

# Risk Management/Lessons Learned Design Professional Litigation (2016)

**Presentation by  
J. Kent Holland, J.D.**

# Copyright Information © 2017

This presentation is protected by U.S. and International copyright laws. Reproduction, distribution, display and use of the presentation for internal use by attendees is granted. Other use without written permission is prohibited.

# Learning Objectives

1. We will learn risk management and contract management lessons from litigation involving design professionals.
2. Learn to identify issues with indemnification and limitation of liability clauses and how to better draft those clauses to manage risk.
3. Learn to identify issues concerning standard of care and warranty clauses and how to draft them to avoid uninsurable risks.
4. Learn issues concerning site safety responsibility arising out of contract language and field activities, and how to manage the risk through contracts and services.

# Indemnification

## Indemnification for 3<sup>rd</sup> Party Claims Only

- After KR receiving GMP contract award, KR subcontracted engineering firm to provide balance of design services for the project.
- Later, KR claims A/E designs were flawed, and it had to make midstream corrections to comply with various code requirements, and thereby incurred unexpected costs.
- Made claim against A/E under indemnity clause.
- Court held against the indemnity claim

Suit based on indemnification could only seek damages resulting from 3<sup>rd</sup> party claims against the Indemnatee (KR). The indemnity clause could not be basis for 1<sup>st</sup> first party KR claims to recover its financial losses.

*Hensel Phelps Construction v. Cooper Carry, Inc.*, 2016 WL 5415621 (U. S. District Ct., District of Columbia, 2016).

**(See next two slides)**

- ***The clause:***

“indemnify, defend and hold ... harmless” [the contractor] from any claim, judgment, lawsuit, damages, liability, and costs and expenses, including reasonable attorneys’ fees, as a result of, in connection with, or as a consequence of [engineer’s] performance of the Services under this Agreement....”

Court says, engineer, “naturally, argues that his clauses refers only to liabilities that [contractor] would face from third parties, not to [contractor’s] own “damage” and “costs and expenses” from contract breaches.”

According to the court, “The words “damage” and “costs and expenses” in the indemnification clause are listed along with other words that clearly anticipate the problem of third-party litigation against [contractor] for problems that [engineer created.... [ ] Reading the indemnification clause in the most obvious way, it required [engineer] to cover [contractor]s] liabilities when and if a third party sues over problems caused by the [engineer’s] fault.”

## Hensel Phelps Affirmed on Appeal

- U.S. Court of Appeals District of Columbia affirmed the trial court summary judgment, holding that the indemnification clause at issue did not cover first-party claims. The court stated, “Unquestionably, indemnification clauses have traditionally been used and interpreted as extending only to third-party claims [ ]. In the initial Agreement, the terms ‘claim, judgment, lawsuit, damage, liability, and costs and expenses,’ must be interpreted in light of the traditional function. Furthermore, the D.C. Court of Appeals has advocated for strict construction of indemnification clauses to avoid covering ‘any obligations which the parties never intended to assume.’” *Hensel Phelps Construction Co. v. Cooper Carry Inc.*, (U.S. Court of Appeals, District of Columbia, No. 16-7128 (June 30, 2017)).

# Does Indemnity Only Apply to 3<sup>rd</sup> Party Claims?

- Beware of court decisions that have held that even first party claims can be made under indemnity clauses.
  - *e.g., Wal-Mart v. Qore Environmental*



# Engineer Required to Defend Client against Routine Contractor Claim

Trial court held A/E owed its client, the town, a defense against a contractor suit that alleged that the plans and specifications prepared by the engineer and provided by the town to the contractor for bidding and construction were defective.

It was a routine breach of contract claim by the contractor against the project owner, but the court concluded the indemnification agreement in the engineer's agreement with the town was broad enough to obligate it to defend the town against the contractor's claim.

*Penta Corporation v. Town of Newport v. AECOM Technical Services, Inc.*, No. 212-2015-CV-00-011 (Merrimack, New Hampshire Superior Court, 2016).

