B. THEORIES OF LIABILITY

Common Law:

A&H Properties, v. GPM Engineering, 2015 WL 9435974 (Tex.App.-Austin 2015) –owner hired design-builder to install/design energy efficient improvement including geothermal loop. No contract between engineer and owner. Owner sued engineer for negligence for design of geothermal loop that caused it financial damages. Summary judgment granted in favor of engineer under **economic loss rule**. Affirmed on appeal.

"[T]he Texas Supreme Court recently clarified in a similar factual scenario that the availability of contractual remedies in a vertical chain of contracts on a construction project precludes tort recovery when no personal injury or property damage is alleged. The record before us establishes that GPM [engineer], as subcontractor, was performing services part of of the overall construction project based on its contract with the general contractor, Bell. GPM's duty to perform work on A&H's [owner] arose of that construction subcontract, and no other duty or relationship between GPM and A&H is presented in this record.

****

"Application of the economic-loss rule is particularly appropriate here, where permitting A&H to sue GPM for economic loss would disrupt the risk allocations that A&H negotiated with Bell, and that Bell, in turn, negotiated with GPM."

B. THEORIES OF LIABILITY

Common Law:

Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 2016 WL 360875 (Md.Ct.Sp.App. 2016)-City hired engineer to produce construction documents for wastewater treatment plant under design-bid-build. Years later successful bidder (contractor) sued engineering firm for delays associated with defective design and negligent misrepresentations. No contract between contractor and engineer. Trial court dismissed based on **economic loss rule**. Affirmed on appeal.

> **"[I]n the absence of privity, death, personal injury, property damage, or the risk of death or serious personal injury, no duty of care in tort runs from an engineer or architect to a contractor for purely economic losses on a public construction project."**

B. THEORIES OF LIABILITY

Common Law:

Gongloff Contracting, L.L.C. v. L. Robert Kimball & Associates, Inc., 119 A.3d 1070 (Penn. 2015)- University hired A/E and GC. GC hired steel sub. Steel sub hired sub-sub to erect steel. During construction it was determined that roof design not sufficient to bear loads. There were 3 shut-downs of steel erection due to redesigns. Sub-sub submitted 81 change order requests resulting in it being unable to pay vendors, laying off its crew, and leaving site. Sub-sub sued A/E for negligent misrepresentation re: the design of the roof. Trial court granted judgment on pleadings based on **economic loss rule**. Reversed on appeal.

"We conclude that the amended complaint's allegations that Kimball's [A/E] design documents constituted negligently-supplied false information have been pled with the appropriate level of specificity to state a cause of action for negligent misrepresentation.... While Kimball might prove later in the litigation that the allegation that it provided false information concerning the integrity of its roof design was unsubstantiated, it is not entitled to judgment in its favor at this stage of the proceedings." (relying on case that A/E can be liable for negligent misrepresentation when it negligently supplies information knowing that 3rd parties will rely on such information)."

B. THEORIES OF LIABILITY

Administrative:

Ohio Administrative Code 4703-3-07 (A) (1)- In practicing architecture, a registered architect shall act with reasonable care and competence and shall apply the knowledge and skill which is ordinarily applied by registered architects of good standing, practicing in the same locality.

Alabama Administrative Code 100-X-7-.01 (1)- In practicing architecture, an architect's primary duty is to protect the public's health, safety, and welfare. In discharging this duty, an architect shall act with reasonable care and competence, and shall apply the knowledge and skill which is ordinarily applied by architects of good standing, practicing in the same locality.

Florida Administrative Code 61G1-12.001(4)- An architect, firm, or business holding a certificate of authorization may not be negligent in the practice of architecture. The term negligence is defined as the failure, by an architect, to exercise due care to conform to acceptable standards of architectural practice in such a manner as to be detrimental to a client or to the public at large.

C. PROVING PROFESSIONAL LIABILITY CLAIMS

Initial Questions:

1) Did the design professional owe YOU a **standard of care - duty** (contractual or common law)?

