ETHICS

MANAGING YOUR CONSTRUCTION PRACTICE

Presenters:

C. Warren Tripp, Jr.

Donald W. St. Denis

Why Are We Here?

Ethics – Managing Your Construction Practice

- **Disclaimer and Limitation:**

THE ENGAGEMENT – PROJECT OR TASK

- Find your Client(s)
- Define what you are asked to do
- Is it something you can do?
- Prepare an Attorney-client Contract
- Who are the Players?

Engagement Contract Language

- **How will you be paid?**
- **How will costs be paid**
- **How will the relationship be terminated**
- **WHAT WILL YOU BE DOING**

Understanding Your Limitations

- **(Competency)**
- **<u>Rule 4-1.1 Competence</u>**
  - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The In-Office Practice:

First, identify the task and the needed documents

- **Litigation?**
- **Lien?**

Forms

- If you are doing document work, what Form will you use?
- AIA
- Some other organization's
- Modification of existing forms?
- Be sure to discuss the benefits or limitations of each

Litigation

- Plaintiff or Defense?
- Who is suing whom?
- State or Federal?
- Complex relationship between Insurers and Insureds
- Must explain to the client benefits and limitations of choices

Communication

- **Rule 4-1.4 Communication**
- (a) **Informing Client of Status of Representation.** A lawyer shall:
-
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;
-
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
-
- (3) keep the client reasonably informed about the status of the matter;
-
- (4) promptly comply with reasonable requests for information; and
-
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
-
- (b) **Duty to Explain Matters to Client.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Consulting with Client

- Rule 4-1.4(2)
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- We must consult with our client to ensure their objectives are discussed and if possible a way is found to meet them.

Understanding Your Client's Expectations

- Risk vs Reward
- Cost vs Benefits
- Every case is different…..

Conflict Resolution

- Conflict Checks
- New Client or Old Client?
- Insured vs Insurer
- New Matter or Continuing Matter?

Conflicts-of-Interest (Conflict Checks)

- Rule 1.7. Conflict of Interest: Current Clients

  (a) Except as provided in paragraph (b), a lawyer must not represent a client if:

  1) the representation of one client will be directly adverse to another client; or
  2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Conflicts-of-Interest (Conflict Checks)

- Checking for (a)(2) is not so simple: “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”
  - materially limited by the lawyer’s responsibilities to another client
  - materially limited by the lawyer’s responsibilities to a former client
  - materially limited by the lawyer’s responsibilities to a third person
  - materially limited by a personal interest of the lawyer

Conflicts-of-Interest (Conflict Checks)

- Material Limitations don't always show up in a conflict check. Here are some examples:
  - Will the representation cause you to take a legal position in one litigation that is contrary to the legal position that you consistently take for another client?
  - Will prevailing against a particular defendant on behalf of one client leave that defendant judgment proof against another client?
  - Does the volume of business with larger clients threaten your ability to provide diligent representation to smaller clients?

Conflicts-of-Interest (Conflict Waivers)

- Rule 1.7. Conflict of Interest: Current Clients

  (b) Informed Consent. Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if:

  1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  2) the representation is not prohibited by law;
  3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
  4) each affected client gives informed consent, confirmed in writing.

Conflicts-of-Interest (Conflict Waivers)

- “informed consent confirmed in writing”
- <u>Rule 1.0. Terminology</u>

  (e) ‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Is there Chinese Wall in Florida?

- **<u>Rule 4-1.10 Imputation of Conflicts of Interest; General Rule</u>**

- (a) **Imputed Disqualification of All Lawyers in Firm.** While lawyers are associated in a firm, none of them may knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7 or 4-1.9 except as provided elsewhere in this rule, or unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Conflict Waiver

- Detailed Correspondence
  - Is the scope similar?
  - Opposing parties?
  - Multiple offices?

Who is your Client?

- Insurer vs Insured
- Condo Owner vs Association
- Corporation vs Contact or Employee
  - **RULE 4-1.13 Organization as Client**

HAZARDS FOR THE TRANSACTIONAL LAWYER (Scope of Representation)

- Engagement Letters/Limiting Representation
  - The 'contract' between you and the client, whether express or implied, establishes the scope of duty.
  - The best practice is to make the contract express (written) and to expressly define (and limit where necessary) your role.
  - When not expressly defined in a written contract, the scope of your duty may be defined by:
    - prior transactions with that client
    - the client's expectations
    - statewide or local customs for similar transactions
  - A lawyer may not avoid legal issues that arise, even where those legal issues are not precisely within the original scope of the representation
    - know when issues outside of your expertise may arise (e.g. tax, zoning, regulatory matters) and refer your client to another professional when they do arise
    - when an issue arises that is out of the ordinary, write a letter or send an e-mail to the client if you do not intend to address the issue

HAZARDS FOR THE TRANSACTIONAL LAWYER (Best Practices)

- Use checklists (competence and diligence)
- Avoid giving business advice (competence)
- Encourage the advice of other professionals (communication)
- Consider regulatory restrictions and requirements (competence and diligence)
- Forms are okay. Trusting forms is not okay. (diligence)
- Beware when creating form deal file documents for your clients (competence and communication)

Who is Working on the Case

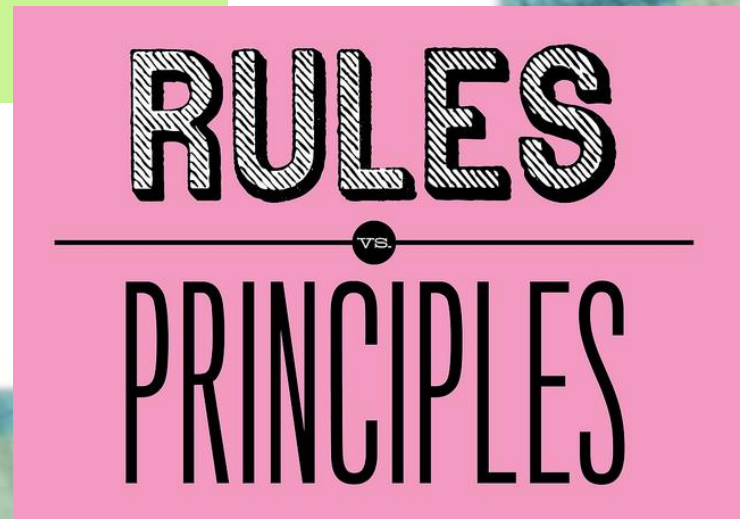
- Your duty is to monitor
  - Associates/other attorneys in your firm
  - Paralegals
  - Experts/Consultants

Electronic Discovery: Proportionality after the 2015 Federal Rules Amendments

Ralph Artigliere, Circuit Judge (ret.)
Construction Law Institute
March 17, 2017

Rules of Procedure for eDiscovery

- 2006 Federal Rules Amendments
- 2012 Florida Rules Amendments
- 2015 Federal Rules Amendments



Proportionality: Federal Rule 26(b)(1)(2015)

- **Rule 26(b)(1) defines the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."**

Proposed discovery must be both relevant and proportional to be within the scope that Rule 26(b)(1) permits.

Proportionality Factors Under Rule 26

… discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering

- the importance of the issues at stake in the action,
- the amount in controversy,
- the parties' relative access to relevant information,
- the parties' resources,
- the importance of the discovery in resolving the issues, and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

Proportionality Fla. R. Civ. P. 1.280 (d)(2)(ii)

(2) In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that … (ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

What do the Judges Say About Proportionality after 2015?

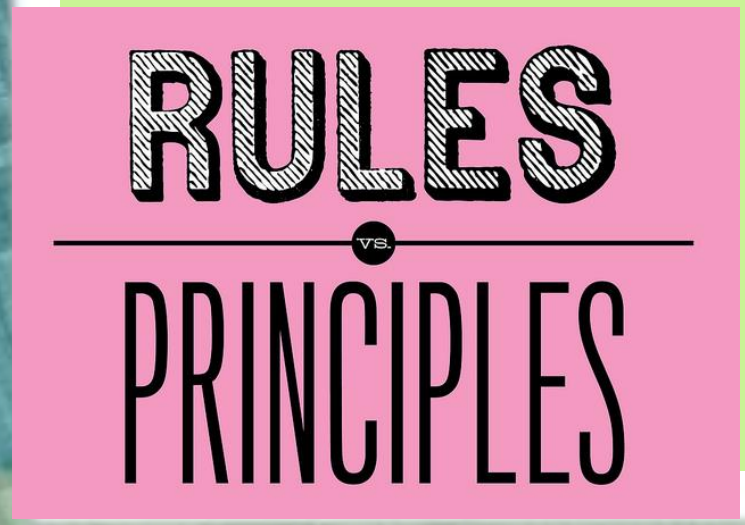
- Chief Justice John Roberts
- Federal Magistrate and District Judges
- Florida State Court Judges
- Case Law

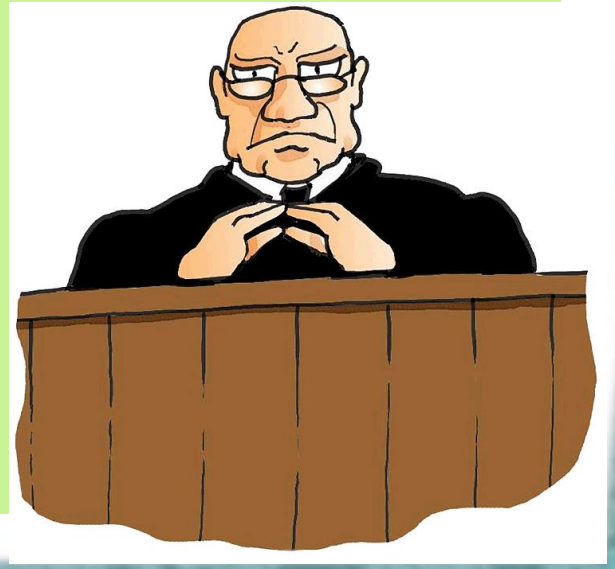
Need for Proactive Discovery Advocacy

- *Johnson v. Serenity Transportation, Inc., No. 15-cv-02004-JSC,* 2016 WL 6393521 (N.D. Cal. Oct. 28, 2016)
- *Rowan v. Sunflower Electric Power Corp., No. 15-cv-9227-JWLTJJ,* 2016 WL 3743102 (D. Kan. July 13, 2016)

