

Getting Your Municipal Money's Worth: Navigating Multi-party Construction Litigation

2024 IMLA Mid–Year Seminar

STEVEN A. TORRES, ESQ.

WEST GROUP LAW PLLC

CHRIS J. PETRINI, ESQ.

P&A PETRINI & ASSOCIATES, P.C.
Counselors at Public Law

Syllabus

ARPA, the Jobs Act, Build Back Better, more public construction means more claims. Municipal counsel must be able not only to defend claims by contractors, but effectively identify defenses, offsets, counterclaims, crossclaims, including third-party claims and professional malpractice. Like Artic explorers Ernest Shackleton Roald Amundsen, Robert F. Scott, and others who ventured into the unknown during the Heroic Age of Antarctic exploration, construction litigators must carefully plan and precisely execute a journey into the sometimes unknown and unpredictable, and navigate occurrences that can lead to delays, large cost overruns and litigation. This program will identify critical construction litigation tactics, from initial case assessment and "must have" discovery to advanced development of evidence, theories of recovery and complex case valuation and apportionment.

Identification/ Planning & Preparation/ Execution

Without these critical steps you don't belong here:







Identification

Typical Construction Claims

- Additional Work
  - Change Orders
  - Contract Change Directive
  - Unknown site conditions
- Additional Time
  - Interference
  - Delay



Counterclaims

- Defective or incomplete work
- Delay liquidated Damages
- Third-party claims/negligence
- Completion

Crossclaims/third party claims

- Design Error
- Contract administration
  - A/E delays response to RFEI, unreasonable delay in redesign
- Negligent supervision/Q/A QC failure

Parties & Potential Parties

- Contractor/Multi-prime Contractor or DESIGN-BUILDER
- Design Professional [A/E]
- Construction Manager/Project or Program Manager
- Manufacturers

Causes of Action

- Breach of Contract
- Negligence
- Indemnification
- Contribution



Architect Standard of Care

§ 3.1 The 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. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the services provided pursuant to a Service Order.

From AIA B121-2018

Engineer Standard of Care

A. Standard of Care and Performance: The standard of care and performance for all services performed or furnished by, under or at the direction of Engineer under or in connection with this Agreement will be the high level of care and skill used by prudent and professional members of the engineering profession practicing under similar circumstances at similar times in the geographic region (at times referred to herein as the "Performance Standard"). Engineer agrees that all services shall be performed or furnished under or in connection with this Agreement in accordance at least with the Performance Standard. Engineer represents that it is properly licensed in the jurisdiction where the Specific Project is located to provide the services required by this Agreement, or shall cause such services to be performed by appropriately licensed design professionals.

B. Technical Accuracy: Owner shall not be responsible for discovering deficiencies in the technical accuracy of Engineer's services. Engineer shall correct deficiencies in technical accuracy without additional compensation, unless such corrective action is directly attributable to deficiencies in Owner-furnished information.

From Modified EJCDC E-505

Obstacles

- Limitations of Action
  - Continuing Representation [ie NY]
  - Discovery
- Privity of Contract
  - Assignment of actions
- Theories of recovery exclusive (contract/negligence ie NY)
- Affirmative Defenses
- Frye/Daubert style analysis for expert testimony



Planning & Preparation

Venue – Contract Clause

- Arbitration (sometimes complicated by unaligned agreements) (attempt to exclude if possible)
- State Court – Choice of venue
- Federal Court – unless properly waived in contract by public owner

Form of Pleading

- Counterclaim
- Crossclaim
- Third and fourth party claim
- Joinder/Consolidation of multiple actions



The Spearin Doctrine

- *United States v. Spearin*, where the court ruled that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, to inform themselves of the requirements of the work, … and to assume responsibility for the work until completion and acceptance."

Affirmative defenses for Spearin/Crossclaims

FOURTH AFFIRMATIVE DEFENSE

All injuries or damages allegedly sustained by Plaintiff as alleged in the Verified Complaint, if any are proven or established, were caused in whole or in part by culpable conduct, negligence, carelessness or lack of care on the part of the Plaintiff and/or third-parties and any recovery against the County should be barred and/or diminished in proportion to said Plaintiff's and/or third parties' relative wrongdoing, fault, misfeasance, malfeasance, failure to exercise due care and/or culpable conduct.