## **KR filed suit against town to recover payments it alleged were owed it under its construction contract.**

- Complaint asserted construction was in accordance with engineer's plans and specs that called for a specific brand of disc filters for a wastewater treatment facility that were not capable of handling required wastewater flow.
- Upon receipt of the suit, the town sent the engineer a demand for a defense against the contractor's suit pursuant to the terms of the indemnification clause in the contract between the engineer and the town and the engineer. The engineer responded to the town's demand, stating it would not defend (or indemnify) the town because the allegations of the contractor were not directed at the engineer.

# The Indemnity Clause

Court found broad duty to defend based on this language:

“shall indemnify, exonerate, protect, **defend (with counsel acceptable to the Town . . .),** hold harmless and reimburse the Town . . . **from and against any and all** damages (including without limitation, bodily injury, illness or death or property damage), losses, liabilities, obligations, penalties, **claims (including without limitation, claims predicated upon theories of negligence, fault, breach of warranty, products liability or strict liability), litigation,** demands, defenses, judgments, **suits,** proceedings, costs disbursements, or expenses of any kind or nature whatsoever, including without limitation, attorneys’ and experts’ fees, investigative and discovery costs and court costs, **which may at any time be** imposed upon, incurred by, **asserted against,** or awarded against **the Town . . . which are in any way related to the Engineer’s performance under this Agreement** but only to the extent arising from (i) any negligent act, omission or strict liability of Engineer, Engineer’s licenses, agents, servants or employees of any third party, (ii) any default by the Engineer under any of the terms or covenants of this Agreement, or (iii) any warranty given by or required to be given by Engineer relating to the performance of Engineer under this Agreement.”

## Duty to Defend Applied to “ALL” Claims – Not Just Tort Claims

- The court noted that the duty to defend applies to “claims,” “litigation,” and “suits” that are “asserted against” the town and related to the engineer’s negligent contract performance.
- Significantly, the court concluded, “This language anticipates unproven allegations, meaning the duty to defend would necessarily arise prior to any factual finding as to [the engineer’s] negligence or breach.”
- The court said, “If [the engineer’s] duty to defend only required it to reimburse the Town for the cost of a defense following adjudication of [the engineer’s] negligence or breach, then the Town would necessarily have to choose its own counsel, thus rendering the [choice of counsel language in the clause] meaningless.”

# “Arising Out Of” is Very Broad Term

- A/E argued that language of the clause reading “but only to the extent arising from” served as a strict limitation on the engineer’s responsibility.
- The court rejected that argument, stating, “The phrase ‘arising out of’ has been construed as a ‘very broad, general and comprehensive term’ meaning ‘originating from or growing out of or flowing from’.”
- The phrase, according to the court, “indicates intent ‘to enter into a comprehensive risk allocation scheme.’ ‘Arising out of’ does not mean that any losses or claims must have been caused by [the engineer’s] negligence or breach. Nor does it necessarily require an action for negligence or breach. A claim merely has to involve an alleged negligent act or omission in the performance of the contract.”
- Thus, the court concluded that the engineer’s assertion that adding the words “to the extent” in front of “arising from” did not alter the broad intent of the words “arising from.”

# Draft Clause to Limit Indemnity to Third Party Tort Claims

- The need to add “third party” as a modifier of “claim” was revealed in the decision of *Wal-Mart Stores v. Qore, Inc.*, 647 F.3d 237 (5<sup>th</sup> Cir., 2011) in which a court concluded that Wal-Mart could make a first party claim against Qore to recover losses incurred on the project even though no third party claim was ever made against Wal-Mart.
- That decision imposed attorneys’ fees on Qore by concluding that the defense obligation in the indemnification clause meant that Qore was responsible for the attorneys’ fees incurred by Wal-Mart in prosecuting a claim against the engineer and contractor.

## A Sample Clause for Your Consideration

- “Consultant shall indemnify and hold harmless (but not defend) the Client, its officers, directors, and employees, from and against those damages and costs that the Client is legally obligated to pay as a result of third party tort claims, including the death of or bodily injury to any person or the destruction or damage to any tangible property, to the extent caused by the negligence of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of remedies or liability contained in this Agreement.”