Practical Application of Proportionality

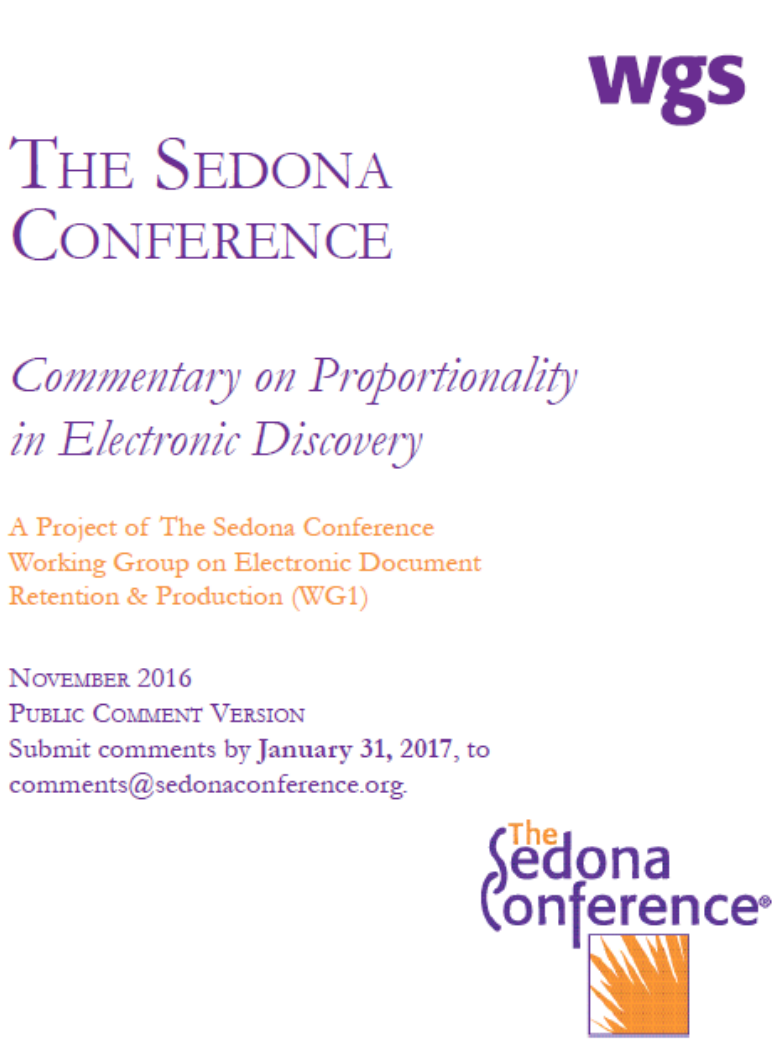
- Why is proportionality important?
- Principles and Guidelines…





Resources

- The Sedona Conference Publications



Resources

21

REVISED

GUIDELINES & PRACTICES

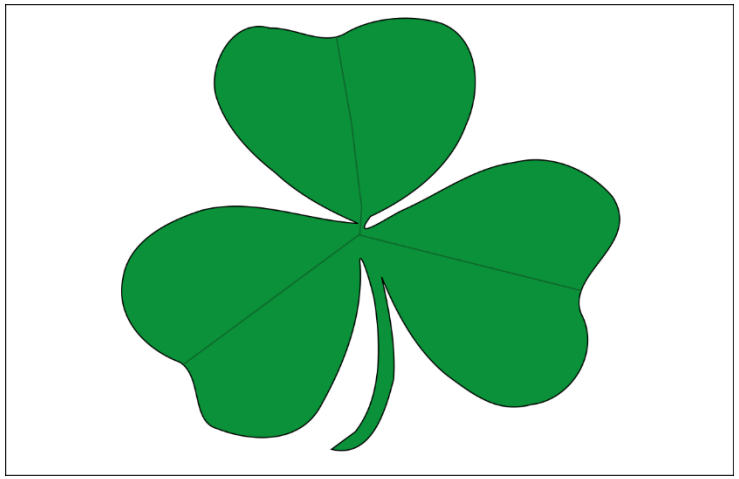
FOR IMPLEMENTING THE
2015 DISCOVERY AMENDMENTS
TO ACHIEVE PROPORTIONALITY

Center for Judicial Studies
Duke Law School
October 2016

Resources

The Duke Law Center for Judicial Studies

- 2016 publication, Revised Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality, is online at: https://law.duke.edu/judicature/volume100-number4/#guidelines
- Also, find regularly updated annotations to the Guidelines and Practices at https://law.duke.edu/judicialstudies/conferences/publications



Happy St. Patrick's Day

Plenary III: General Overview of the Changes to the 2017 AIA Form Documents

2017 Florida Bar Construction Law Institute

March 17, 2017

AIA Contract Documents

AIA Contract Documents

Presenter

Ken Cobleigh, Esquire, Managing Director and Counsel, AIA Contract Documents

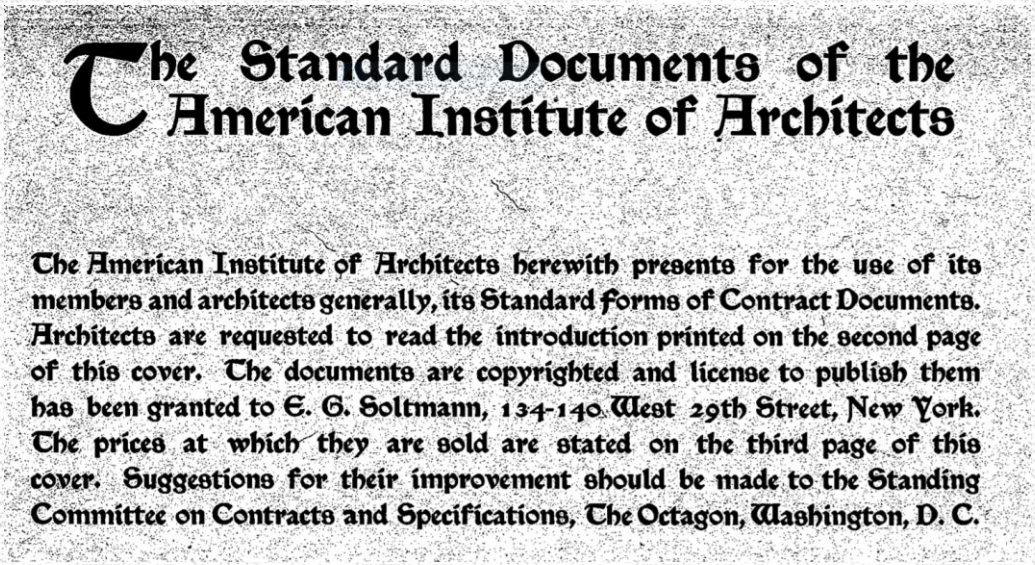
AIA Contract Documents

AIA Contract Documents Overview

AIA Contract Documents

History

- Standard form documents since 1888 (129 years)
- Evolved to reflect practices in the construction industry
- Substantial volume of interpretive case law (AIA Legal Citator)
- Now, nearly 200 agreements and forms



The Standard Documents of the American Institute of Architects

The American Institute of Architects herewith presents for the use of its members and architects generally, its Standard Forms of Contract Documents. Architects are requested to read the introduction printed on the second page of this cover. The documents are copyrighted and license to publish them has been granted to E. G. Soltmann, 134-140 West 29th Street, New York. The prices at which they are sold are stated on the third page of this cover. Suggestions for their improvement should be made to the Standing Committee on Contracts and Specifications, The Octagon, Washington, D. C.

AIA Contract Documents

Objectives

AIA Contract Documents

Drafting Process

AIA Contract Documents

Participants

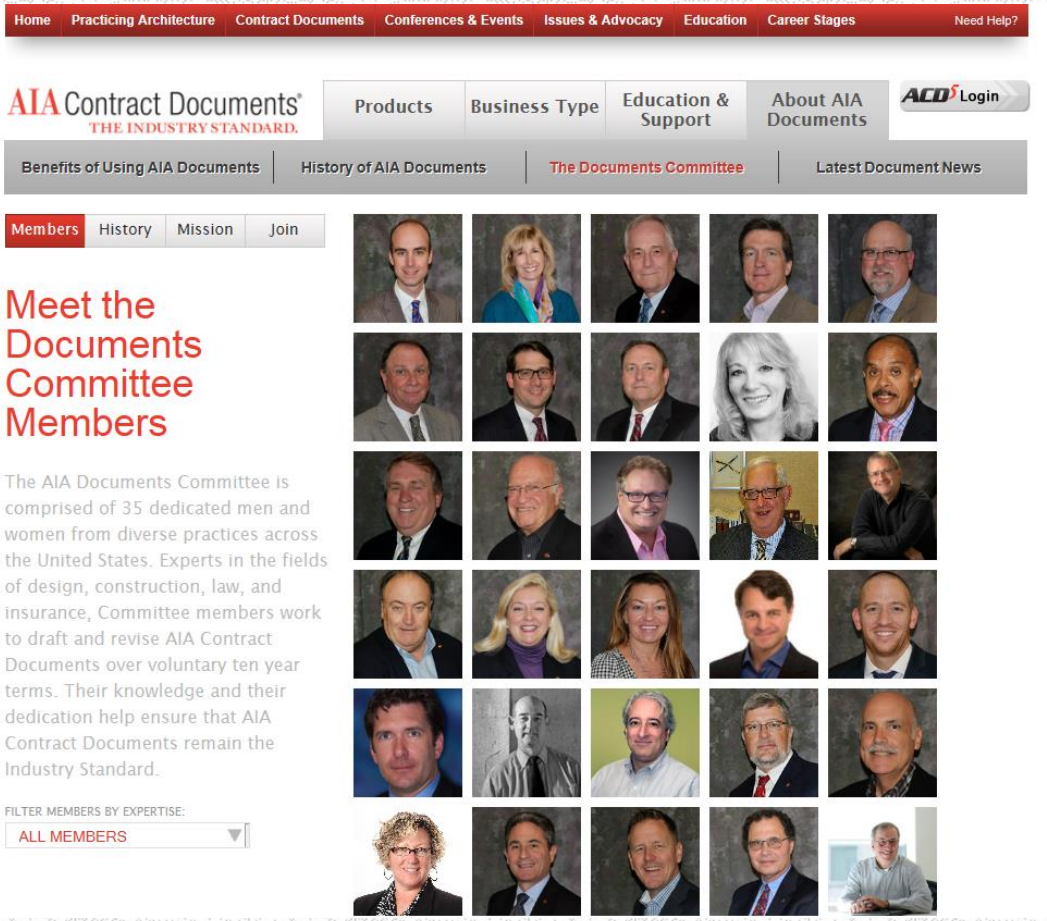
- Market Research
- Industry Stakeholders
- AIA/ Member Resources (Knowledge Communities)
- Liaisons/ Subject Matter Experts
- AIA Contract Documents Committee

AIA Contract Documents Committee

- History
  - Began in 1887 as the *Committee on the Uniform Contract*
  - Uniform Contract 1888
  - First set of standard documents, including General Conditions, published in 1911.
  - First Owner-Architect Agreement in 1917
  - Committee continuous except brief lapse for Great Depression and WWII

