September 2022

BUILDING BLOCKS

DESIGNPRO
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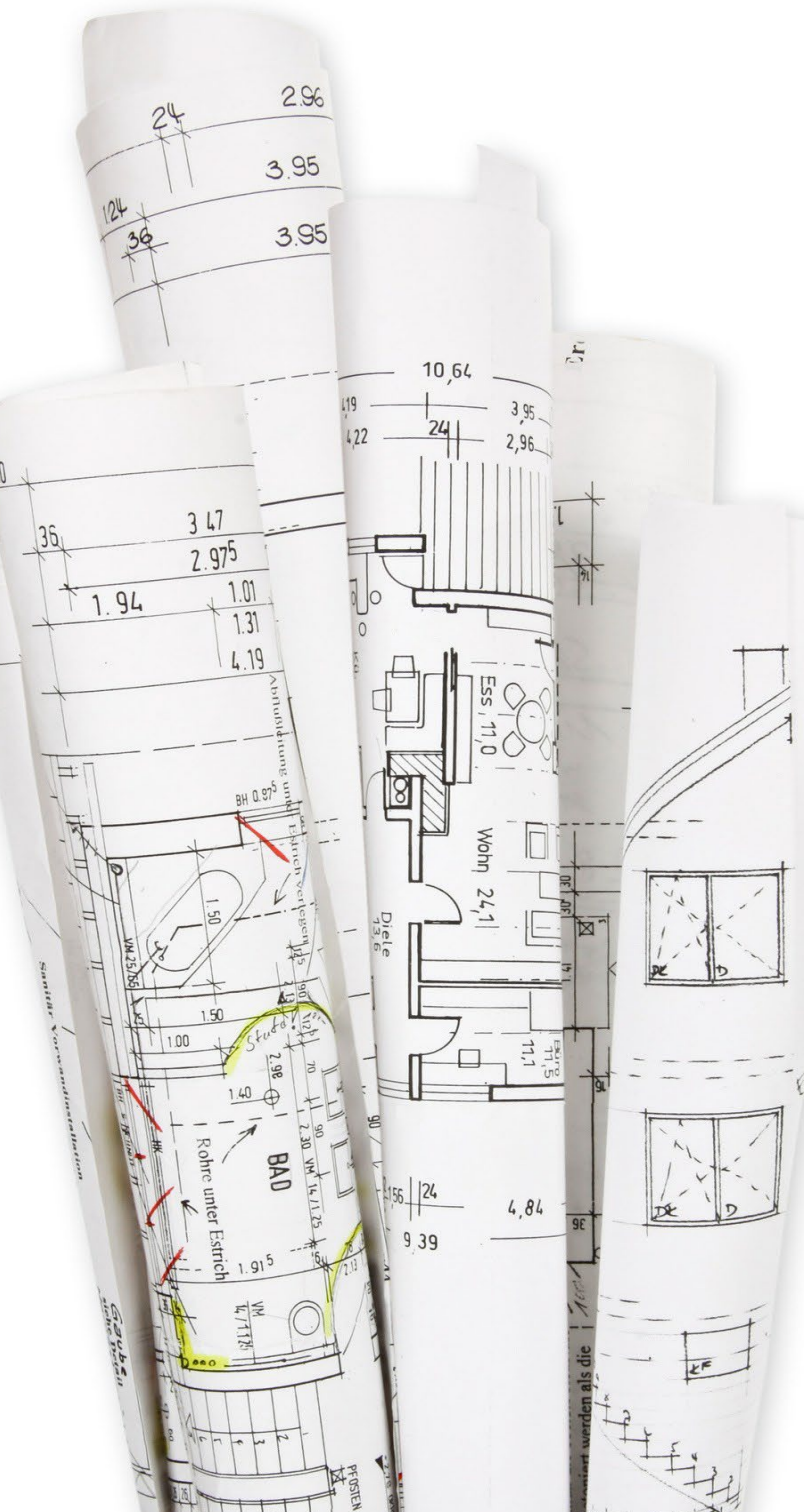
A Wichert Insurance Agency



A VIEW FROM A RISK MANAGER'S DESK – AN ARCHITECT/ENGINEER IN LITIGATION

By: Eric O. Pempus, FAIA, Esq., NCARB
DesignPro Insurance Group

From time to time, my client architects/ engineers (A/Es) may end up in litigation on one of their design and/or construction projects. The dispute track outlined here is for litigation, as opposed to arbitration or mediation. In contrast, see DesignPro Insurance Group's risk management article *"Which is the Better Choice of Dispute Resolution Option for a Design & Construction Controversy—Litigation, Arbitration or Mediation?"* https://www.designproins.com/news/56858/15702/12-2020_Newsletter.pdf., December, 2020. In that risk management article I outlined the course of a mediation of a construction industry dispute.