# Limitation of Liability (LoL)



## Enforcing Limitation of Liability Clauses

- Where a housing developer won a jury verdict for more than \$9.5 million against a geotechnical engineer, the court applied the limitation of liability (LoL) clause in the geotech's contract to cap the liability at \$550,000. The developer attempted to avoid the LoL by arguing that the geotech's conduct was willful and wanton. The trial court allowed evidence in that regard, but the jury found the conduct was not willful and wanton. Therefore, the LoL clause withstood the challenge.
- *Taylor Morrison of Colorado, Inc. v. Terracon Consultants, Inc.*, 2017 WL 2180518, 2017 COA 64 (2017).

## LoL Clause Broadly Applied

- The court stated that the LoL clause “capped [geotech’s] total aggregate liability to [developer] at \$550,000 for any and all damages or expenses arising out of its services or the contract.”
- Clause must have met all the requirements with regard to drafting a strong LoL clause that will be broadly applied.
- It apparently specifically stated that the cap applied to damages whether alleged to be caused by breach of contract, breach of warranty, negligence, errors or omissions or any other theories.

# Sample LoL Clause

- **Limitation of Liability**

- To the fullest extent permitted by law, the total liability, in the aggregate, of Consultant and its officers, directors, partners, employees, agents, and subconsultants, to Client, and anyone claiming through or under Client, for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way relating to this Project or Contract, from any cause or causes, including but not limited to tort (including negligence and professional errors and omissions), strict liability, breach of contract, or breach of warranty, shall not exceed the total compensation received by Consultant or \$100,000, whichever is greater. The Client may negotiate a higher limitation of liability for an additional fee, which is necessary to compensate for the greater risk assumed by Consultant.

# Waiver of Consequential Damages Clause

- **Mutual Waiver of Consequential Damages**

Consultant and Client waive all consequential or special damages, including, but not limited to, loss of use, profits, revenue, business opportunity, or production, for claims, disputes, or other matters arising out of or relating to the Contract or the services provided by Consultant, regardless of whether such claim or dispute is based upon breach of contract, willful misconduct or negligent act or omission of either of them or their employees, agents, subconsultants, or other legal theory, even if the affected party has knowledge of the possibility of such damages. This mutual waiver shall survive termination or completion of this Contract.

# Site Safety: Responsibility and Liability

## When A/E is Sued for Contractor injuries, does Professional or CGL Coverage Respond?

- Professional Liability Exclusion in CGL Policy Bars A/E from GCL Additional Insured Coverage for Laborer's Injuries From Alleged Failure to Plan for Safe Removal of Digester Tank Lid;
- Sparks from a cutting torch being used to remove bolts from a wastewater digester tank ignited a methane gas explosion that killed an employee of a construction subcontractor and injured an employee of another subcontractor.
- Both subcontractor's were required by their contracts to name the project design professional (DP) as an additional insured on their commercial general liability (CGL) policies.
- When claims were brought on behalf of the subcontractor employees against the DP, the DP tendered the claims to the subcontractor CGL carriers for defense.

## Insurance for Injuries continued

- The CGL carriers refused to defend.
- Court held that regardless of how underlying cause of action was framed, “The substance of the underlying claims is that [DP] is liable for failing to properly plan for, and take preventative measures to ensure, the safe removal of the digester tank lids. ... The underlying plaintiffs allege that [DP] had a duty as the project’s consulting engineering firm to do so. Even if some of the underlying factual allegations implicate tasks that do not, in and of themselves, involve a specialize skill, such acts and omissions are reasonably related to [DOP’s] overall provision of professional services.”
- DP’s own professional liability carrier defended it in the two actions and the court concluded that the CGL policies were “never intended to cover professional negligence claims.” *Orchard, Hiltz & McCliment (OHM) v. Phoenix Insurance Co.*, 2017 WL 244787 (U.S. Court of Appeals, 6<sup>th</sup> Cir., 2017).
-

# Scaffolding Collapse:

## Engineer, Architect, Project Owner Not Liable for Injuries

- Summary judgment for architect and an engineer, against employees of a contractor that were injured when scaffolding failed under the weight of a concrete slab that was being poured.
- No basis for claim against firms that designed and observed the project because they were not involved in actual supervision and control of the contractors work.
- Citing the AIA B141 agreement, the court found the engineer “was not obligated to inspect the scaffolding to ensure that it was in compliance” with the plans and specifications.

