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## **Liability From the Ground Up: Design, Surveyor, and Contractual Liability Issues On A Construction Project**

### **I. Introduction**

According to the US Census Bureau, the annual value of all construction work is approximately \$1.5 trillion — that's almost 7% of the country's GDP. Additionally, passed the XYZ BILL. Construction is alive and well. Construction claims are also alive and well with potential exposure as at all time high and Plaintiff's counsel, in many instances, making outrageous demands and letting the defendants fight it out amongst themselves. Many projects start with a piece of land that needs to be developed. Site surveyors and geotechnical consultants are, in many instances, the first design professionals who perform work and face exposure. Next comes the architects and engineers along with the general contractors who perform the work to construction whatever is intended on being constructed.

The panel will go through the phases of a construction project and why, there are many instances where, the defendant would be better off standing together as a united front against Plaintiff. While, there will come a point where each party needs to take care of their own interests, at least at the outset, a unified front may be the best front.

### **II. The Players**

#### **A. Land Surveyor**

Surveying is often one of the first processes that need to be completed during a development. Not only does surveying need to be accurate, but also needs to be fast. A lengthy survey will ultimately push deadlines back, delaying every stage of the development process. Professional land surveyors understand the urgency related to a land survey and are able to execute their duties as efficiently and thoroughly as possible.

A professional land survey identifies major features of the land, which includes assessing both risks and opportunities. The entirety of a development project is mapped for further planning. Measurements and maps are made and known maps are double-checked to ensure that the development is happening in the right areas of the land and the right property boundaries have been laid.

Many properties may have pre-existing issues, such as incorrect boundaries, the improper recording of utilities and easements, or misplaced wildlife crossings. A proper land survey will correct these issues, which could have easily occurred over time. Failing to correct these issues will ultimately lead to problems later on, which could range from government fines to injury to workers.

## **B. Architect/Engineer**

Architects are in charge of design and project planning, and they are also responsible for the visual appearance of buildings and structures. The term “architect” refers only to individuals who are registered with a local governing body. To become licensed, architects must meet specific professional training requirements and pass an exam. Architectural services can be obtained from individuals without licenses, but they cannot call themselves architects and cannot sign construction documents.

Architects work hand-in-hand with other professionals such as civil and HVAC engineers to deliver qualified designs. Architects have several responsibilities during all stages of a project, from the initial drafts and meetings to the inauguration of a building. Architects are appointed by the client, and they have the duty of gathering all the information and ideas necessary to create a functional space that meets client needs while being code compliant.

Architects are not just involved in the building design phase. Their role is important in every stage of a project, and this article summarizes their responsibilities. Architects can also help improve energy efficiency, by designing buildings that maximize natural lighting and ventilation, while reducing the heating and cooling needs.

## **C. Contractor and Related Subcontractors**

In general terms, a contractor is responsible for planning, leading, executing, supervising and inspecting a building construction project. The responsibility extends from the beginning to the end of the project, regardless of its scope.

Contractors accomplish their duties by planning activities, supervising workers, and ensuring the project follows local codes and laws. A contractor may hire subcontractors for specialized areas, such as electrical installations and HVAC systems.

As mentioned before, a building contractor has multiple responsibilities, which may vary depending on the contract. There are many roles a contractor can assume during different stages of a project, and this section covers the most common ones.

### **1. Project Planning**

Every project has a master schedule that describes all activities, along with their time distribution and planned budget. This schedule has a completion date that contractors must meet, and hefty penalties normally apply for missing the deadline. A late completion can only be justified if the project was delayed by external factors beyond the contractor’s control, such as extreme weather.

## **2. Project Management**

The contractor needs to complete the project on time, and this involves many construction management activities:

- Ensuring funds are available to keep the project moving
- Purchasing materials with enough anticipation for them to reach the site when needed
- Purchasing or renting the construction equipment required for the project
- Interviewing and hiring subcontractors to complete specialized work
- Creating progress reports to justify intermediate payments

## **3. Legal and Regulatory Issues**

Contractors have a handful of responsibilities in terms of legal and regulatory issues. They must acquire all the necessary permits and licenses before starting the project, while covering any fees and taxes that apply. Also, the entire construction process must follow local legislation and building codes.

Being unaware of legal requirements is not a valid excuse in construction projects, which means that contractors must have updated knowledge. With the right construction permits and contractor licenses, the project can progress without disruption.

## **4. Health and Safety Issues**

The contractor must guarantee health and safety in the construction site, by implementing adequate procedures and raising awareness among workers. The contractor is also responsible for the proper operation of equipment and preventing any accidents from misuse.