IN THIS ISSUE:

The following is my view from 42 years in dispute resolution, in the design and construction industry. This perspective will certainly vary from differing views of other professionals, depending on the players involved, project types, the “all-important facts on the dispute,” etc.

ACRET & PEROCHET, ATTORNEYS AT LAW, LOS ANGELES

James Acret, Esq.

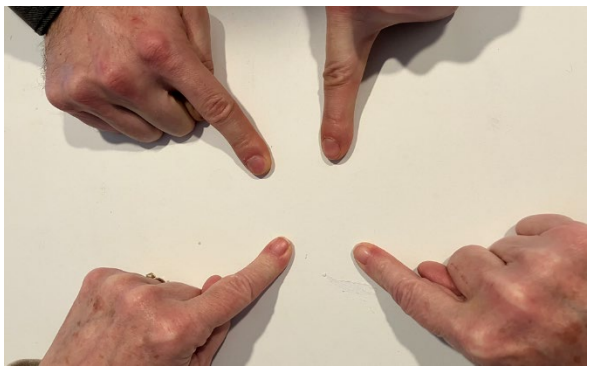
During my last two years of my four-year law school evening program, I was fortunate to have worked as a law school clerk under the direction of a senior attorney, Nick. The firm was a construction law and litigation boutique firm in Los Angeles. The founder of the firm, James Acret, Esq., wrote the seminal text on design and construction law in the early 1970s.

So fortunate I was to be surrounded by accomplished construction lawyers. Nick, a great person, and lawyer. Early on he told me, “anybody can learn the law, but the facts are everything.” Nick was always right on, but not at all full of himself. One of his other sayings was “you may have done do your best, but you must have to do what is required.”

HERE IS ONE WAY HOW THIS TOPIC UNFOLDS

An A/E provides professional services, sometimes as a full-scope services (design through construction administration), other times with an abbreviated scope. Something goes amiss. The design and construction of a project is a complicated adventure, and has seemingly an unlimited number of moving parts—the project owner (A/E’s client), the budget, specialty consultants, building code officials, construction contractors and their subs, inspectors, construction managers, soil and weather conditions, politics, availability of labor and materials, etc. Sometimes there may even be opposition to the project, such as retail center planned in a residential neighborhood. It is no wonder that a project is ever completed; and in reality some projects are never “completed.” They just fade into the landscape of the built environment.

During the course of the project, or after, someone pulls a trigger to initiate a dispute. Not necessarily a “claim,” which is understood in the professional liability insurance industry to mean a “demand of money, more time to accomplish a task, etc.” But this gets the ball rolling. At this initial stage, people are hopefully to be able to discuss the issue and resolve the dilemma. That is the best outcome, so everyone can get back to their tasks at hand. Unfortunately, that does not only happen. People are not bashful when it comes to money. And finger pointing ensues.



THE DISPUTE THEN EVOLVES INTO A CLAIM

The “claim” must be reported to the A/E’s professional liability insurance company, through their insurance agent, if there is to be insurance defense and coverage. (If the A/E does not have professional liability insurance, disregard the prior sentence.) The agent can assist in gathering information about the claim, but ultimately it rests with the insurance carrier to take the ball and run,

to mount a defense. The insurance carrier would then assign the matter to outside legal counsel, which is not part of the internal insurance team.

The claim may have certain, typical, allegations that the A/E is a wrong doer. These include an allegation that the A/E was negligent when performing its professional services, the A/E breached its agreement with their client, and other assertions such as a breach of warranty, delay of the project, etc. Of the allegations, a breach of a warranty is especially troublesome. Reason being—warranties are not covered by a typical professional liability insurance policy. If the A/E included a warranty, express or implied, in its agreement with their client, the A/E will have insurance coverage headaches.

THE DISCOVERY PHASE

In litigation, legal counsel will now gather documents, especially the written and signed agreement between the A/E and their client. This document usually becomes the keystone of the dispute. And if there is no written and signed agreement, the dispute becomes much more complex. What "he said, she said," is unreliable to sort out the facts in the dispute.