*McKean v. Yates Engineering Corp.*, 2015 WL 5118062 (Mississippi 2015).

**See discussion Next Slide**



# Engineer Had no Duty to Warn

- Court stated only limited circumstances where engineer has duty to warn employees of the contractor or subcontractor of hazardous conditions.
- Engineer had one initial site visit and then a visit after the collapse.
- Court considered factors to determine if supervisory powers went beyond provisions of contract:
  - (1) actual supervision and control of the work; (2) retention of the right to supervise and control; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) assumption of responsibilities for safety practices; (6) authority to issue change orders; and (7) the right to stop the work.

**Continued on next slide**

- Court said: “the scaffolding was a means to build the project's second-story floor”, and “nothing in the contract made the architect responsible for ensuring that the engineer’s scaffolding design was adequate.”
- Court found no contractual duty to inspect the scaffolding before the concrete was poured. Quoted the contract that stated the DP “shall visit the site at intervals appropriate ... to determine that the Work when completed will be in accordance with the Contract Documents.”
- General authority to “reject” non-conforming work did not create a special duty, because the architect “had no authority to stop the work. Only [the owner] had the authority to *stop* work on the project.”

## Architect/Design-Builder Responsible for Construction Subcontractor's Site Safety

- On a design-build project where an architect held the prime contract under DBIA forms 530 and 535, it was liable for overall site safety – including that which it had by subcontract expressly delegated to its construction subcontractor.
- Because the language of the prime agreement imposed safety duties on the prime design-builder, the court held that those duties could not be avoided or delegated down to a subcontractor. *Ryan v. TCI Architects/Engineers/Contractors, Inc.*, 72 N.E. 3d 908 (Indiana 2017).

- Employee of sub-subcontractor sustained a workplace injury. The injured individual filed suit against the design-builder to recover for its injuries.
- The trial court, on the basis that the subcontract agreement between the prime and sub, stated that all site safety responsibility was delegated to the subcontractor granted summary judgment for the design-builder.
- This decision was reversed and remanded on appeal, with the appellate court explaining that the prime contractor had expressly agreed by the terms of the prime contract with the project owner to accept site safety responsibility, and this could not subsequently be delegated away. The court explained as follows:
  - “The language that Ryan points to as affirmatively demonstrating [Prime’s] intent to assume a duty of care is found in the contract [Owner] and [Prime] entered into—specifically Form 535.

# Who has Responsibility for Jobsite Safety is Determined by Contract Language (Ryan Continued)

- Court found that the design-builder assumed a duty of safety to all workers on the site, including those of its subcontractor.
- Language in the subcontract purporting to shift responsibility to the subcontractor for safety of the subcontractor's employees did not eliminate the design-builders own responsibility that it undertook pursuant to its prime contract – DBIA Form 530.
- The result of the court's analysis was that the 1998 DBIA Form No. 530 created responsibility and liability for the design-builder/general contractor with respect to injuries of subcontractor employees on the Project site.

# Safety Aspects Imposed by Agreement (Ryan Continued)

- The Court noted that the Form agreement specified that TCI, the design-builder:
- “(1) “[TCI] recognizes the importance of performing Work in a safe manner so as to prevent damage, injury or loss to . . . all individuals at the Site whether working or visiting . . .” ;
- (2) [TCI] assume[s] responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work;
- (3) [TCI] was “to designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work”
- (4) The TCI Safety Representative was to “make routine daily inspections of the Site and . . . hold weekly safety meeting with . . . Subcontractors and others as applicable”;
- (5) TCI and subcontractors “shall comply with all Legal Requirements relating to safety”;
- (6) TCI agreed that it “shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction”; TCI was responsible for the performance of the “Work of Subcontractors and acts and omissions in connection with such performance;” and
- (7) TCI was to “provide all material, equipment, tools and labor, necessary to complete the Work.”
- The Court concluded that, taken together, all of this safety specific contract language meant that TCI had contractually agreed to assume a duty to keep the worksite in a reasonably safe condition. Importantly, TCI argued that its subcontract with Craft in which TCI explicitly required the subcontractor to meet the safety requirements of the Project, did not “override” the language in TCI’s contract with the Project Owner to somehow eliminate TCI’s liability to Ryan.