### **III. Standard of Care**

The traditional standard of care is what a reasonably prudent design professional in the same or similar locale would do under same or similar circumstances. The standard of care is also reflected in the design professional's contract for services. A design professional's standard of care, which is the level of quality that an surveyor, architect or engineer's work must achieve to avoid liability for professional malpractice, is best described by the standard language used in the American Institute of Architect's contract forms, such as the AIA B101-2017, which states at Section 2.2 that "[t]he 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."

Section 2.2 served to clarify the notion that there are great differences in "the level of skill and care" afforded different contracts. Additionally, that there is no one size fits all. That said, contractors and design professionals pare down their scope of work by skimping on general provisions, or requirements, to the level they feel a given commission merits, or what they are willing to concede; as general requirements are notoriously the first services to be tweaked.

One wonders how a judge, arbitrator, or jury will look back at all of the unusual circumstances occurring during a pandemic and determine how a design professional managed to reasonably fulfill all of the necessary obligations. At the onset of the pandemic everyone was scrambling to simply survive and live to see tomorrow. Project owner, general contractors, and design professionals were patient to allow construction projects to be completed and they worked with each other to complete the projects in a safe and timely manner. Now, almost two years later, the patience of people involved in construction project have changed. Project owners want their work completed in a timely manner and care far more about timely completion than a contractor whose work force may be severely limited due to a Covid outbreak or a design professional who cannot complete drawings in a timely manner or approve payment applications as submitted.

Now the standard of care can defined as what would a reasonable and prudent design professional do and/or perform services during the Covid-19 pandemic with the pandemic becoming a way of life.

In the new Covid-19 world, the best course of action at this time is to openly communicate with the other project participants (owner, contractor, subs, etc.) about the situation, identify the challenges presented, and work toward a mutually acceptable resolution, such as putting a limit on the number of people onsite during observations, adopting methods for virtual observation, and other solutions. In their discussions, the parties may consider how social distancing, the Centers for Disease Control (CDC) guidelines, and other requirements or recommendations by applicable public authorities or officials will be addressed to allow for safe and approved site visits by the architect and its consultants.

The standard not only goes to handling active construction projects but also applies to the types of design that need to be contemplated to provide safe buildings moving forward. For many years old school design professionals balked at the time and expense of designing “Green Buildings.” Designers of “Green Buildings” had a goal to reduce or eliminate negative impacts, and at the same time create positive impacts, on our climate and natural environment. Now “Green Buildings” have become the norm rather than the exception.

Some of the initial pandemic-inspired design adaptations involve a building’s HVAC system. To address the need for improved air filtration, technologies that were once considered state of the art, such as high efficiency particulate air (HEPA) filtration and ultraviolet germicidal irradiation (UVGI), are now more commonplace. In fact, the CDC has created its own set of recommendations for making these and other improvements to new and existing HVAC systems. Space needs are like likewise changing. Workspaces are now being designed to account for more permanent social distancing using physical separation, directional signage, and staggered shift patterns. De-densification strategies are being used to account for workers who are now more comfortable working from home. Use of wider corridors, reconfigurable partitions and keyless/touchless entries are being integrated into designs that previously were only seen in Star Trek.

It remains to be seen whether the standard of care will be understood to include addressing these types of risks in the future. Could, for example, a design professional be found to have acted negligently by failing to advise an owner to incorporate UVGI equipment into its HVAC

system? Does it make a difference that prominent organizations like the Centers for Disease Control and Prevention and WHO are urging caution and adaptation?

#### **IV. Site Safety on Construction Project**

##### **A. Owner Responsibility for Site Safety**

Once the project owner has executed a contract with its independent contractor delegating site safety responsibility to that firm, the owner generally has no legal liability for injuries to the employees of the independent contractors unless the owner asserts some control over the means, methods and procedures of the contractor's work or takes some action at the project that causes or contributes to an injury. There are exceptions to the general rule, including where there is (1) a non-delegable duty; (2) an inherently or intrinsically dangerous activity; or (3) negligent exercise or retention of control over the work by the owner.

Merely retaining the right to stop, inspect or approve work is generally not enough to create owner liability. Instead, retention of control by the owner must be so significant that the contractor cannot freely choose and exercise its means, methods and procedures as it deems fit.

In the case of *Beil v. Telesis Construction, Inc.*, 11 a.3D 456 (PA Supreme Ct. 2011), a project owner, Lafayette College, entered into a construction management agreement with a general contractor (GC) to renovate a building. That firm in turn subcontracted the renovation work to other contractors, one of whom performed the roofing work.

An employee of the roofer climbed scaffolding that had been installed by a masonry subcontractor and fell from that scaffolding, suffering a serious injury. The employee sued the construction manager /general contractor as well as the masonry subcontractor and the college — alleging that all were negligent.

The Supreme Court of Pennsylvania held that although the college exercised some authority regarding safety, and regulated access to, and use of, certain areas of the premises, this conduct did not constitute the type of control that would subject it to liability since it did not retain control over the actions of the independent contractors.