2) Did the design professional **breach** that standard of care?

3) Did the design professional's breach **cause** YOU damages?

4) What are YOUR **damages**?

C. PROVING PROFESSIONAL LIABILITY CLAIMS

Issues caused by design professional's errors and omissions:

- Delay?
- Increased construction costs?
- Bust in the GMP?
- Property damage and/or personal injury?

*Cull applicable project documentation including notice you sent to design professional

C. PROVING PROFESSIONAL LIABILITY CLAIMS

Engaging standard of care expert:

*Hire a *consulting expert* sooner than later to serve as standard of care expert to look at contract (and any basis of design), design plans, applicable RFIs, and change orders to determine whether there was a **breach to the standard of care**:

- If expert says design professional met standard of care, you know (i) you may not have a claim and/or (ii) if you want to pursue claim you cannot use this expert

- If expert says design professional did NOT meet standard of care, you know (i) you may have a claim against design professional, (ii) this expert can serve as a *testifying expert*, and (iii) this expert in conjunction with you or another expert can determine damages caused by breach

C. PROVING PROFESSIONAL LIABILITY CLAIMS

Determining damages:

- Remember, first cost defense / added first cost benefit theory

- Causation – need to prove those damages caused by breach of standard of care

- Can damages be segregated, as applicable, between design professional and contractor or is there overlap

LITIGATING PROFESSIONAL LIABILITY CLAIMS

OVERVIEW

- Insurance Coverage
  - Defense and indemnity
- Defense Strategies
  - Contract Defenses
    - Limitation of liability
  - Common Law Defenses
    - Standard of care
    - Mitigation of damages/Betterment
  - Statutory Defenses
    - Statute of limitations/repose

What to do if dispute arises

- Do not admit liability but maintain relationship with claimant while avoiding discussions about claim.
  - Risk statements against interest or admissions
  - Let your attorney do the talking
- Notify your professional liability carrier immediately.
  - Ensure coverage for E&O
  - Facilitate early resolution
- Document facts in a letter to attorney if you must.
  - Addressed to attorney and can copy in-house personnel but not anyone outside the company.
  - Protected by attorney/client privilege if prepared in anticipation of litigation.
- Safeguard all project documents

E & O Insurance

- Insurance that covers the professional negligence (errors and omissions) of design professionals.
  - Does not cover intentional acts or breach of obligations under contract.
  - Keyed to breach of the standard of care

E & O Insurance

- Tender defense of claim to insurer
  - Late tender may bar coverage and cost of defense incurred prior to tender
- Insurance company response to tender
  - Accepted without reservation
  - Accepted with reservation of rights disputing coverage
  - Refused
    - Declaratory judgment action to determine rights

E & O Insurance

- Notice of Claim
  - Claims-Made v. Occurrence Policies
    - OCCURRENCE: loss covered if occurrence takes place in policy period, even though claim made after expiration of policy
    - CLAIMS-MADE: loss covered only if event arises & claim made during policy period
  - Must provide prompt notice upon loss

Standard of Care

- Standard of professional care – one will be judged according to the standard of care required by their profession.
  - "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."

Negligence

- **Negligence** is a breach of the applicable standard of care
  - Failure to use that care exercised by the reasonably prudent person under similar circumstances
  - ***Must be*** proved with expert testimony
    - Testify to level of skill and care required of professional under the circumstances.
  - PERFECTION IS NOT REQUIRED

Negligence

- Expert qualifications
  - Must be qualified by specialized knowledge, skill, experience, training, or education before he/she will be allowed to testify.
  - Lack of state license goes to weight of testimony not admissibility.

