WEBINAR

NSM
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RISK MANAGEMENT LESSONS
from Recent Litigation & Court Decisions

PRESENTERS

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PUA
UNIVERSITY

WED., APRIL 2 | 2:00 - 3:00 PM ET

Today's Agenda

- PUA Overview
- The Standard of Care
- Dealing with Costs Associated with New Laws and Tariffs
- Indemnification
- Prevailing Party Attorneys' Fees
- Site Safety
- Conditional Payment Terms
- Limitation of Liability
- Design-Build
- Q&A

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.

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PUA Overview

Meet PUA

WHEN IT COMES TO PROFESSIONAL LIABILITY

WE'RE THE PROFESSIONALS

Formed in 1990

- Stability & proven track record
- $74M+ in GWP
- 1,500+ Insureds

Four lines

- A&E
- Design-build contractors
- Miscellaneous PL
- Excess limits

Strong paper & broad coverage

- Arch – admitted
- Lloyd's – E&S

Assist in navigating difficult, complex risks and issues

- PUA Market Solutions

Value-added CE webinars via PUA University

- Library of past webinars on puainc.com

PUA UNIVERSITY

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Learning Objectives

- Become familiar with how courts are deciding cases involving design professionals;
- Learn risk management ideas and strategies from recent court decisions;
- Explore using contract language to reduce risk;
- Gain a better understanding of how project delivery method and relationships of parties may impact responsibilities and risks of the parties to the contract;

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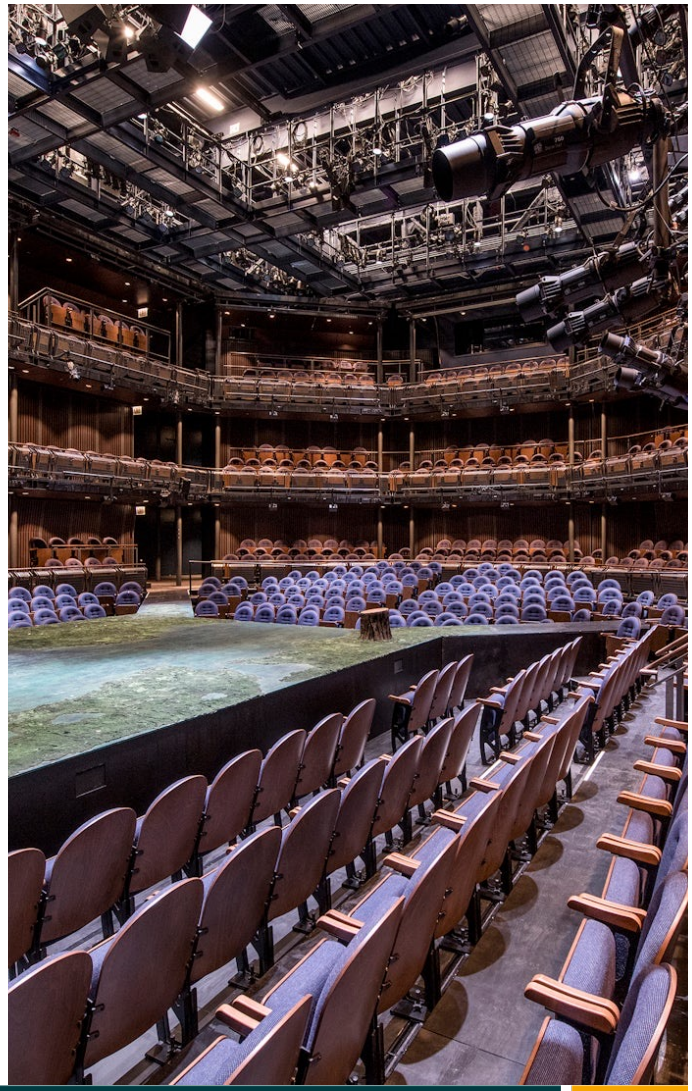
The Standard of Care

The Standard of Care

- Adrian Smith + Gordon Gill Architecture LLP v. Chi. Shakespeare Theater, 2024 IL App. (1st) 230133 (Ill. App. Sep. 27, 2024)