Affirmative defenses for Spearin/Crossclaims

FIFTH AFFIRMATIVE DEFENSE	SIXTH AFFIRMATIVE DEFENSE
The injuries or damages alleged in the Verified Complaint, if proven or established, would be due in whole or in part to the culpable conduct of third parties other than the County or over whom the County exercised no control or supervision.	The liability of the County, if any, to the Plaintiff, is limited to their equitable share to be determined in accordance with the relative culpability of all parties contributing to the losses sustained.

Sample 3rd party plea – negligence

- Upon information and belief, the Third-Party Defendant failed to adhere to and carry out these highest professional standards by, among other things, failing to completely inspect the premises and review existing documents and drawings provided by the County prior to designing the Project, failing and neglecting to provide complete adequate design drawings, and submitting construction documents that were unworkable.
- As a result of the Third-Party Defendant's professional negligence, the County has been damaged in an amount to be determined at trial.
- Such damages include amounts owed by the County to other third-parties as a result of the Third-Party Defendant's failures, including, but not limited to damages for change orders that were necessary as a result of the failures, and the additional costs and expenses associated therewith and with resulting Project delays.

Document Discovery – Must Haves

1. All subcontracts, including contracts for labor services,
2. invoices, payments and vouchers for actual costs incurred for subcontracts, including contracts for labor services
3. Change order requests, change order forms, and all documentation supporting and price adjustment or schedule adjustment supporting a change order request
4. All Contracts for Insurance
5. All internal communications
    a. between and among your employees, contractors, consultants, agents or assigns or any other person acting on your behalf,
    b. concerning any designs, drawings, specifications or bid documents provided by the County in conjunction with the invitation for bids issued for the Contracts

Document Discovery – Must Haves

6. All notes, summaries, mark ups, comments, commentaries, evaluations, or supplemental drawings created by Acme GC relating to, annotated or affixed to or appearing on any of the design drawings specifications or bid s
    a. All documents, including draft documents created by you in conjunction with your preparation for your Bid.
    b. All construction estimates prepared by you or any person acting on your behalf, for the Rock Removal specifications under the Contract, include all documents supporting the estimates
    c. All manuals, policies, guidelines, or protocols used by Acme GC in conjunction with the evaluation of Bid Documents and preparation of your bid.
7. All job records, daily logs, daily reports, other periodic reports and diary entries for the project maintained by Acme GC or any of its employees or agents/ representatives for the Project.
8. Correspondence, notices of claim, incident reports, or any other communication provided by you to any person providing you with a performance and/or payment bond for performance of the work under the Contracts

Document Discovery – Must Haves

9. All test reports, summaries, evaluations, and reports created by you or any person acting on your behalf regarding work performed during the course of the Project
10. Any claim, incident report, correspondence or other notification of any form submitted by Acme GC to any person who provided insurance coverage required by the Contract and all documents received in response or other documents relating to insurance claims for damage
11. The Project Manager, Project engineer, field supervisor, or any person with similar responsibilities's field book, journal or note book used in recording events, occurrences, conversations, schedules or related matters for the Project.
12. Daily logs – job summaries
13. Job Cost Reports
14. Change order requests, change order forms, and all documentation supporting and price adjustment or schedule adjustment supporting a change order request

Witness Discovery & Depositions

- Key Witnesses
  - Estimator
  - Engineer of Record [PM, GC, A/E]
  - Consulting engineers
  - Field Supervisor
  - Project Manager
  - Experts (where allowed)

Testing Theories of recovery and defense

- Testing Theories of recovery & defense
- Case Valuation
- Strategic Partnerships and Joint Defense



Statutory Standards

- *i.e.* Massachusetts unknown subsurface conditions
- Interest on late payments
- Pay When Paid

Planning & Preparation

Case & Common Law Standards

Seminal Case

Parallel / Persuasive case law

- Similar fact patters
- Dispositive on threshold or valuation issues


Execution

Process & Forums

- Litigation or ADR
- Mandatory ADR [ie Rhode Island Mandatory Arbitration Clause]
- Non-binding mediation

State Court or Federal [WGL Forum Selection Clause Suggested]

- Avoid mandatory arbitration if possible (contract drafting stage)
- Removal and Diversity Jurisdiction

WGL's Recommended Form of Venue Selection

1.01 Controlling Law; Venue

A. This Agreement shall be governed by and construed in accordance with the Laws of the Commonwealth of Massachusetts, including choice of law rules.