AIA Contract Documents

Today's Committee



http://www.aia.org/contractdocs/documents-committee/

AIA Contract Documents

2017 Release

AIA Contract Documents

2017 Release: Process

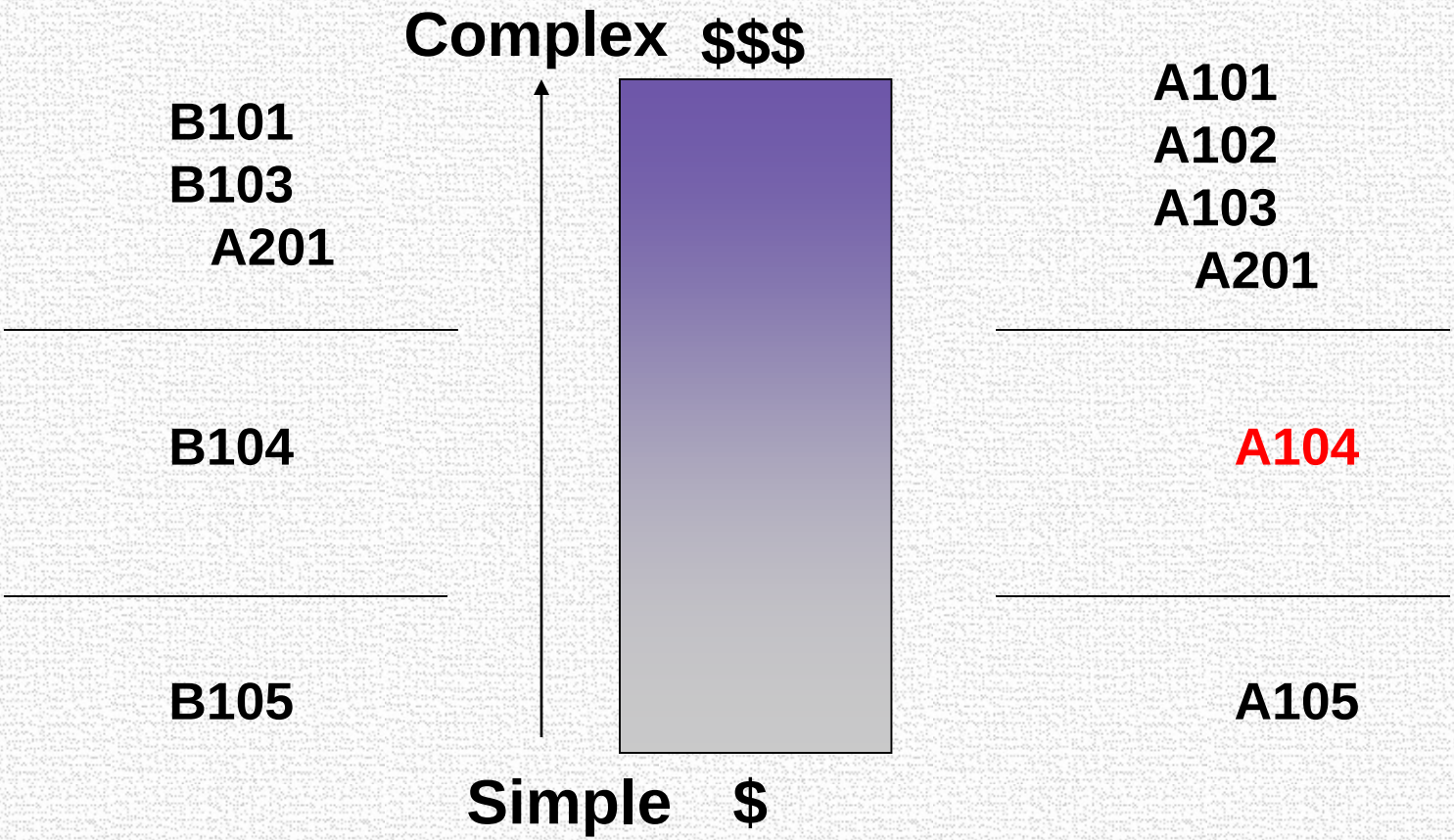
- Roundtable discussions with industry representatives.
- Review of materials published by other industry stakeholder associations and related contract terms and issues.
- Sought guidance from several AIA knowledge communities,
- Sought comments from groups representing industry stakeholder interests and prominent attorneys representing industry stakeholders.
- Iterative revise/review/comment/revise process

2017: Some Key Revisions

- Insurance
  - A201 Article 11
  - New Insurance Exhibit
- Digital Data/BIM
- New Sustainable Projects Exhibit
- Termination Fees
- Alternates
- Liquidated Damages
- Notice Provisions
- Contractor's Means and Methods
- Direct Communication between the Owner and Contractor

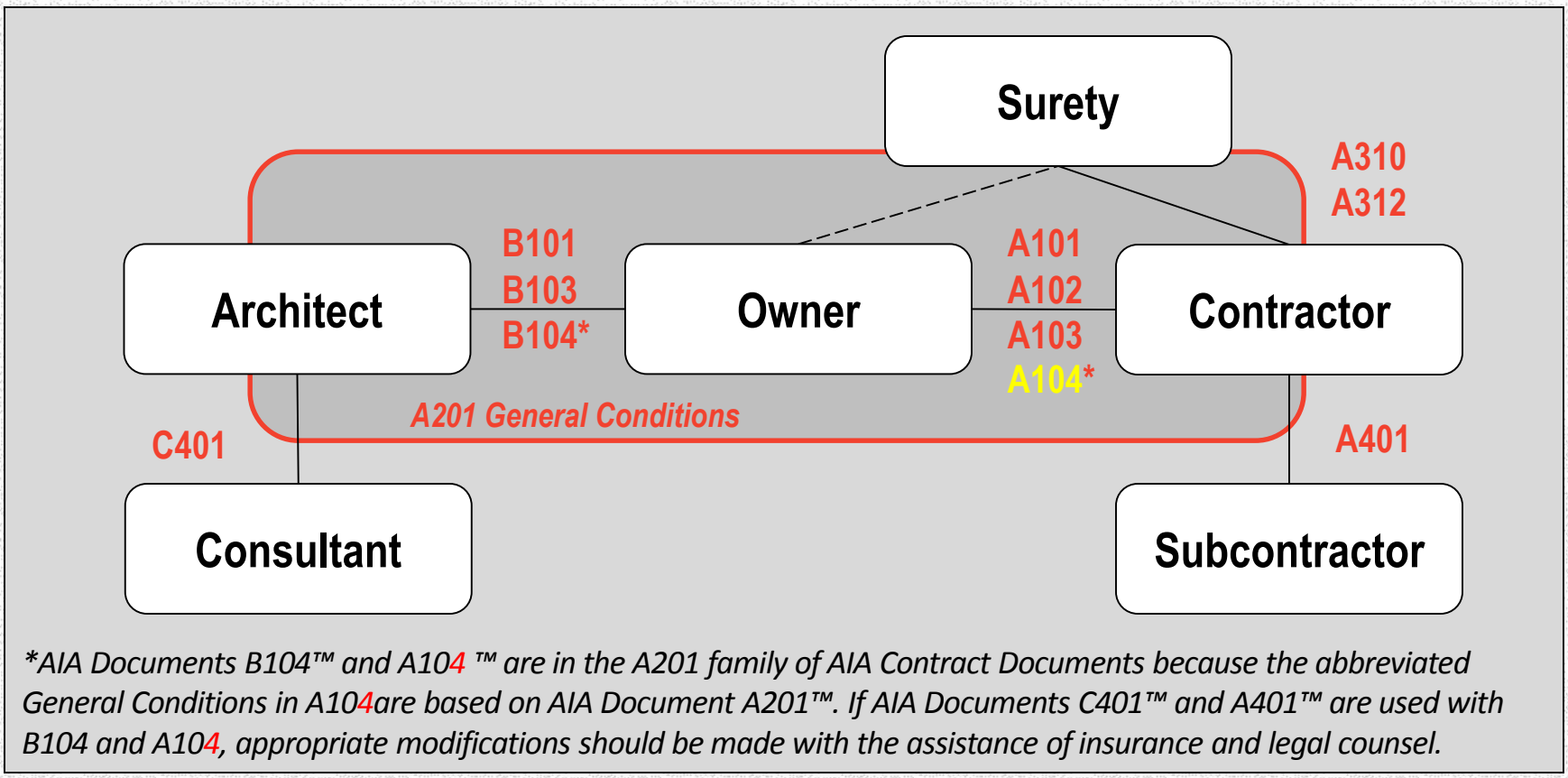
AIA Contract Documents

Project Size and Complexity



AIA Contract Documents

Conventional (A201)

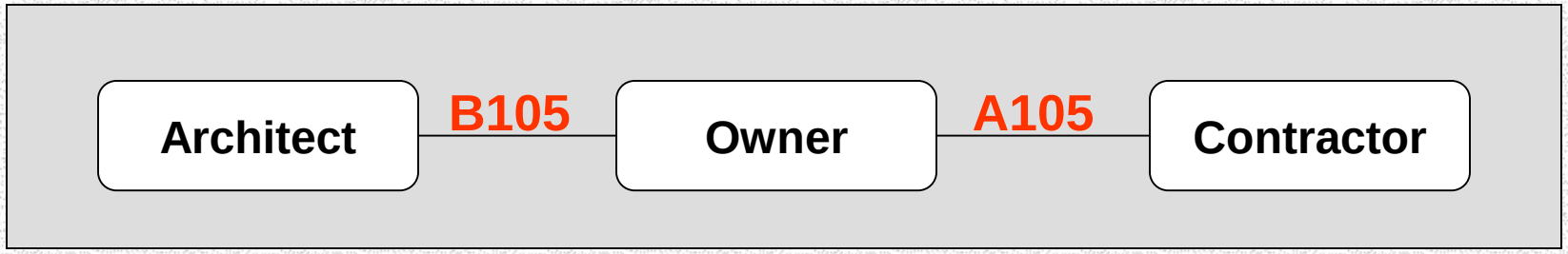


**AIA Documents B104™ and A104 ™ are in the A201 family of AIA Contract Documents because the abbreviated General Conditions in A104are based on AIA Document A201™. If AIA Documents C401™ and A401™ are used with B104 and A104, appropriate modifications should be made with the assistance of insurance and legal counsel.*

AIA Contract Documents

Small Projects

- Suitable for projects of relatively low cost and brief duration.
- These documents (B105 & A105) are in effect conventional Design-Bid-Build documents (B101 and A101/A201) “stripped down” to essentials
- These feature use of Stipulated Sum and Integrated General Conditions



AIA Contract Documents

Insurance: Why an Exhibit

- Changing range and types of coverage
- Flexibility in developing Project Insurance Requirements
- Need to allow for adaptation to changes in the insurance market w/o edits to A201
- Facilitate transmission to insurance advisors/brokers
- Exhibit for 2014 Design-Build documents

AIA Contract Documents

Insurance: The Exhibit

- Separate (but identical)Exhibit for A101, A102 and A103
- Key terms of Exhibit and Article 11 of A201 written into A104
- A105 contains very basic insurance provisions

AIA Contract Documents

Insurance: The Exhibit

- Requires Owner or Contractor to obtain and maintain property insurance written on builder's risk "all-risk" completed value or equivalent policy form
- Begins from premise that Owner will obtain and maintain property insurance, but allow parties to shift burden to Contractor
- Sufficient to cover the value of the entire Project on a replacement cost basis
  - And existing structure in case of renovation or remodeling
- Maintained until Substantial Completion and thereafter continued or replaced through the Contractor's one-year period for correction of the Work