The Standard of Care

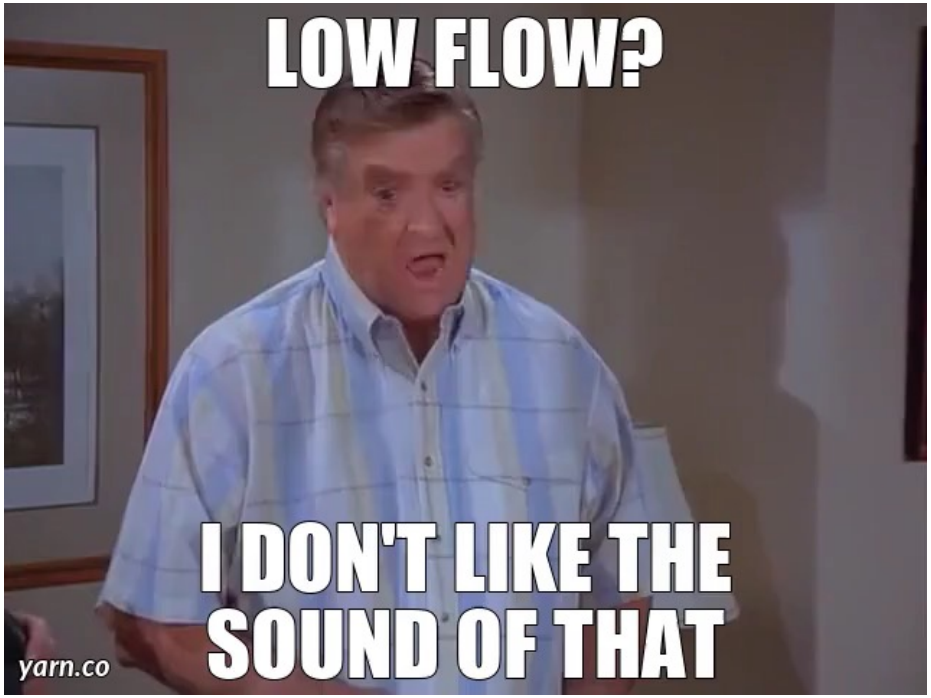
- Owner fails to prove claim of negligence against Architect where expert testified as to what he would have done under the circumstances, rather than what a reasonable architect would have done.

Lesson Learned

- Practitioners should be able to explain “standard of care” not just to judges and juries but also to colleagues and clients.

The Standard of Care

- Cranes Creek, LLC v. Neal Smith Eng'g, Inc., 291 N.C. App. 532 (N.C. App. Dec. 19, 2023)



The Standard of Care

- Owner fails to prove professional negligence through expert witness testimony in case against engineering firm.

Lesson Learned

- Advice to non-clients and advice which is relied upon for acquisition of land are both risky circumstances because the parties often misunderstand the respective roles of the other.

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Dealing with Costs Associated with New Laws and Tariffs

Dealing with Costs Associated with New Laws and Tariffs

- Protect against cost overruns due to changes in (1) laws, (2) new tariffs that increase prices for materials, and (3) labor shortages due to deportation of undocumented workers).

  "A Change may include, without limitation, any of the following events occurring after the establishment of the Contract Price, CGMP or GMP (as applicable) and provided that such events are not within a Design-Builder Responsible Party's reasonable control and could not have been avoided by a Design-Builder Responsible Party or mitigated through the exercise of reasonable skill and care: (i) a change in Applicable Law as set forth in Section 1.4 of the Agreement, (ii) the implementation or proposed implementation of new tariffs or modification of existing tariffs that increase Design-Builder's cost of materials and equipment, or (iii) regional labor escalation or shortages that cannot be reasonably foreseen and estimated at the establishment of the Contract Price, CGMP or GMP."

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Indemnification

Indemnification

- New Eng. Bldg. & Bridge, Co. v. Town of Cohasset, 2024 U.S. Dist. LEXIS 90865 (D. Mass. May 21, 2024)

Indemnification

- Town's indemnification claim against Engineer based on failure to designate expert to offer evidence of breach of standard of care.

Lesson Learned

- The prudent design professional should tie any indemnity obligation to a breach of the standard of care when negotiating a contract.