## Prime Contractor not Liable for Injuries of Sub's Employee where Prime Retained no Control of Individual's Work

- An employee of an independent contractor cannot generally recover damages from the one who hired the contractor for work-related injuries. One exception to this rule is where the hirer actually retained control of the work or otherwise caused or contributed to the injuries.
- Appellate court affirmed trial court's dismissal of a sub employee's case because the employee failed to present evidence that the prime contractor ("hirer") retained control over the work and affirmatively contributed to his injuries.
- Although contract between Prime and the project owner required the prime contractor to "exercise precaution at all times for the protection of persons and their property," and to "retain a competent, full-time, on site-superintendent to ... direct the project at all times," and otherwise made the prime contractor "exclusively responsible" for the health and safety of its subcontractors, and required it to submit "comprehensive written work plans for all activities affecting University operations," this was not sufficient in itself to render the prime contractor in "control" over the work actually performed by the subcontractor's employee. *Khosh v. Staples Construction Company*, 4 Cal. App. 5<sup>th</sup> 712 (2016) **(NEXT SLIDE)**

## Site Safety (Retention of Control – 2)

- The court further explained that, “An affirmative contribution may take the form of directing the contractor about the manner of performance of the work, directing that the work be done by a particular made, or actively participating in how the job is done.” In this case there was no evidence that the prime contractor did any of these things. Moreover, the court concluded that, “A hirer’s failure to correct an unsafe condition, by itself, does not establish an affirmative contribution.”



# Code Compliance

# Standard of Care May Exceed Code Requirements

- Tragic death of a two-year-old child who fell to his death from the third floor of Staples Center in Los Angeles.
- Parent's sued architect. Court dismissed based on statute of limitations applicable to "patent", easily discovered defect
- Parent's also claimed against the owner of the arena, arguing it negligently breached a duty of care owed to patrons.
- The appellate court reversed summary judgment for owner because foreseeable that someone would sit or stand on the shelf, and could suffer injuries or death from a fall.
- Even if the arena owner could prove it had conformed to building codes, that would not be a complete defense in a negligence action. The individual facts would have to be considered to determine what "reasonable care" required.

*Henry Tang v. NBBJ, LP*, 2014 WL 555163 (Cal. Appl. 2 Dist. (2014)).

# Contractor not Excused from Violating Building Code Even if Homeowner Directs Him to Violate the Code

- Where a homeowner directed its roofing contractor to perform work in a manner that violated the building code, the contractor was nevertheless liable for a per se violation of the code. The homeowner's waiver of the code requirements does not preclude the contractor's liability for violation. In this case, the code permitted no more than two layers of roofing on the building. The trial court issued a jury instruction advising the jury that if they found the code violation was the result of the homeowner's instruction, they need not assess damages against the contractor. The appellate court reversed and held it was an error to give that instruction and moreover, because the jury found that the contractor violated the code, judgment must be granted to the homeowner. Downey v. Chutehall Construction Co., 88 Mass. App. Ct. 795 (2016).

# Standard of Care and Warranties

# Engineer Liable for Rainwater Tank Collapse Where it Failed to Provide Appropriate RFI Responses to Contractor

- Engineering firm designed site plans for a rain tank system to be buried under a parking lot for a new church sanctuary. As a contractor began constructing the project, it inquired of the engineer via a Request for Information (RFI) about concerns about the suitability of the tank for the location, given the high water table, and included questions about installation and performance. Without addressing the performance issues or reevaluating the choice of the tank system in light of the contractor's concerns, the engineer referred to information in the manufacturer's drawings to assure the contractor that their ground water concerns would not impact the functionality of the tank. Only a few months after it was installed, the tank collapsed under the parking lot. In litigation that followed, the trial court found the engineer breached its professional standard of care by (1) failing to conduct due diligence regarding the suitability of the tank, (2) incorporating a manufacturer's specifications into its own plan without verifying them, and (3) failing to respond to appropriate RFI questions during construction. *William H. Gordon Associates, Inc. v. Heritage Fellowship*, 291 Va. 122 (2016).