Insurance: The Exhibit

- Must include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors– and the interests of mortgagees as loss payees
- Owner assumes financial responsibility for any loss not covered because of deductibles or self-insured retentions

Insurance: The Exhibit

In addition, the parties may agree that the Owner will purchase and maintain certain optional extended property coverages:

- Loss of Use, Business Interruption, and Delay in Completion Insurance
- Ordinance or Law Insurance
- Expediting Cost Insurance
- Extra Expense Insurance
- Civil Authority Insurance
- Ingress/Egress Insurance
- Soft Costs Insurance

Insurance: The Exhibit

The parties may also agree that the Owner will purchase and maintain certain other optional coverages:

- cyber security insurance
- other potential Owner coverages

AIA Contract Documents

Insurance: The Exhibit

Contractor Required Coverages for all Projects:

- Commercial General Liability
- Automobile liability
- Worker's compensation
- Employer's liability

AIA Contract Documents

Insurance: The Exhibit

Contractor Required Coverages depending on the nature of the Project:

- Jones Act and Longshore & Harbor Worker's Compensation
- Professional Liability
- Pollution liability coverage
- Maritime Liability
- Coverage for use or operation of manned or unmanned aircraft

Insurance: The Exhibit

Other coverages the Contractor might obtain:

- Railroad Protective liability
- Asbestos Abatement liability
- Coverage for physical damage to property while in storage or transit
- Property coverage for property owned by he Contractor and used on the Project

Payment and Performance Bonds

Insurance: The Exhibit

- Insurance and Bonds from companies lawfully authorized to issue insurance or surety bonds in the jurisdiction where the Project is located
- Insurance and Bonds must be procured prior to commencement of Work
- Owner must provide proof of required coverages and, upon request of the Contractor, a copy of the property insurance policies

Insurance: The Exhibit

Contractor required to provide certificates of insurance acceptable to Owner:

- Prior to Commencement of Work
- Upon renewal or replacement of each policy
- Upon Owner's written request

Certificate evidencing continuation of commercial liability coverage at final application for payment and thereafter upon renewal

Insurance: A201 Article 11

- Owner and Contractor must provide each other with notice of an impending or actual cancellation or expiration of coverage
- Notice provided within 3 business days of the date the party becomes aware
- Party receiving notice has the right to stop the Work until lapse cured– unless lapse caused by that party
- Notice does not relieve party of the contractual obligation to provide any coverage
- Additional provisions protect the interest of the Contractor and Subs if the Owner fails to purchase required coverage

AIA Contract Documents

Insurance: A201 Article 11

New provisions on adjustment and settlement of loss covered by property insurance:

- Loss adjusted by and payable to the Owner as fiduciary
- Prior to settlement Owner notifies Contractor of proposed settlement and proposed allocation of proceeds
- Contractor has 14days to object
- If Contractor does not object, the Owner settles and Contractor bound by settlement and allocation
- If Contractor timely objects, Owner may proceed to settle the loss and dispute between Owner and Contractor is resolved per the Claims and Disputes provisions

Sustainable Projects Documents History

- 2007 Owner-Architect Agreements contained very basic references and requirements
- D503-2011 Guide for Sustainable Projects
- 2013 SP versions of Design-Bid-Build (A201), CM as Constructor, and CM as Advisor documents
- 2014 SP exhibit for Design-Build

E204-2017: Sustainable Projects Exhibit

- Single document sets forth roles and responsibilities for each Project participant as they relate to unique elements of sustainable design and construction
- Once Owner determines project will involve a Sustainable Objective, E204 is incorporated into the Owner-Architect and Owner-Contractor agreements and as appropriate into each of the other Project related agreements
- Establishes a comprehensive process for identifying, developing, and assigning responsibility for sustainable design and construction elements (similar to that outlined in D503 and preceding SP documents)

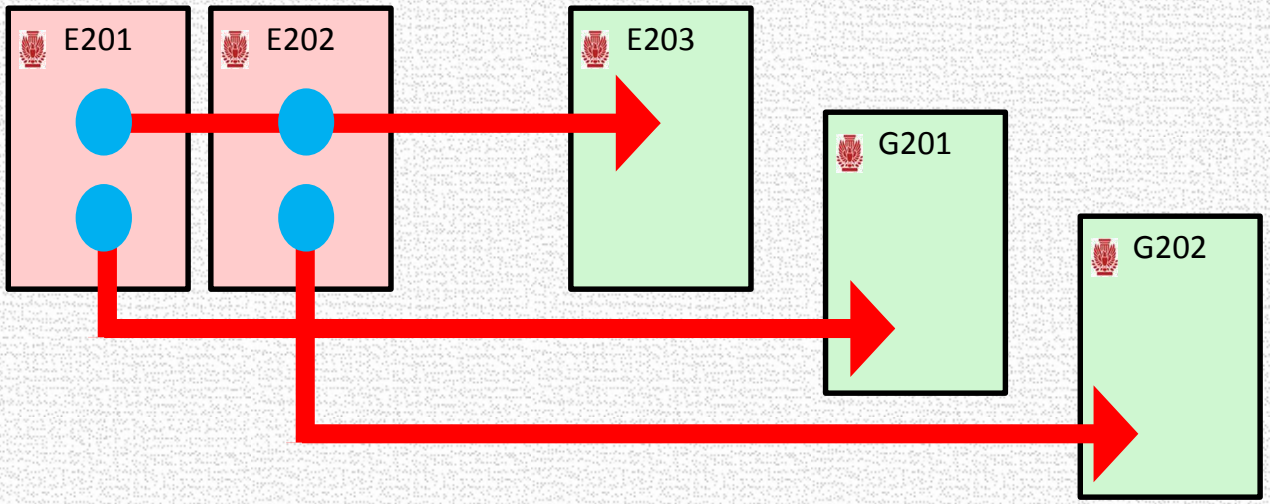
AIA Contract Documents

E204-2017: Sustainable Projects Exhibit

- Sustainable Objective
- Sustainability Workshop
- Sustainability Plan
- Sustainable Measures
- Other issues unique to Sustainable Projects

AIA Contract Documents

Updated Digital Documents

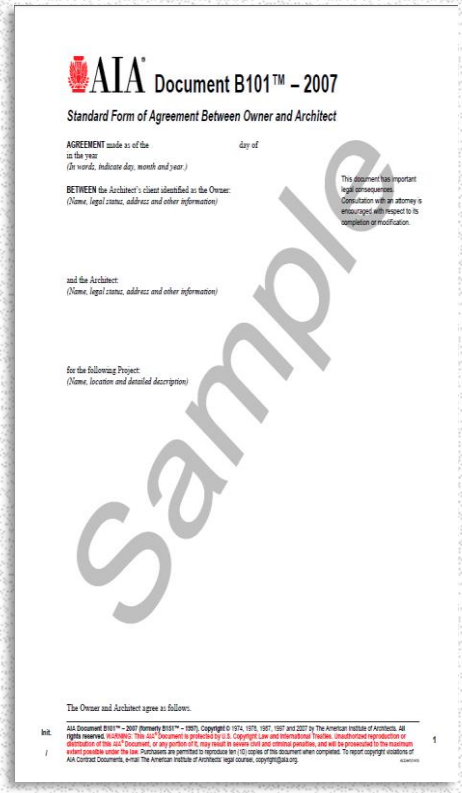


AIA Contract Documents

AIA Digital Practice Documents

Agreement + E203

Protocols – G201 and G202


AIA Document B101™ – 2007

Standard Form of Agreement Between Owner and Architect

AGREEMENT made as of the day of in the year (In words, indicate day, month and year.)

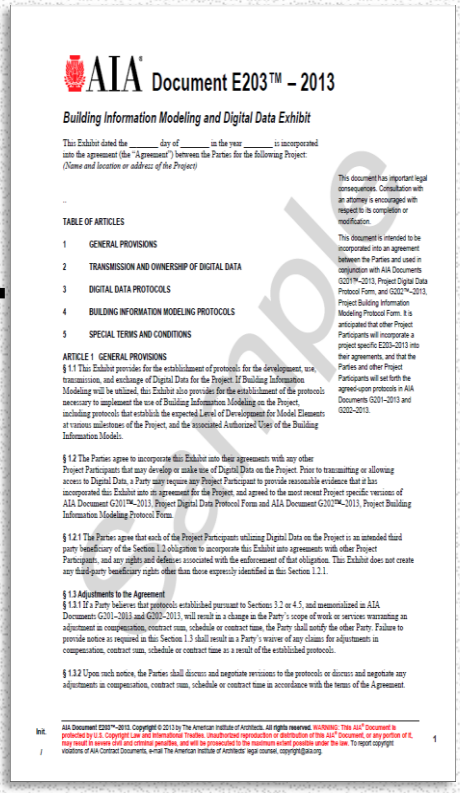
BETWEEN the Architect's client identified as the Owner: (Name, legal status, address and other information)

and the Architect: (Name, legal status, address and other information)

for the following Project: (Name, location and detailed description)

The Owner and Architect agree as follows.

+

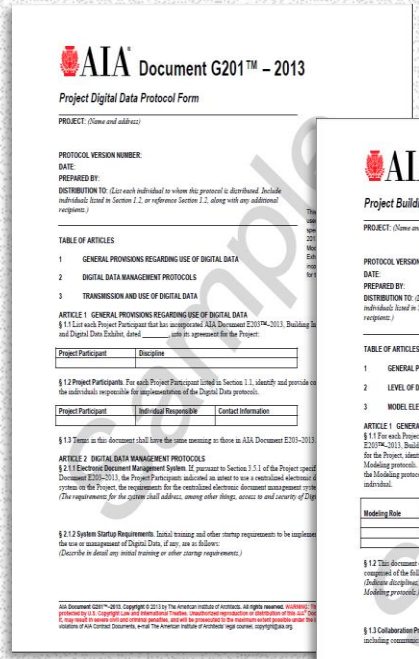

AIA Document E203™ – 2013

Building Information Modeling and Digital Data Exhibit

This Exhibit dated the day of in the year is incorporated into the agreement (the "Agreement") between the Parties for the following Project: (Name and location or address of the Project)

TABLE OF ARTICLES

1 GENERAL PROVISIONS
2 TRANSMISSION AND OWNERSHIP OF DIGITAL DATA
3 DIGITAL DATA PROTOCOLS
4 BUILDING INFORMATION MODELING PROTOCOLS
5 SPECIAL TERMS AND CONDITIONS


AIA Document G201™ – 2013

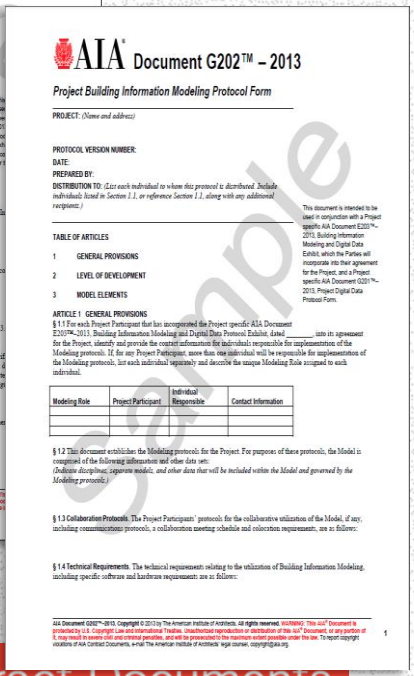
Project Digital Data Protocol Form

PROJECT: (Name and address)

PROTOCOL VERSION NUMBER:
DATE:
PREPARED BY:
DISTRIBUTION TO: (List each individual to whom this protocol is distributed. Include individuals listed in Section 1.2, or reference Section 1.2, along with any additional recipients.)