If it is a typical dispute in litigation, the matter enters into what is the "discovery phase." This is a period of time, usually lengthy, where the parties' lawyers have an opportunity to review and copy documents to support their client's position in the dispute. In so many words, everyone in the matter has retreated to their corner to build their case for the possible, and eventual, jury trial. This period time has teeth to it. Evidence may come to light that may make the dispute become a "slam-dunk," as who will likely prevail in the dispute. But more likely, however, the waters become muddy, and shades of gray emerge.

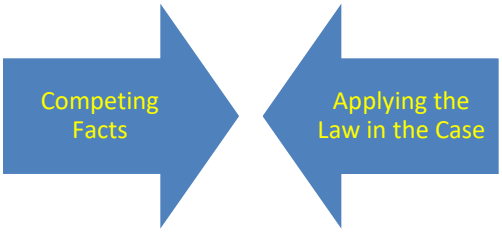
> To begin preparing for trial, both sides engage in discovery. This is the formal process of exchanging information between the parties about the witnesses and evidence they will present at trial. Discovery enables the parties to know before the trial begins what evidence may be presented.
> *How Courts Work: Discovery - American Bar Association, https://www.americanbar.org › groups › resources › disco.*

During this discovery phase, life still must go on for the A/E firm. Yet there is the distraction that the dispute may end up for serious damages to be paid out. The firm's staff becomes aware of this "cloud" hanging over the firm, and rumors emerge as to how serious this matter is. The principals are concerned as well, as they still need to focus on current and future projects.

During this discovery phase there may be engagement of firm staff members in the litigation. Most notably is when the lawyers in the case arrange for and conduct "depositions" of the firm's staff. It could be the project's principal in charge, project manager, project architects and engineers, or field/site visit personnel that went to the project site where there is a question of damages. Regardless, depositions are nerve-racking. The staff member is seated in a conference room, put under oath, and to swear to the truth as they know what occurred on the ill-fated project. Of course the defense counsel is there to make sure nothing takes place is inappropriate. Nonetheless, anger, frustrations, etc. emerge.

A cynical footnote could evolve, as the facts presented may not end up as a “truth-telling” contest. Everyone may shed the light of the discovery only in their favor.

At the end of the discovery phase, the lawyers involved may make motions to the court to refine the focus of the dispute. This period of time may be lengthy as well as the discovery phase.



SETTLEMENT WITHIN LITIGATION

The next step is very interesting. The judge presiding over the matter may likely arrange a “settlement” conference, requiring all parties involved with authority to resolve the case before more time and money is expended. This could take place in the judge’s chambers, a stately office lined law books, dark mahogany wall panels and a big desk. The following occurs.

The no-nonsense judge gather everyone’s attention in the room, and pressures the parties and their lawyers, insurance representatives, etc. to “go out in the hallway and settle this matter, or I will make all of your lives miserable.” It works. Case settled. Most everyone contributed to settle the dispute, otherwise the case would go to the jury. The alternative settlement could have had the “courthouse steps settlement”—a settlement just before the dispute to goes to trial. If there is no settlement, hold on to your seats.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group’s experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

MARK YOUR CALENDARS FOR ERIC'S UPCOMING CONTINUING EDUCATION PROGRAMS:

Speaking Engagements:

"Maximizing Compliance with Rules of Professional Conduct for Engineers"
September 23, 2022, National Program
Webinar; 1:00 – 2:00 pm EST

"Reducing Risk for Yourself, Your Company & Your Clients"
Webinar; 2:30 – 3:30 pm, CDT
"Minimizing Risk by Maximizing Compliance with Rules of Professional Conduct"
Webinar; 3:30 – 4:30 pm, CDT
October 26, 2022, National Program

"Avoiding Risky Business: How's to Control Claims & Understand the Insurance Process"
Co-Presenters: Brad Bush, CPCU, AU and Eric. O. Pempus, FAIA, Esq., NCARB
Live Program, Keystone Conference Center, Dillon, Colorado
12:30 – 1:30 pm, MST

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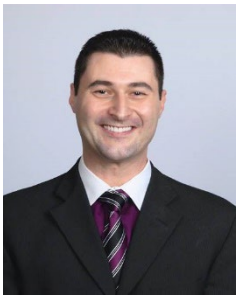

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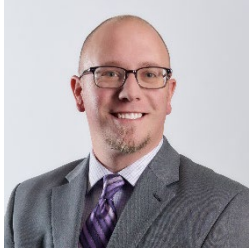

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