



2021 CLM Construction Conference

Sept 22nd – 24th 2021

San Diego, California

Blurred Lines: Emerging Issues with Design Professional Liability and Construction Defects

I. Background and Purposes

Understanding Key Roles on a Construction Site

Design Professionals (architects and engineers) and contractors have very distinct roles on a construction site. Yet, their work is intertwined requiring a collaborative process that ultimately blurs together the claims and litigation process. This is highlighted with the interplay of coverage and liability. This roundtable panel delves into the roles of claims professionals, coverage, defense attorneys, and experts during construction matters involving design and construction. Knowing the typical methodologies versus the emerging trends utilized by each entity in investigating and litigating these matters, and importantly, the ethical implications considered and/or omitted during this process is critical. The discussion of coverage and liability often can allow the parties to align in the defense but then can push ethical boundaries during handling in litigation.

A. Introduction to Investigation of Claims involving both Design and Construction

Investigating claims and finding solutions and the data captured by them are proving useful on the front end of litigation for risk reduction, and efficient use of resources and on the back end of litigation (i.e., post-loss) with more effective claims resolution and assignment of liability.

B. Categories to consider during the handling of design and construction claims.

1. Identify what type of contract is being used.

While effective at reducing risk, contracts do not eliminate risk altogether, and the various risks can depend greatly on the chosen project delivery model. The

traditional model (often referred to as design-bid-build (DBB)) has the project owner separately contracting with both an architect/engineer and a contractor. While this enables the owner a great deal of flexibility from one project phase to another, it does position the owner as the middleman in the necessary collaboration between phases and participants; inherently, it also highlights the different priorities, aims and motivations among the project participants.

Utilizing a design-build (DB) model addresses some of these risks. Instead of the traditional model's dual contracting, DB consolidates the design and build roles into one team and requires just one contract with a single point of responsibility. This model holds out the promise of reducing an adversarial relationship between participants and promotes early involvement by the contractor, allows for more expert input in initial stages, and should allow for faster project delivery with the added potential to reduce costs.

Identify Roles and Responsibilities:

- Who is the Owner's representative? The owner's representative is given broad authority to approve change orders and invoices. Evaluate who is responsible for communicating with the owner's rep to ensure the owner is apprised of the construction.
- Construction Oversight. Typically, contracts will require the Architect to inspect the contractor's work, but the contractor shall inspect the subcontractor's work. Who becomes responsible when there are defects?
- Change order Submittals. Typically, the contractor will submit to the architect for review. This can become a blame game when things go wrong because it is a collaborative process.
- Are there any coverage issues for design versus construction?

II. Handling of Claims with both the architect and contractor in action.

The best way to exemplify how strategies, emerging trends and important considerations will shape the future of claims and litigation is by looking at recent examples.

A. Case Study #1

1. Construction issues involving the design team, owner, and developer. A Midrise townhome project under construction involves defects of a louver system in the Bay Area. What happens when the retained expert determines that it is a design issue and there is no resultant damage and opposing expert says it is a construction issue? Who inspected the work? Is a repair even necessary?

B. Case Study #2

1. Design and construction issues for the same component. The builder builds according to plans. The plans call for a particular design that may not be the best suitable for the situation. What can the builder do? Metal roof vs. copper roof explained.

III. Trends in Design-Build Claims:

Emerging trends vary by jurisdiction. However, there is a predominate claim in the industry. It involves creating coverage for costs to prevent damage from occurring or to stop damage that has already begun to occur. For example, a contractor defectively installs louvers for windows in a residential high rise. Water intrusion damages interior drywall. The louvers were not appropriate for the area and the design team should have chosen something else. Typically, the damaged drywall is a covered cost, but the louver repair costs are not. However, some courts are finding coverage for the costs to repair the louvers under the theory that it must be done to prevent further covered damage. The difficulty with this argument is that it is not necessary to repair the louvers to effectuate repairs of the already damaged drywall.

IV. Determination of Liability with Discovery.

Typically, you see the contractor's consultant say it is a design issue and the architect's consultant say it is a construction issue. Is there an advantage to presenting a unified defense against the Plaintiff? What about a cost of repair? Advantages to jointly preparing one cost of repair. You do not give the Plaintiff an opportunity to review different costs that could impact liability of each party.

1. The Scientific Method

Experts rely upon the principles of the scientific method as a systematic way of solving a problem; hypotheses are formed and then systematic tests are performed to determine the conclusion (i.e., cause, liability, etc.). Understanding the scientific method as it relates to investigation of claims is critical, including the following six steps:

- Purpose/Question – Ask a question. Example: What caused the fire?
- Research – Conduct background research. Example: Inspect the fire damage. Interview interested parties. Etc.
- Formulate Hypothesis – State an opinion that must be tested; generally, in a cause-and-effect format. Example: The fire was caused by sparks produced by welding crew working in the attic of the building.

- Conduct Experiment – Test the hypothesis. Example: Bodycam video from the welding crew depicted sparks landing on the framing and attic insulation. Sensors in the attic pinpointed the time and occurrence of the fire.
- Data/Analysis – Record observations and analyze what the data means. Example: Review industry standards. Review data. Etc.
- Conclusion – Conclude to accept or reject the hypothesis.

The previous exercise is basic and arbitrary; considering the data discovered using technology (i.e., bodycam, sensors), there is potentially less contention with the expert opinion and subsequent assignment of liability in a scenario like this.

2. Accepting Results – Plaintiffs & Defense

A more contentious foreshadowing of claims handled with design and construction issues will occur when the builder performs their own investigation in response to a defect claim and produces the results. The results need to be accepted by the opposition even if they do not have their own consultant investigating the claim. What happens when the defense results are not favorable? Does this incite the opposition? Should the defense forego creating a formal report? This would apply in either direction – if the claimant alleges defects to a property, extrapolates across a property, and presents such opinions to the builder, and the architect what happens when each points the finger at each other designs versus construction. Like any skeptic, when there is a universal acceptance or acknowledgement of something new or unknown, the opposition is going to have a hard time.

V. Conclusion and Takeaways.

A. Understand the potential Issues to better prepare for cross-over claims.

By understanding and anticipating issues of potential dispute, parties are better positioned to collaborate on a project. An essential piece of avoiding conflict is creating a contract which delegates roles and responsibilities in a fair and reasonable manner. Equally important is having the parties understand the contractual roles and responsibilities before the dispute arises. While a contract cannot safeguard entirely from conflict, it is a necessary tool to navigate turbulent waters.