TABLE OF ARTICLES

1 GENERAL PROVISIONS REGARDING USE OF DIGITAL DATA
2 DIGITAL DATA MANAGEMENT PROTOCOLS
3 TRANSMISSION AND USE OF DIGITAL DATA


AIA Document G202™ – 2013

Project Building Information Modeling Protocol Form

PROJECT: (Name and address)

PROTOCOL VERSION NUMBER:
DATE:
PREPARED BY:
DISTRIBUTION TO: (List each individual to whom this protocol is distributed. Include individuals listed in Section 1.1, or reference Section 1.1, along with any additional recipients.)

TABLE OF ARTICLES

1 GENERAL PROVISIONS
2 LEVEL OF DEVELOPMENT
3 MODEL ELEMENTS

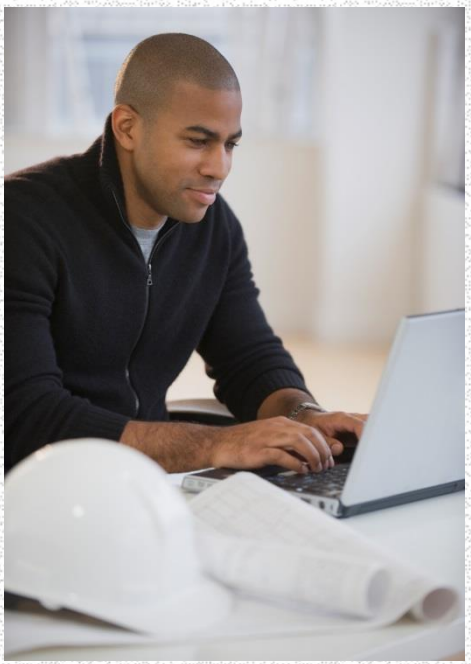
AIA Contract Documents

BIM and other Digital Data

- 2017 Agreements require the parties to agree on protocols governing the use and transmission of digital data, and
- Require the use of E203, G201 and G202 to establish those protocols
- With respect to BIM, the 2017 agreements further provide that any use of, or reliance on, information contained in a Model, without first having established the protocols, is at the using or relying party's own risk and without liability to any other project participant

BIM and other Digital Data

- A201-2017 section 3.11 clarifies that the Contractor can maintain Contract Documents, Change Orders, Construction Change Directives and other Modifications at the site in electronic format
- A201-2017 also addressed the issue of Notice in electronic format



AIA Contract Documents

Termination Fee Provisions

- AIA documents have allowed Owner to terminate for convenience
- Contractor and Subs were entitled to “reasonable overhead and profit on work not executed”
- Architect and Consultants were entitled to “anticipated profit on the value of services not performed”

Termination Fee Provisions

- Owners often deleted OH and P entitlement provisions
- Other industry groups moved away from entitlement to OH&P

AIA Contract Documents

Termination Fee Provisions

2017 documents:

- Owner-Contractor, Owner-Architect , and Architect-Consultant agreements eliminate automatic entitlement to OH&P and prompt parties to discuss and negotiate a termination fee
- A401 retains entitlement to OH&P on unperformed Work
- Nothing prevents Contractor and Sub from negotiating a termination fee in lieu of arguing over lost OH&P calculation

Termination Fee Provisions

A201-2017:

- **§ 14.4.3** In case of such termination for the Owner's convenience, the Owner shall pay the Contractor ~~shall be entitled to receive payment~~ for Work properly executed~~, and~~; costs incurred by reason of ~~such~~ the termination, ~~along with reasonable overhead and profit on the Work not executed~~ including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

Termination Fee Provisions

B101-2017:

- **§ 9.6** ~~In the event of termination not the fault of the Architect~~ If the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the Architect ~~shall be compensated~~ for services performed prior to termination, ~~together with~~ Reimbursable Expenses ~~then due~~ incurred, and costs attributable to termination, including the costs attributable to the Architect's termination of consultant agreements ~~all Termination Expenses as defined in Section 9.7~~.

Termination Fee Provisions

B101-2017:

§ 9.7 In addition to any amounts paid under Section 9.6, if the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall pay to the Architect the following fees:

(Set forth below the amount of any termination or licensing fee, or the method for determining any termination or licensing fee.)

.1 Termination Fee:

.2 Licensing Fee if the Owner intends to continue using the Architect's Instruments of Service:

AIA Contract Documents

Miscellaneous Items

- Commencement and Substantial Completion of the Work
- Alternates
- Liquidated Damages
- Progress Payments and Retainage
- Initial Decision Maker
- Notice
- Choice of Laws and Savings Clause
- Evidence of Owner's Financial Arrangements

Miscellaneous Items

- Means and Methods
- Contractor communications with Owner
- Additional Services and Supplemental Services
- Architect Compensation based on percentage of budget for Cost of the Work
- Architect obligation to revise Contract Documents
- Initial Information in Owner-Architect Agreement
- Review of Requests for Substitution

Miscellaneous Items

- Owner's right to carry out the Work
- Time limit for notice of differing site condition
- Contractor's Construction Schedule
- Delegated design responsibility
- Special warranties
- Minor changes in the Work
- Schedule of values
- Lien Wavers
- Mechanic's Lien Claims

Miscellaneous Items

Cost of the Work Contracts:

- Labor Costs
- Agreed rates
- Bonuses
- Audit Rights

AIA Contract Documents

Other resources

- A503
- B503
- Comparatives
- A201 Commentary
- B101 Commentary
- Articles
- Webinars and seminars
- ABA Forum on Construction Law (Fall 2017)

AIA Contract Documents

Obtaining and Using AIA Contract Documents

AIA Contract Documents

Using AIA Documents

- Available formats?
- How much does it cost?
- Where to purchase?
- Where to get additional information/help?

AIA Contract Documents

Formats and Price Ranges

Agreements
$9.99 – $24.99

Forms
$49.99/50

Paper

$29.99 /
Agreement

$9.99/ Form

Basic Single Document

Agreements
$59.99 –
$79.99

Forms $24.99

ACD5- Custom
Single Document

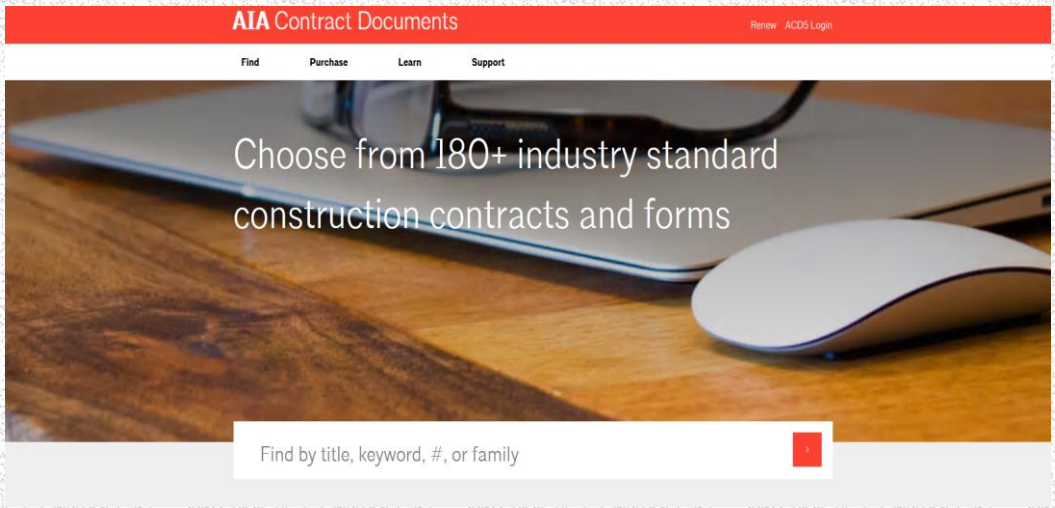
$949.99, AIA
member price

$1,199.99, non
AIA member
price

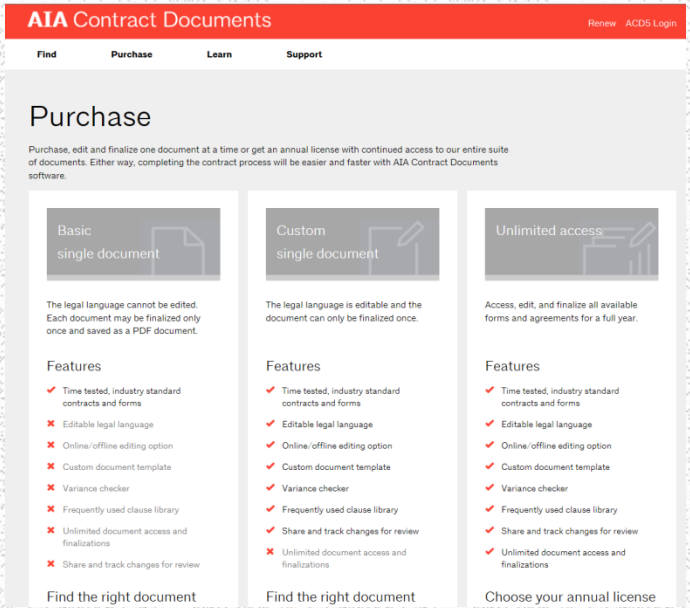
ACD5- Unlimited

AIA Contract Documents

AIA Contract Documents Webpage



https://www.aiacontracts.org/



https://www.aiacontracts.org/purchase

AIA Contract Documents

Free Online Product Training

- ACD5 Basics Training

Follow along while the trainer shows you how to use key features, answers your questions, and shows you how to access resources and support. Please email Hasti Hejazi at hastihejazi@aia.org if you have any questions.

AIA Contract Documents

Contact and Resources

AIA Contract Documents

Questions?

Questions about AIA document content:

Email: docinfo@aia.org

Tel.: (202) 626-7526

Web: www.aia.org/contractdocs/reference

Questions about AIA document products/ ACD5:

Email: docstechsupport@aia.org

Tel.:800-942-7732

AIA Contract Documents

Continued Learning

- AIA Contract Documents on AIAU
- AIA Contract Documents on Youtube

AIA Contract Documents

Opportunity

AIA Contract Documents® Train-the-Trainer Program

Interested?