##### **B. Contractor Responsibility for Site Safety**

The general contractor on a project is typically responsible for overall site safety because the contractor is performing the type of work that is creating the most significant safety risks on a site. The Agreement between the contractor and the owner specifically assigns this responsibility to the contractor as an independent contractor responsible for its own means, methods and procedures — including safety precautions. See for example, American Institute of AIA A 201-2007, section 10, and ConsensusDOCS 200 – 2007, Section 3.11.

In addition to being liable for acts that cause injuries, the contractor may in some instances also have liability for the injuries of its subcontractor's employees. This can be so even when those injuries are not directly caused by the prime contractor.

Courts in some states impose liability on contractors for hazards where the contractor knows or should know the employee of a subcontractor is not protecting himself against a known hazard. Some states find contractors liable for injuries to subcontractor employees if the contractor has retained control over the subcontractor's means, methods and procedures – especially if the prime contractor maintains safety-related supervisory duties such as providing a safety supervisor, or ensures compliance with safety rules and regulations.

Some courts find contractor liability by focusing the legal analysis primarily on the language of the contract between the project owner and contractor that includes specific and detailed safety responsibilities being imposed by the contract upon the contractor. *Cochran v. Gehrke, Inc.*, 305 F. Supp. 2d 1045 (N.D. Iowa 2004).

Other courts hold that merely maintaining the authority to direct, control or supervise the work that created the injury is not sufficient basis to find the prime contractor liable for subcontractor injuries if the contractor did not exercise actual control over its subcontractor's work. Thus, in the absence of proof of any negligence or actual supervision of a subcontractor, the mere authority the general contractor has to supervise the work and implement safety procedures is not a sufficient basis to impose liability on the prime contractor or to find that it owes any common law indemnification to the project owner for damages.

### **C. Design Professional Responsibility**

Design professionals and professional consultants also need to take precautions against accepting responsibility for the safety of anyone other than their own employees. Numerous court decisions have addressed the question of whether a firm such as an architect, engineer or CM has liability for someone else's employee despite not being directly or even indirectly responsible for causing the injuries.

The first question addressed by courts is whether the contract between the consultant and the project owner established consultant safety responsibilities. Even if the contract language clearly states that the consultant has no responsibility for project site safety and the contractor is solely responsible (e.g., AIA B 101-2007, § 3.6.1.2 and AIA A 201-2007, § 11.1.4), the court will not stop there with its analysis. Rather, the courts will look at the facts of the case to determine whether the consultant did anything or should have done anything in the field during construction affecting site safety.

Courts in different states take very opposite positions concerning the responsibility of the design professional for safety during construction. In *Carvalho v. Toll Brothers* 278 NJ Super. 451(1995), the New Jersey court found under the contract the Engineer had authority to stop work that was not in compliance with the specifications, and that by common law the Engineer had a duty to take action when confronted with a dangerous condition with which he has actual knowledge.

In sharp contrast to the *Carvalho* holding, the Pennsylvania court in the case of *Herczeg v. Hampton Transportation Municipal Authority*, 766 A.2d 866 (PA Superior Ct. 2001), concluded that even where the engineer had actual knowledge of the dangerous condition that led to the death of a construction worker, the engineer owed no duty to the construction worker.

The Pennsylvania court said, “We reject any notion that a duty arises solely upon an engineer’s actual knowledge of dangerous conditions. If someone is under no legal duty to act, it matters not whether that person is actually aware of a dangerous condition. Conversely, if someone by contract or course of conduct has undertaken the responsibility for worker safety, that person may still be liable even in the absence of actual knowledge of the dangerous condition if they should have known of the condition.” The court made a point of explaining that the contractual authority of an architect or engineer to reject work that is not being performed consistent with the plans and specifications is solely for the benefit of the project owner.

## **V. Insurance Coverage Challenges for the Players in a Construction Project**

### **A. Commercial General Liability Insurance**

Whether property damage caused by defective construction work constitutes an accidental “occurrence” under the standard form Commercial General Liability (“CGL”) insurance policy is now highly dependent on which state’s law applies. Determining which state’s law applies to a particular construction defect claim is therefore critical and often outcome determinative.

A majority of jurisdictions find that defective or faulty workmanship can constitute an “occurrence” under the modern day CGL insurance policy. Generally, these jurisdictions find that defective construction work that occurs unintentionally is a fortuitous “accident,” and therefore an “occurrence” within the meaning of the coverage grant in the CGL policy, or they find that unintentional defective work can constitute an accidental “occurrence” if the defective work causes property damage to something other than the defective work itself. In all of these jurisdictions, a policyholder can potentially trigger coverage for a construction defect claim, assuming other terms and exclusions in the policy do not apply to bar coverage.