Elevated Standard of Care

- Consequences of elevated standard of care?
  - Insurance coverage only for acts of negligence (errors and omissions)
  - No insurance coverage for breach of contract
    - Breach of warranty
    - Unfulfilled guarantee
  - NEVER EVER WARRANT OR GUARANTEE

Negligence

- Causation
  - Must be cause in fact
    - But for conduct, injury would not have occurred.
  - Must be proximate cause
    - Foreseeable result of conduct
  - Examples:
    - Soils v. structural design problem
    - Failure to follow plans

Negligence

- Damages
  - Existence of damages proved with reasonable certainty and cannot speculate.
  - Allowed all foreseeable consequences of act including consequential and economic damages.
  - Measure:
    - Cost of repair or diminution in value (whichever is less).
  - Attack via betterment doctrine.

Claim Defenses

- **Disclaimers**
  - Should disclaim responsibility for control of and implementation of safety precautions.
    - One's acts could give rise to responsibility even with contractual disclaimer. Do not assume responsibility beyond scope of agreement.
  - Some states have passed legislation protecting the DP from safety related liability on construction projects unless the DP assumes certain safety related obligations. (Missouri, Kansas, Nebraska, Wash., etc.)

Claim Defenses

- Disclaimers
  - Statement that DP has no control over construction means and methods
  - Not responsible for making continuous or comprehensive on-site inspections
  - Only to check progress of work, not for compliance with contract documents
  - Not intended to “guarantee” or “certify” that contractor complied with plans and specifications

Claim Defenses

- Liability of others (Comparative fault)
  - Each potentially responsible party assigned percentage of fault.
  - P's fault must be less than D's fault or the combined fault of all Defendants.
    - No recovery if P fault equal to or greater than 50%
  - In any case, P's damages is reduced by % of P's fault.

Claim Defenses

- Liability of others (Comparative fault)
  - May assign fault to immune party
    - Goal to avoid imposing liability that is disproportionate to fault
    - State employees protected by sovereign immunity
    - Parties protected from liability due to SOL & SOR
    - Settled entity as long as fault asserted in pleadings
    - CANNOT apportion fault to employer due to workers comp immunity unless prove employer is 100% at fault

Limitation of Liability

- Waiver of consequential damages
  - Loss of use, lost profits, lost sales, etc.
- Example:
  - Owner hereby agrees, to the fullest extent permitted by law, that the design professional shall not be liable to the owner for any special, indirect or consequential damages whatsoever, whether caused by the design professional's negligence, errors, omissions, strict liability, breach of contract, breach of warranty, or other cause or causes.

Limitation of Liability

- Exculpatory clause
  - To be valid, exculpatory clause ***must*** satisfy certain conditions such as:
    - The clause has been freely negotiated between parties of relatively equal bargaining power;
    - The clause is conspicuous and clearly set forth in the agreement; and
    - Their exists no public policy prohibiting the enforcement of the clause.

Limitation of Liability

- Limitation to sum certain enforceable
- Example
  - Owner hereby agrees that, to the fullest extent permitted by law, design professional's total liability to the owner for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to the project or this agreement from any cause or causes included, but not limited to, the design professional's negligence, errors, omissions, strict liability, breach of contract, or breach of warranty shall not exceed the compensation paid to the design professional, or the total amount of $50,000, which ever is greater.

Limitation of Liability

- Construed strictly
  - More limited = more scrutiny
    - Limitation nominal compared to potential damages
    - Limitation nominal compared to fee
    - Goal is to avoid minimization of concern for acceptable performance
  - Less sophisticated = more scrutiny
    - Member of general public

Limitation of Liability

- Clauses that shorten applicable statute of limitations.
  - "The owner and engineer agree that the applicable statute of limitations shall commence to run upon substantial completion of the project"
  - Void in Alabama
    - Al. Code Ann. § 6-2-15

Claim Defenses

- Written Notice Requirements
  - Purpose of Notice Requirement
    - To advise owner or DP of breach and provide opportunity for cure.
    - Effect of failure to comply with notice requirement?
      - Claim may be barred - first breach