Please email Hasti Hejazi at hastihejazi@aia.org

AIA Contract Documents

The Construction Law Committee of The Florida Bar Real Property, Probate and Trust Law Section present

March 16 - 18, 2017

10th Annual Construction Law Institute

THE FLORIDA BAR

COURSE CLASSIFICATION: ADVANCED LEVEL

JW Marriott Orlando Grande Lakes
4040 Central Florida Parkway
Orlando, FL 32837
407-206-2300

and also featuring

Annual CLI Golf Tournament

March 16, 2017

Course No. 2290R

The 2017 Advanced Construction Law Certification Review Course (Course Number 2291R) will be simultaneously taking place at the same location (separate registration form required).

Spoliation

Duty to Preserve?

Convergence of Related Trends

Spoliation and ESI

Convergence

Eroding time honored rules – Impact well beyond ESI

Documenting Preservation Process and Methodology

Preservation/Proportionality

Goodbye “All is Fair” in Discovery Dance

Hello Early Disclosure of Methodology for Preservation/Analysis

Florida Supreme Court in *Martino* (2005)

No Tort for Spoliation

Martino did not address –

Common law duty to preserve when reasonable apprehension of litigation

Judge Jacqueline Griffin – 2004 Fla 5th DCA

Lurch Forward to Impose Sanctions for Spoliation

S-O-O-o-o-o. . . .

In the absence of legally defined duty

Is there a duty to preserve?

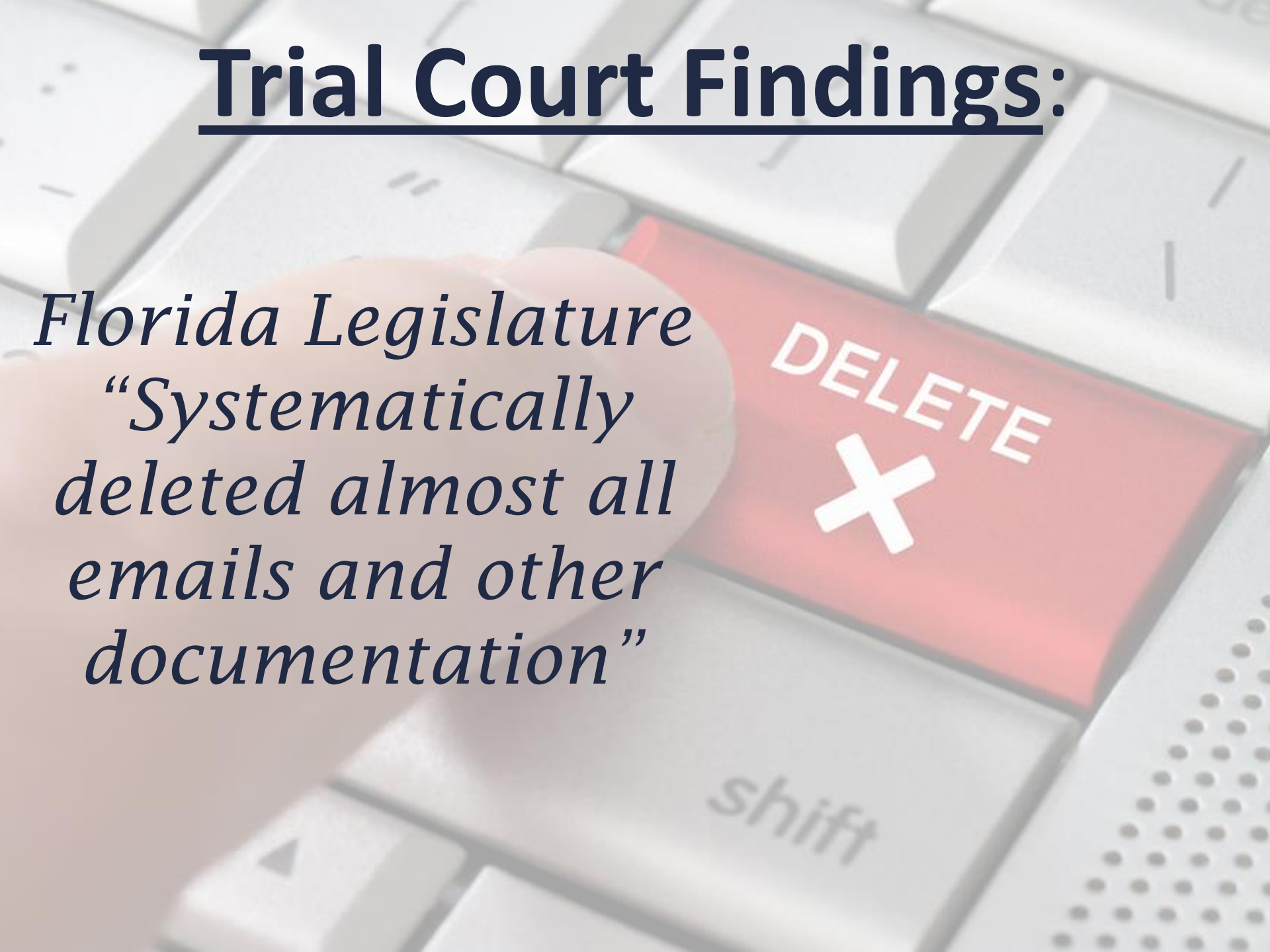
Detzner – Florida Supreme Court
2015/2016

Reapportionment Battle

Does the Florida Legislature Heavy Duty to Preserve Emails???

Trial Court Findings:

Florida Legislature "Systematically deleted almost all emails and other documentation"



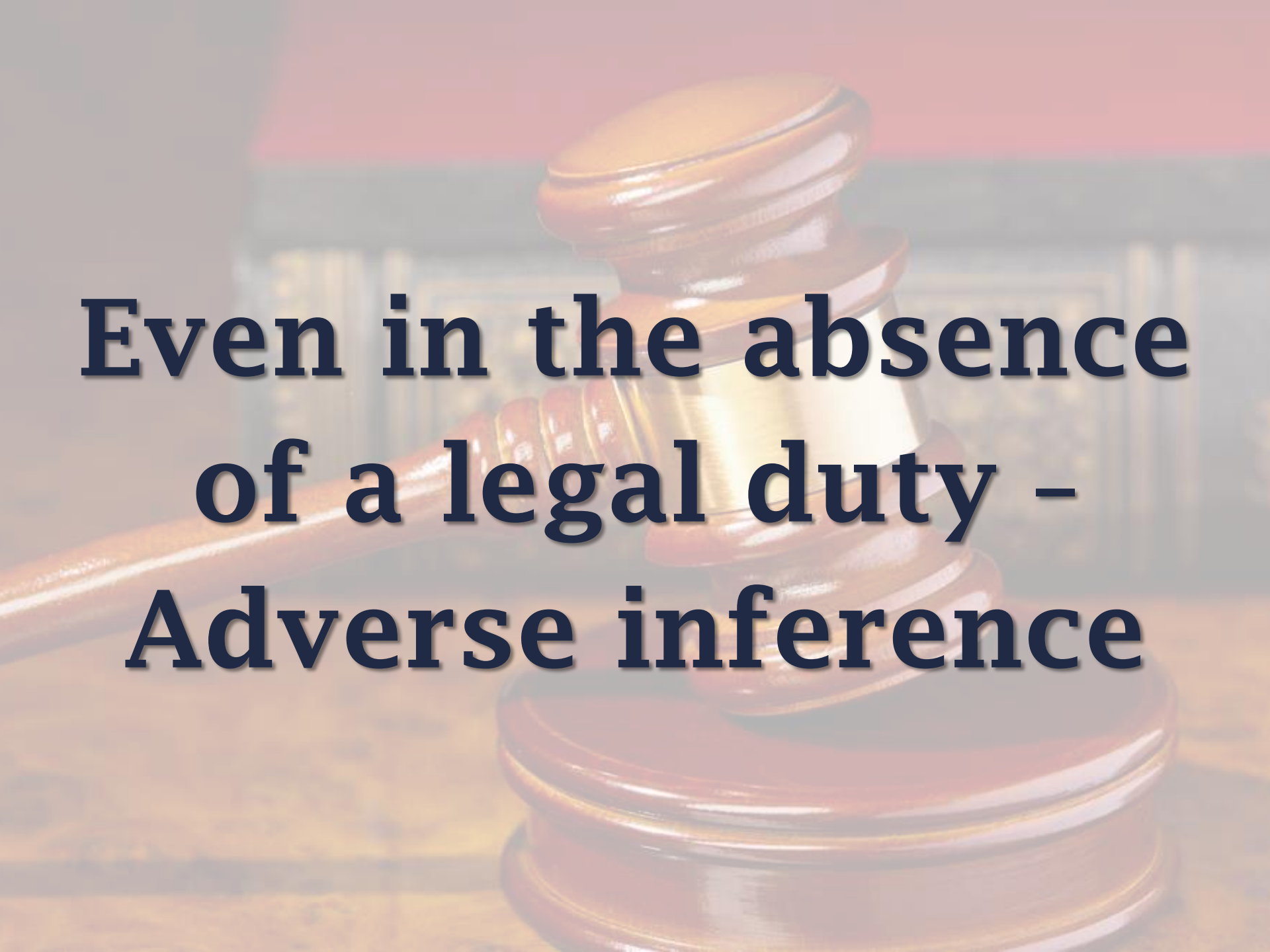
Detzner trial court – no legal duty

"<u>But</u> you have to wonder why they did not preserve"

W H A T ! ! ! ? ? ?

Florida Supreme Court in *Detzner* –

Does not proceed from *Martino*



Even in the absence of a legal duty – Adverse inference

SUMMARY

1. “Even in the absence of a legal duty, though, the spoliation of evidence results in an **adverse inference** against the party that discarded or destroyed the evidence.

2. Florida courts may impose sanctions, including striking pleadings, against a party that **intentionally lost, misplaced, or destroyed** evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability.

3. **Negligently destroyed - a rebuttable** presumption of liability.

4. “An adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.”

"*Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA 2002) (stating that "[c]ases in which evidence has been destroyed, either inadvertently or intentionally, are discovery violations" that may be subject to sanctions)."

Consider the need to establish a factual record before concluding that a duty to preserve exists in all circumstances where there was any degree of reasonable anticipation of litigation.

Is it cynical to state:

That merely entering into a construction contract should trigger a reasonable anticipation of litigation?

Court's Authority to Impose Sanctions

The first is the court's "inherent power to control the judicial process and litigation."

"The need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."

AUTHORITY TO IMPOSE SANCTIONS

The second is by court rule (*e.g.*, Fed. R. Civ. P. 37 or Florida Rule of Civil Procedure 1.380)

Florida Rule 1.380(e) specifically limits award of sanctions for lost ESI to exceptional circumstances as long as the loss was part of a routine document retention policy.

Rule 37(b) of the Federal Rules of Civil Procedure provides a range of sanctions, including dismissal or judgment by default, preclusion of evidence, imposition of an adverse inference or assessment of attorneys' fees and costs for failure to comply with a court order.