B. Any legal proceedings filed by either Party shall be solely and exclusively initiated, filed, tried and maintained in the State Court located in Plymouth County, Massachusetts. The Parties each expressly and irrevocably waive any right otherwise provided by any Applicable Law or legal rule or principle to remove the matter to any other state venue or to a federal venue, consent to the jurisdiction of such state courts in any such legal proceeding, waive any objection such Party may have to the laying of the jurisdiction of any such legal proceeding, and waive its right to a trial by jury.

Case Valuation

Value Contractor Claims (Low/High/Midpoint)

- Full Value as presented (less WJT)
- Interest (to date & estimated through trial – (court scheduling order)
  - Interest per contract
  - Interest per statute, including judgment interest statutes
- Less *offsets*

Value public owner's *offsets*

- Delay damages
- Completion/correction

Value third-party claims, indemnity & Contribution [A/E recovery]

Claims, Valuation and Settlement Rubric

CONFIDENTIAL – ATTORNEY WORK PRODUCT

Claims, Valuation and Settlement Rubric

Basis of Amount	Amount	Interest	Outside Valuation
Full Claim amount	$11,394,790.13	$4,169,556.63	$15,564,346.76
OPM/EXPERT Assessment Low	$2,501,798.24	$915,452.53	$3,417,250.77
Midpoint Valuation	$6,948,294.00	$2,542,504.51	$9,490,798.51

Settlement Markers:

Low + Litigation:	$3,967,250.00
@ 25% off Midpoint:	$7,118,098.88
@ 50% off Midpoint:	$4,745,399.25

Acceptable Settlement Range: **$3,967,250.00 - $7,118,098.88**

Target Settlement Amount: [***TBD with County Officials***]

Estimated Forward Litigation Costs

Estimated Forward Litigation Costs

WGL:	$375,000.00 - $425,000.00	
Expert:	$75,000.00 - $125,000.00	
Outside Valuation Litigation Costs:		$550,000.00

The estimate costs are based upon applying standard, industry rules of thumb for case preparation and case presentation for attorneys and expert witnesses. Hourly rates used in the computation are those rates appearing in professional services agreement for attorneys and professionals under contract with the County for this matter. WGL has previously provided a litigation budget to the County for this matter and figures are substantially in accord with that original estimate.

Strategic Litigation, defense and prosecution of claims

Strategic Litigation, defense and prosecution of claims

Joint-defense Agreements

- Owner & design professional
- Spearin liability
- Time limits & Triggers

Indemnity Agreements

Assignment of Claims



Summary

Damages – proof is in the ***DOCUMENTS*** – standards are in the ***LAW***

Liability – Too often public owners ***answer*** & ***absorb***, leaving contribution on the table $$$

Parties - More pockets, more equitable and more achievable

Valuation – is a matter of interpretation, exposure, risk, costs and compromise

*** Like legislation, a reasonable settlement is one that no one likes, but everyone can live with ***

All things considered, I would rather be in Philadelphia

Antarctica 2024 - "Trip of a Lifetime"

"Relevant to Construction Claims" 😉











WEST GROUP LAW PLLC

P&A PETRINI & ASSOCIATES, P.C. Counselors at Public Law

Any Questions?



Contact Information

Steven A. Torres, Esq.

storres@westgrouplaw.com

914-898-2400



Christopher J. Petrini, Esq.

cpetrini@petrinilaw.com

508-665-4310



WEST GROUP LAW PLLC

www.westgrouplaw.com

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Counselors at Public Law

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