Claim Defenses

- Prior waiver and release
  - Voluntary relinquishment of known right
    - Expressed or implied from conduct
    - Implied by an act manifesting an intent not to claim right

Claim Defenses

- Statute of limitations
  - Statutory time bar to causes of action
    - Action must be filed prior to expiration of statutory period
  - Two years for tort claims
  - Two years for injury arising out of improvements to real property
  - Ten years for breach of contract

Claim Defenses

- Statute of limitations
  - Commences on date cause of action accrues
    - When breach is sustained
    - Discovery rule (other jurisdictions)
      - When injury is discovered or, in the exercise of reasonable care and diligence, should have been discovered

Claim Defenses

- Statute of repose
  - Statutory termination of right to file lawsuit regardless of accrual/discovery
  - Seven years from substantial completion of the project
  - Exception for concealment
    - Actual knowledge of defect and fail to disclose

Claim Defenses

- **Failure to follow design**
  - If the plaintiff complains that plans and specifications furnished by a design professional are defective, the **plaintiff must prove that the plans were followed**.

Claim Defenses

- Failure to allege that the project was constructed in accordance with the plans prepared by the design professional may result in dismissal because, the essential element of negligence, proximate causation, is lacking. Montgomery Industries International, Inc. v. Southern Baptist Hospital of Florida, Inc. 362 So.2d 145, 146 (Fla. Dist. Ct. App. 1978); Goette v. Press Bar and Café, Inc., 413 N.W.2d 854, 856 (Minn. Ct. App. 1987).

Claim Defenses

- It has been specifically recognized that:
  - "When a case is based upon negligence of an architect or engineer in preparing plans, it is essential that the plaintiff prove that construction of the project designed was accomplished in compliance with the plans and specifications furnished by the defendant, at least with respect to that portion of the work claimed to be defective. Likewise, it is necessary that a plaintiff allege this element as an ultimate fact in his petition, for without it there would appear in the petition no causational link between the alleged negligence and the injuries complained of." Covil v. Robert & Co. Associates, 144 S.E.2d 450, 455 (Ga. Ct. App. 1965). See also, Balcom Industries, Inc. v. Nelson, 454 P.2d 599, 601 (Colo. 1996).

Claim Defenses

- Another court has held that:
  - The contractor has a duty to carry out the construction in accordance with the plans and specifications agreed upon and can depart from them at his peril. (Citation omitted). Accordingly, we conclude that plaintiff's departure in the instant case from the plans and specifications provided by the [party] now precludes it from alleging a faulty design in those specifications. Thus, the directed verdict was properly granted. W.H. Lyman Construction Co. v. Village of Gurnee, 475 N.E.2d 273, 281 (Ill. App. Ct. 1985).

Claim Defenses

- Summary
  - In order to recover for negligently prepared plans and specifications, the plaintiff must show that, as a result of compliance with such defective plans and specifications, it sustained damage. McGuire v. United Brotherhood of Carpenters and Joiners of America, Local No. 470, 314 P.2d. 439, 444 (Wash. 1957).

Claim Defenses

- **Betterment** – also known as the “added benefits” doctrine
  - Most claims for damage are for the entire amount spent on remedial repairs.
  - Costs the owner would have incurred anyway had the work been performed correctly in the first place are “added benefits”
  - Based on the premise that subsequent modifications are improvements to the design.

Claim Defenses

- Example:
  - St. Joseph Hospital v. Corbetta Constr. Co., 316 N.E.2d 51 (1st Dist. 1974)
    - Specified wall paneling already installed did not meet building code and had to ripped out and replaced with more expensive paneling. The court ruled that proper measure of damage was the cost of installing and removing the original wrong paneling, not the additional cost associated with the more expensive correct paneling and more expensive installation. Had the DP originally specified the proper system, the owner would have incurred that cost any way.