A minority of jurisdictions still hold that construction defect claims do not, and cannot, give rise to an accidental “occurrence” within the meaning of the CGL insurance policy, and therefore refuse to provide any coverage at all for construction defect claims. This is the situation in Illinois, and frankly the law in Illinois needs to be corrected.

The modern day CGL insurance policy contains two key parts, namely, the coverage grant and the policy exclusions. The coverage grant broadly provides insurance coverage up to the policy limits for amounts the policyholder becomes legally obligated to pay because of “property damage” caused by an accidental “occurrence.” The CGL policy then narrows and defines the actual scope of insurance coverage for a particular claim through the many policy exclusions.

The correct legal analysis recognizes that there is an accidental “occurrence” under the CGL policy coverage grant when a claim alleges that a general contractor and/or a subcontractor caused property damage by accidentally (not intentionally) performing faulty construction work. Whether or not coverage exists for the claim is then determined by examining the various construction-specific policy exclusions that may apply to the particular situation.

The correct legal analysis examines the kind of property damage at issue only as required by the analysis of the policy exclusions, and not to determine in the first instance if the claim involves an accidental “occurrence.” This is a very important difference. A threshold finding of no

“occurrence” is an absolute bar to coverage, which means there is no possibility of coverage and therefore no duty to defend the policyholder against the claim. On the other hand, a finding that the claim involves an accidental “occurrence” then requires analysis of the claim under the policy exclusions. This often leads to a finding that there is at least potential coverage for part of the claim, the insurance company is therefore required to provide its policyholder with a defense at the carrier’s cost. As a result, the applicable law regarding the “occurrence” issue can, and often does, dramatically affect the policyholder’s financial posture for a construction defect claim.

## **B. Professional Liability Insurance**

In many ways, the potential for loss arising from poor design work is greater than any other risk on a construction project. There is a possibility that the owner, contractors and subcontractors will suffer substantial delays, bodily injury or property damage in the event of defective design. Further, depending on the project delivery model, all claims will flow through the owner, which in many cases is the only party in privity of contract with the architect or engineer. This risk is somewhat reduced on design-build projects. Regardless of the delivery model, it is crucial that the design professional on your project has professional liability insurance tailored to the project.

Professional liability insurance covers losses arising from services considered professional in nature, typically architectural, engineering or other design services. Professional liability policies generally cover the “wrongful act” or “professional negligence” of an architect or engineer. A wrongful act may be defined, depending on the carrier, as a negligent act, error, omission, and sometimes a breach of contract. Dishonest or fraudulent acts are generally excluded.

In addition to the acts and actors covered by professional liability policies, coverage differs from CGL and builder’s risk insurance in several respects. Most importantly, professional liability policies do not require bodily injury or property damage to trigger coverage. While those damages are covered, professional liability insurance may also cover some nonphysical and purely economic damages caused by design errors and any resulting delays. On the other hand, defense costs of the insured are often deducted from the policy limits. The result is that the amount available to pay claims is depleted by the insured’s legal costs related to the claim. Further, professional liability insurance is typically written on a “claims-made” policy, meaning that the claim must be made during the policy term. CGL policies are most commonly “occurrence-based,” meaning coverage depends on the date of occurrence, not the date of the claim.

Another important characteristic of professional liability insurance is that it may cover contractual liability. However, there is a gap in coverage when the breach of contract does not rise to the level of “professional negligence.” While a professional standard of care is typically incorporated into design contracts, technical breaches – which in many cases can cause substantial harm – may not constitute professional negligence. For example, if an architect fails to turn over plans or respond to a contractor’s request for information within the time required, there may be a breach, but not professional negligence. Coverage for this sort of breach can be added through an endorsement for “insured contract coverage.”



## **VI. Strategies in Litigation**

By the time a lawsuit is filed there is generally bad blood amongst many of the players on a construction project. Once an attorney receives the file from an adjuster, he/she must prioritize reaching out to the respective insured and getting all the contract and insurance information. The contract is to see the specific scope of work and insurance is to see coverage and who to tender defense to. An answer will then be filed, and discovery will be served. Sometime in the near future mediation will likely take place. Sometime mediation is before fact depositions and in other situations mediation takes place after some, if not all, of the depositions.

While contractual indemnity clauses come into play and provide another layer of exposure it is beneficial to retain an expert early on and conduct an investigation of the alleged defect on the project. One of the key issues is whether there is actual defects or is Plaintiff's expert just asking for a general complete rebuild/reconstruction. This is where it behooves defendants, whether they be contractors or design professionals and their attorneys to, in general, without exchanging expert reports identify how valid is Plaintiff's claim. At some point after beating down Plaintiff's claim, the project professionals may need to go their separate ways but until that happens it may make sense to work together.