# Designer not Liable for Implied Warranty of Habitability on Condo

- Condo association filed suit against a number of the parties involved in the design and construction of the condo complex, alleging breach of implied warranty of habitability.
- Association attributed air and water infiltration to latent defects in the design that were not discovered until 2007.
- Trial court dismissed suit against designer, and appellate court affirmed dismissal.

*Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC, 2015 IL App (1st) 123452*

**See next slide**

- Court cited the principle that an architect does not warrant or guarantee perfection in his or her plans and specifications is long standing
- Court found implied warranty should be limited to subcontractors who were involved with the physical construction or the construction-sale of the property.

**See next slide**

- Court emphasized that implied warranty of habitability of construction arises between the builder-seller and the buyer because of their “unusual dependent relationship.”
- Court concluded that designer’s role in the design of the condominiums did not create such a relationship.

**See next slide**



# Designers are not “workmen”

- Court rejected condo association's argument that DPs have an implied obligation to perform their tasks in a “workmanlike” manner.
- Citing to Black's Law Dictionary, the court noted a “workman” is a person who is “employed in manual labor, skilled or unskilled.”
  - “Thus the term “workmen” does not include professional persons such as design professionals, and design professionals are not obligated to perform their professional services in a workmanlike manner.”
- **Contract Lesson:** Architects and engineers should be careful not to agree to contract provisions that require them to perform their services in a “good and workmanlike manner.” While the phrase is seemingly innocuous, a court could find that it imposes a higher standard than the professional standard of care.

# Engineer Can be Sued for Breach of Warranty of Professional Services

Pulte Homes sued the engineering firm that performed certain engineering and testing services for a building site on which it built a home. It alleged that the home developed structural problems after construction due to deficiencies in the engineer's site work and testing. After resolving defects asserted by the homeowner through arbitration proceedings, Pulte filed suit against the engineer seeking to recover the damages it incurred with the homeowner. The theories of recovery, in addition to a basic negligence count, included a count based on the right to indemnity arising from breach of express or implied warranties. Pulte alleged that "S&ME expressly or impliedly warranted to Pulte that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or specific purpose." In reviewing the contract language, the court agreed that it "includes language arguably in the nature of an express warranty." *Pulte Home Corp. v. S & ME, Inc.*, 2013 WL 4875077 (U.S. District Court, South Carolina, 2013). For a sample contract clause to disavow and avoid all warranties, read the comment at the conclusion of this article.

- Design Professionals should be careful in their contract language to avoid agreeing to warranties – particularly with language such as that referenced in this decision concerning “merchantability, workmanlike service, and/or fitness for a particular or intended purpose.” It is important to limit the design professional’s responsibility to meeting the requisite professional standard of care. When the client of the design firm is a general contractor, a design-builder, or a home-builder, those entities are more inclined to attempt to insert warranties into the design professional contract. The designer needs to look beyond just the standard of care clause in its contract, and strike out all such express and implied warranty language.
- Some design professional contracts I review contain so many blatant or hidden warranties buried throughout the fine print of the Agreement that I have found it necessary to create a catch all clause to attempt to disavow all warranties, just in case one slips through the cracks even after we have attempted to find and delete them all. A clause that I use for this purpose is as follows:
- **“Standard of Care.** Notwithstanding any clause in this Agreement to the contrary, Consultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Consultant performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances. Nothing in this Agreement shall be construed to establish a fiduciary relationship between the parties.”

# Contractor Claims against A/E

# Contractor Sues Owner's Engineer for Negligent Misrepresentation

- Sub-subcontractor experienced numerous problems with steel erection, allegedly caused by engineer's defective design.
- Sub-sub submitted 81 change order requests; payment was stopped; and Sub sued owner's engineer for negligent misrepresentation of the adequacy of its design.
  - Trial court dismissed suit for failure to identify specific negligent misrepresentations.
- Issue concerned application of Economic Loss Doctrine and the exception allowed by Section 552 of the Restatement (Second) of Torts for negligent misrepresentation claims.