Sound Discretion of the Court

1. The identity and sophistication of the spoliator;

2. The reason and timing of the spoliation;

3. Who owns the evidence;

Sound Discretion of the Court

4. The length of time the evidence was kept;

5. The importance of the evidence destroyed;

6. The spoliator's state of mind;

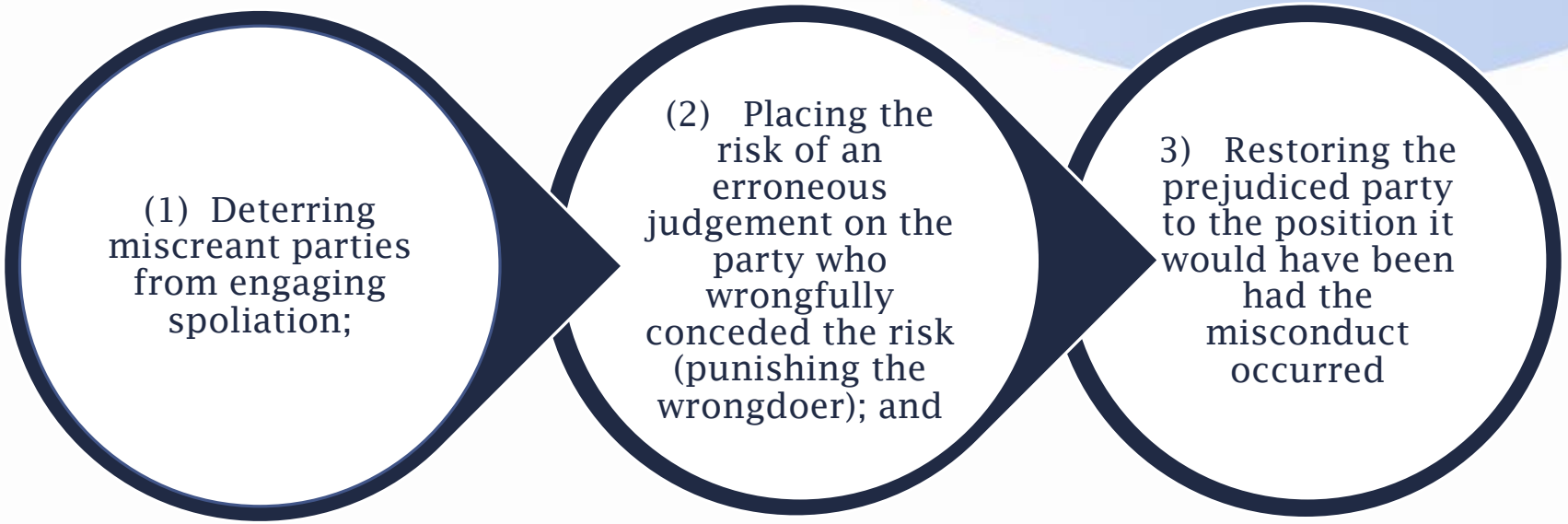
Sound Discretion of the Court

7. The egregiousness of the spoliator's conduct;

8. The consequences of the destruction to the adversary's case;

9. And whether alternate sources of information exist in place of the destroyed evidence.

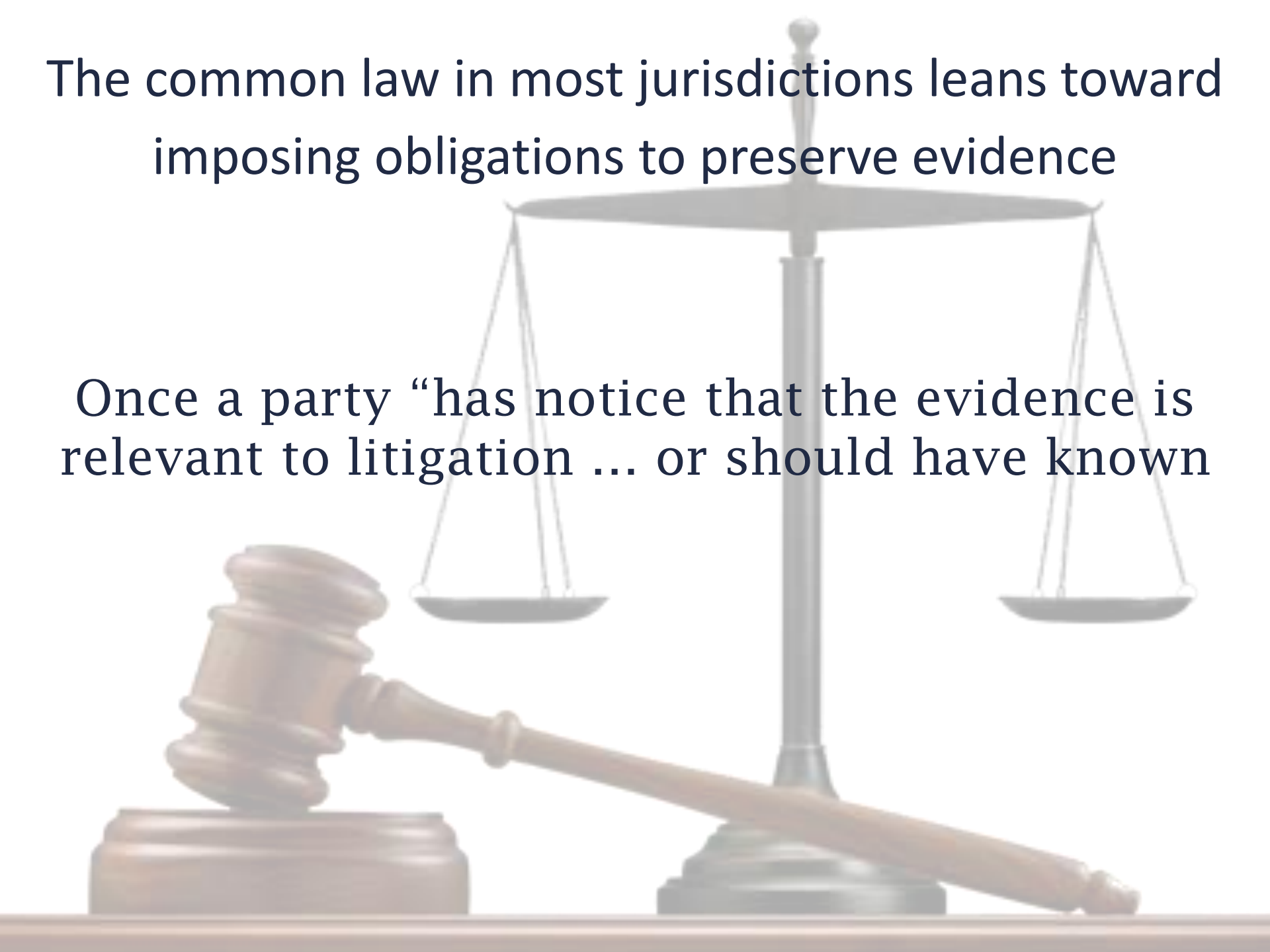
Three-Fold Purpose of Sanctions:



Goal: **Leveling the evidentiary playing field**

The common law in most jurisdictions leans toward imposing obligations to preserve evidence

Once a party “has notice that the evidence is relevant to litigation … or should have known



Key points in time include:

(1) Pre-litigation

(2) Before or after initial notice

(3) After litigation is filed

(4) Before expert disclosures

(5) Before or during repairs

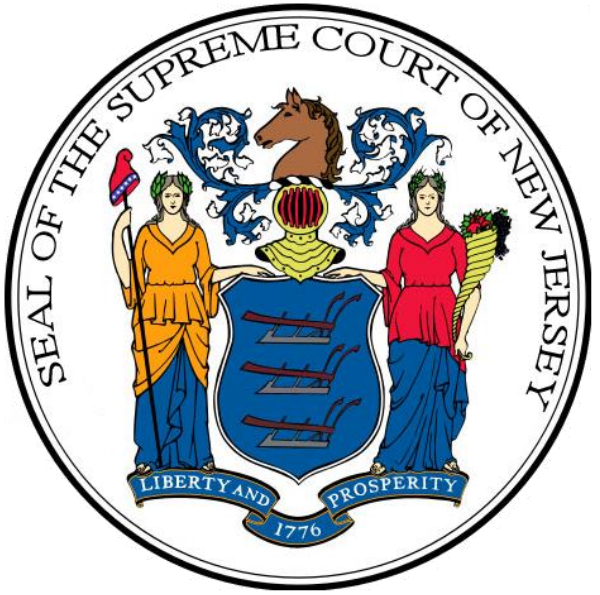
New Jersey

(1) pending or probable litigation involving the defendants;

(2) knowledge by the plaintiff of the existence or likelihood of litigation;

(3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and

(4) evidence relevant to litigation



Texas Court

Described the trigger - when “a reasonable person would conclude from the **severity of the incident** and other circumstances that there was a **substantial chance for litigation** at the time of the alleged spoliation.”