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Prevailing Party Attorneys' Fees

Prevailing Party Attorneys' Fees

- Trial court awarded prevailing party attorneys fees to a subcontractor pursuant to contractual prevailing party attorneys fees clause, because subcontractor prevailed on a significant issue, even though it lost on several other issues in the trial.

  Reversed on appeal because Subcontractor only partially prevailed on one count of the complaint while losing several other counts. Lemartec Corp. v. East Coast Metal Structures Corp, 2024 WL 2178312, 49 FL.L. Weekly Fed D 1028 (2024).

Define Who is the “Prevailing Party”

- “Prevailing party is the party who recovers greater than 67% of its total claims in the action or who is required to pay no more than 33% of the other party’s total claims in the action when considered in the totality of claims and counterclaims, if any. In claims for monetary damages, the total amount of recoverable attorney’s fees and costs shall not exceed the net monetary award of the Prevailing Party.”

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Site Safety

- Alviarez v. Goya Foods, Inc., 2024 U.S. Dist. LEXIS 78289 (S.D. Tex. Apr. 30, 2024)

Site Safety

- Design engineer granted summary judgment in wrongful death suit.

Lesson Learned

- Design professionals are not responsible for site safety standards which fall outside the scope of their contractual obligations or knowledge.

Site Safety

- Bonilla v. Verges Rome Architects, 382 So.3d 62 (La. Mar. 22, 2024)

Site Safety

- Architect will make site visits to the site as required (with a minimum of one per week) to review the progress and quality of the Work and to determine, in general, if the Work, when fully completed, will be in accordance with the Construction Documents and the Construction Progress Schedule. On the basis of its on-site observations, Architect will keep the Owner informed of the progress and quality of the work performed, and report known deviations from the Contract Documents, deviations from the most recently approved construction schedule, and shall endeavor to protect the Owner against defects and deficiencies observed in the Work.

Site Safety

- Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work, nor shall Architect be responsible for the Contractor's failure to perform the work in accordance with the Construction Documents. Architect shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

Site Safety

- Architect not responsible for Employee's on-site injury as its contractual responsibilities did not extend to construction authority or duties.

Lesson Learned

- It is just as important for a contract to say what you will not do as it is to say what you will do.

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Conditional Payment Terms

Conditional Payment Terms

- Where subcontractor executed a contract containing a pay-if-paid provision, the contractor subsequently used that clause as a basis to refuse paying for work performed by that sub because the project owner refused to pay the Prime for that same work. In New Jersey no statute or caselaw prohibits pay-if-paid clauses. JPC Merger Sub, LLC v. Tricon Enterprises, Inc., 286 A.3d 1186, 474 N.J. Super. 145 (2022).

  Consider adding a clause like the following:
  "If payment of any undisputed amount due and owing to Engineer is not made within 45 days of submittal of the invoice for such amount, Engineer shall, upon seven (7) days written notice, be entitled to suspend its services until such payment is made."

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Limitation of Liability

Limitation of Liability

- Court found LoL clause was ambiguous due to the word "consequential damages" in the language.

  "… liability shall be limited to the sum of two thousand dollars ($2,000 or twice The Engineer's fee whichever is greater) as consequential damages and not as penalty…."

Limitation of Liability

- This didn't make the clause void but it required the trial court to analyze the intent of the parties before making a judgment. Johnson Nathan Strohe, P.C. v MEP Engineering, Inc., 2021 WL 4314216 (Colorado 2021).

  We recommend a clause like the following:
  "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."

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Design-Build

Design-Build

- Aecom Tech. Servs., Inc. v. Flatiron | Aecom, LLC, 2024 U.S. Dist. LEXIS 11957 (D. Colo. Jan. 23, 2024)

Design-Build

- Standard of care referenced in teaming agreement applicable to pre-award services performed by engineer on a design-build project.

Lesson Learned

- Disputes on design-build projects often involve discrepancies, or perceived discrepancies, between teaming agreement and design agreement.

Obtaining CE Credits

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Architects must self-report their participation to the AIA for continuing education credits

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Questions and Concluding Remarks

Questions?

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