*Gongloff Contracting, L.L.C. v. L. Robert Kimball & Assocs., Architects and Eng'rs, Inc., 2015 Pa. Super 149 (Pa. Super. Ct. July 8, 2015)*

**See next slide**

- Architects are subject to liability for Section 522 negligent misrepresentation claims” when it is alleged that those professionals negligently included faulty information in their design documents.
- “The design itself can be construed as a representation by the architect that the plans and specifications, if followed, will result in a successful project.”
- “ If, however, construction in accordance with the design is either impossible or increases the contractor’s costs beyond those anticipated because of defects or false information included in the design, the specter of liability is raised against the design professional.”
- Contractor was not required to explicitly pinpoint the specifics of the faulty design, *i.e.*, it was not required to identify an express representation by the engineer.”

# Engineer May Be Liable to Contractor for Both Breach of Professional Duty and Negligent Misrepresentation

- Engineer who prepares documents that contractors will rely on when preparing their bids owes duty of care to contractors, and can be held liable for both breach of professional duty and negligent misrepresentation.
- Before project was put out to bid, the engineer conducted geological studies and prepared reports describing the conditions on the project. Geotechnical Baseline Report (“GBR”), was furnished to bidders so they could estimate the cost of performing the work. The GBR indicated that “the majority of the subterranean region ... was composed of stable soils suitable for HDD.”

*Apex Directional Drilling, LLC v. SHN Consulting Eng’rs & Geologists, Inc.*, 2015 U.S. Dist. LEXIS 105537 (N.D. Cal. Aug. 11, 2015).

**See next slide**

- Contractor encountered mud and flowing sands very different from the soils described in the GBR.
- When contractor reported these different conditions to city, the engineer “continued to maintain that the project was proceeding in the competent soils described in the GBR, and, on that premise, repeatedly gave Apex illogical instructions.”
- City, acting on the engineer’s recommendations, rejected change order requests and ultimately terminated the contractor.
- Contractor sued city for breach of contract and then filed a separate complaint against the engineer asserting claims for breach of professional duty and negligent misrepresentation.
- Engineer argued it did not owe the contractor a duty of care.
- Court found engineer owed the contractor a duty of care.

**See next slide**



- Court observed that in the context of a negligence claim seeking economic damages where there is no contractual privity, California courts use a six-factor balancing test to determine whether a duty of care exists.
- Factors are: **1)** the extent to which the transaction was intended to affect the plaintiff; **2)** the foreseeability of harm to the plaintiff; **3)** the degree of certainty that the plaintiff suffered an injury; **4)** the closeness of the connection between the defendant's conduct and the injury suffered; **5)** the moral blame attached to the defendant's conduct ; and **6)** the policy of preventing future harm.
- Court found that first, third and fourth factors favored imposing a duty of care, as the GBR was prepared for the purpose of establishing a baseline upon which the contractor would base its bid; mistakes in the GBR and the engineer's subsequent actions caused the contractor to suffer considerable losses.
- The court stated that because the duty was owed to "a specific, foreseeable and well-defined class", there would not be "unlimited liability to a nebulous group of future plaintiffs."

# Design vs. Performance Specs

## Impacts Who is Liable for Problems

- Contractor installed pine wood decking renovating the front porch of a historical building.
- Project owner (an architect), insisted on use of pine despite the contractor's "repeated recommendations to use a different material" such as vinyl flooring because pine was not a suitable choice for decking the northeast.
- Owner's insistence on pine constituted a design specification.
- Court concluded, "Although the contract did not expressly state whether the parties entered into a performance or design specification contract, it is abundantly clear that the parties were working pursuant to a design specification agreement."
  - *CGM Construction, Inc. v. Sydor*, 144 A.D.3d 1434, 42 N.Y.S.3d 407 (2016)
  - **NEXT SLIDE**

## Design vs. Performance Specs (continued)

- Since a design specification contract requires a contractor to use the materials selected by the owner, the contractor does not bear any responsibility if the design proves to be inadequate to achieve the intended result. *CGM Construction, Inc. v. Sydor*, 144 A.D.3d 1434, 42 N.Y.S.3d 407 (2016). This decision applied the *Spearin* Doctrine.