Claim Defenses

- Example:
  - Henry J. Robb, Inc. v. Urdahl, 78 A.2d 387 (D.C. 1951)
    - DP designed inadequate heating system requiring three new heaters and relocation of one heater. Court held that the owner was not entitled to total cost of remedial work and was only entitled to increased cost to perform the remedial work (increase material and labor costs). Court noted that allowing the owner to recover a greater sum would allow the owner to profit from the designer's mistake.

Claim Defenses

- Example:
  - Wendward Corp. v. Group Design, Inc., 426 A.2d 57 (Me. 1981).
    - DP negligently reported favorable soil conditions at site when site actually contained rubbish inadequate to support a foundation. Error was not discovered until after foundation had been poured. Wendy's had to demolish original foundation, over excavate and refill site with adequate material and reconstruct the foundation. Soils engineer was liable for damages incurred, among others, to build and demolish original foundation. The court refused to award the money spent to over excavate and refill the site because Wendy's would have spent that money anyway if the problem were exposed originally. Perhaps if Wendy's could have proved that it would have relocated had it known of the bad soil conditions, the court would have awarded the additional site prep costs.

Claim Defenses

- Four Elements:
  - No guaranteed estimate of costs
  - Costs in nature of added work, not rework
  - If owner had known of defect, would have proceeded any way
  - The additional work enhances value of project.
- Conclusion
  - The DP should not have to pay for costs the owner would have paid anyway
  - Would have been incurred had the initial design been appropriate.

Avoiding Litigation

- Well drafted contract
- Performance to minimize potential for dispute
- Documentation of significant events
- Know danger signs
- Develop preventative forms and procedures
- Educate subordinates

Questions?

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IV. PRACTICAL CONSIDERATIONS

IV. PRACTICAL CONSIDERATIONS

- Have a lawyer participate in negotiating your contract so you can appreciate risks shifted to you and those that are not
- Read your contract to make sure you understand terms including those risks shifted to you, notice provisions, scope of work provisions, indemnity provisions, standard of care provisions, basis of design, obligations during construction administrative phase, etc.
- Understand difference between visual observations (*i.e.*, general conformance) and contractual inspections (*i.e.*, ensuring conformance) during construction administration phase
- Understand you can expand or heighten your standard of care by language in your contract…Beware of this and contractual provisions that impose guarantees, warranties, certifications, etc. beyond your common law standard of care

IV. PRACTICAL CONSIDERATIONS

Insurance considerations

- E&O insurance will be "claims made" triggered by date of claim
- E&O insurance traditionally has declining balance policy limits meaning fees/costs will reduce policy limits
- E&O insurance traditionally will not pick up a defense obligation of an "additional insured," so review this in contractual indemnity provision

IV. PRACTICAL CONSIDERATIONS

IPD Considerations:

- Shared risk/reward through "transparency"
- Waiver of claims among project team
- **Collaborative relationship between design and construction**
- Need sophisticated leadership team
- Funding requirements
- Procurement requirements
- **Technology (BIM) requirements (for collaborative design)**
- **Sustainability**
- Lean construction principles
- New school thinking regarding risk allocation
- Contingency? (unlike GMP contracts)
- **Insurance considerations (e.g., project specific professional liability / manuscript policies with extended reporting period, make sure PL covers negligent design conveyed in digital data, rectification coverage…**
  - ***Note*: professional liability coverage centers on conventional notions of professional liability / E&O**

IV. PRACTICAL CONSIDERATIONS

Green – Sustainable Project Considerations:

- LEED certification
- Financial incentives and projected cost savings
- Claims associated with achieving certification, incentives, projected cost savings

IV. PRACTICAL CONSIDERATIONS

P3 Considerations:

- Sophisticated leadership teams with understanding of process
- Cost of private financing (cost associated with debt)
- Increased private party participation in delivering public project
- Risk transfer to private consortium (*e.g.*, design, construction, financing, operations and maintenance, etc.)
- **Insurance considerations (similar to design-build or potentially IPD)**