**Next Slide**

## Design vs. Performance Specs (continued)

- Whether a construction contract is one of performance or design specification turns on the language of the contract as a whole, with consideration given to factors such as “the nature and degree of the contractor’s involvement in the specification process, and the degree to which the contractor is allowed to exercise discretion in carrying out its performance” [citations omitted].”
- The court found that the contractor’s work was completed according to the owner’s instructions and the owner was, therefore, responsible for any defects that resulted from his design and could not escape payment of the balance owed the contractor for the completed work.

# Dispute Resolution

# Why A/E Firms Should Opt to Litigate instead of Arbitrate

- 1) Paying arbitrator costs (especially 3 person panel) very expensive;
- 2) Discovery and depositions in litigation vs. limited and uncertain discovery in arbitration;
- 3) Dispositive motions can be made in litigation, however, that is not a right in arbitration – or the arbitrators may not consider them before the arbitration hearing anyway;
- 4) You have a chance to obtain a complete defense verdict in litigation, whereas in arbitration, the arbitrator often "splits the baby";
- 5) You have the right to file post-trial motions in litigation, no such right exists in arbitration; and
- 6) You have the right to appeal the trial court verdict in Litigation - in contrast, there is essentially no right to appeal in Arbitration.

## Settling Suit without Prior Approval of Insurance Carrier Causes Insured to Forfeit Coverage Regardless of Whether the Carrier was Harmed

- The “no-voluntary payments” condition of an insurance policy was violated by an insured subcontracting concrete company, when it entered into a settlement with its prime contractor and paid damages for contractual liability for construction delays as well as for an accident, without first notifying its insurance carrier and obtaining prior approval to settle the dispute.
- When Sub subsequently sought indemnification from its insurance carrier, the carrier denied coverage.
- Held: Sub’s complaint against carrier should have been dismissed on summary judgment motion regardless of whether the subcontractor could demonstrate that the unauthorized settlement did not cause prejudice or harmed to the carrier.

*Travelers Property Casualty Company v. Stresson Corporation*, 370 P.3d 140 (Colorado 2016).

# Disclaimer

This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

ConstructionRisk, PLLC is not a subsidiary or affiliate of Arch/PUA and use of ConstructionRisk, PLLC products and services are independent of, and not included within, the Policy or any other Arch/PUA product or service. Arch/PUA and USI expressly disclaim any and all damages and other costs that may arise related to the use of or reliance upon the products, services, representations or warranties made by or on behalf of ConstructionRisk, PLLC.



# Questions?

J. Kent Holland, Esq.

**ConstructionRisk, LLC**

1950 Old Gallows Rd, Ste 750

Tysons Corner, VA 22182

703-992-9480 (o)

703-623-1932 (c)

Kent@ConstructionRisk.com

Sandip R. Chandarana, J.D., CPCU, RPLU

Director

Professional Underwriters Agency

A Division of NSM Insurance Group

2803 Butterfield Road, Suite 260

Oak Brook, IL 60523

Direct: 630-861-2330

Phone: 630-572-0600 x1601

sandip@puainc.com

www.puainc.com

# CONTACT Information & DISCLAIMER

- Contact Information: **Kent Holland**

Email: [Kent@ConstructionRisk.com](mailto:Kent@ConstructionRisk.com)

WEBSITE: [www.ConstructionRisk.com](http://www.ConstructionRisk.com) - Free Risk Report

Phone: 703-623-1932

**Disclaimer:** This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

# Questions?

J. Kent Holland, Esq.

**ConstructionRisk, LLC**

1950 Old Gallows Rd, Ste 750

Tysons Corner, VA 22182

703-992-9480 (o)

703-623-1932 (c)

Kent@ConstructionRisk.com

- For case notes and articles on design-build decisions and other case law, visit: [www.ConstructionRisk.com](http://www.ConstructionRisk.com). For research or for free newsletter, visit: “*ConstructionRisk.com Report*”