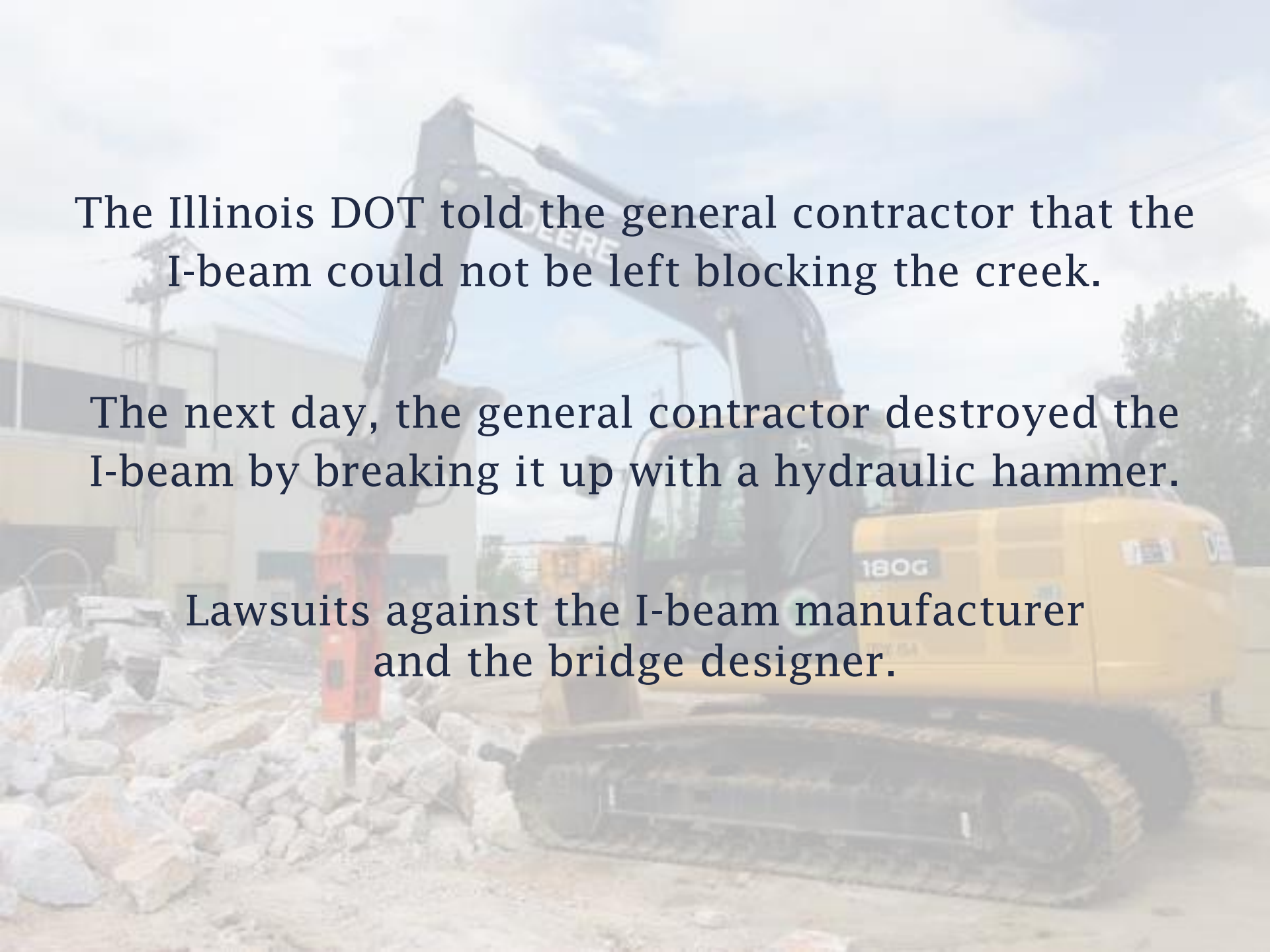
Flexible

Fact Specific Standard

No Surprise There

Illinois Supreme Court

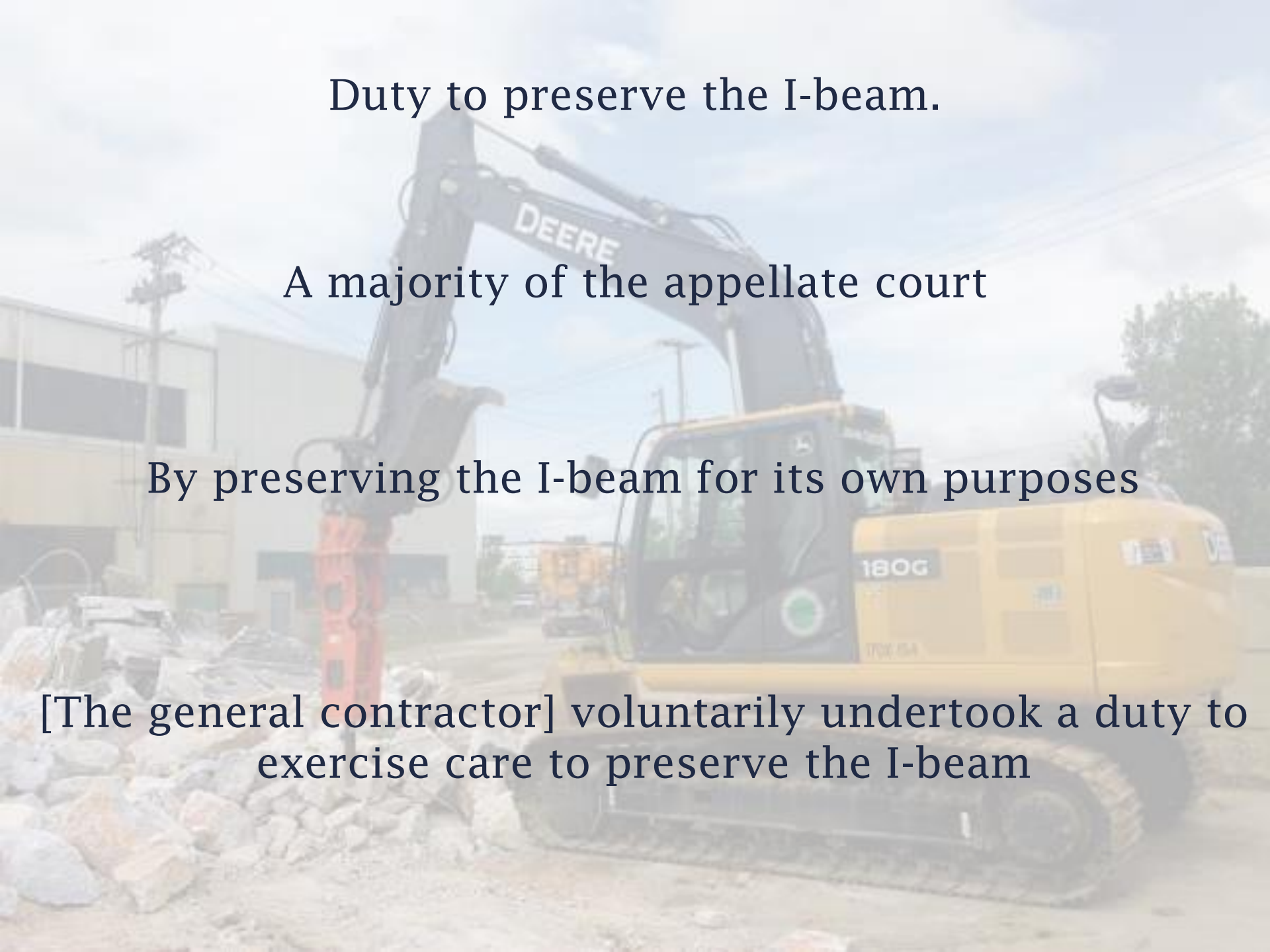
Whether a general contractor had a duty to preserve a concrete I-beam that collapsed during a bridge reconstruction



The Illinois DOT told the general contractor that the I-beam could not be left blocking the creek.

The next day, the general contractor destroyed the I-beam by breaking it up with a hydraulic hammer.

Lawsuits against the I-beam manufacturer and the bridge designer.



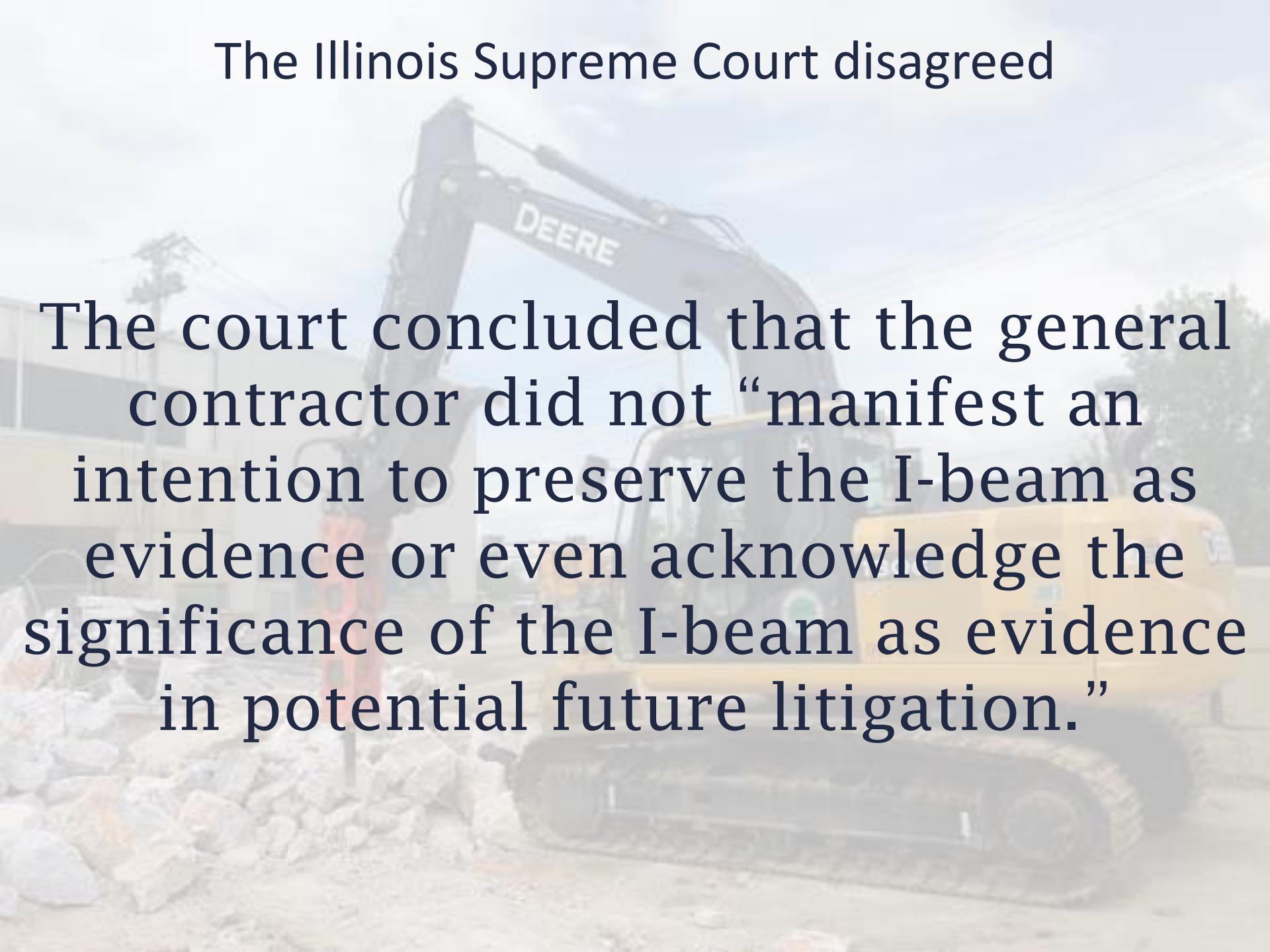
Duty to preserve the I-beam.

A majority of the appellate court

By preserving the I-beam for its own purposes

[The general contractor] voluntarily undertook a duty to exercise care to preserve the I-beam

The Illinois Supreme Court disagreed



The court concluded that the general contractor did not "manifest an intention to preserve the I-beam as evidence or even acknowledge the significance of the I-beam as evidence in potential future litigation."

Florida – 4th DCA

In 2004, the Fourth District Court of Appeal explained in *Royal & Sunalliance v. Lauderdale Marine Center*

The mere anticipation of litigation does not establish a common law duty to preserve evidence.

Instead, the Fourth DCA ruled that the duty to preserve evidence can only arise by contract, by statute or by a properly served discovery request *after* a lawsuit has been filed.

Statute, or properly served discovery request after litigation filed

No Common Law Duty

Royal rejected/overridden by *Detzner*

Scope of duty

The scope is broader than a zealous advocate would likely recognize.

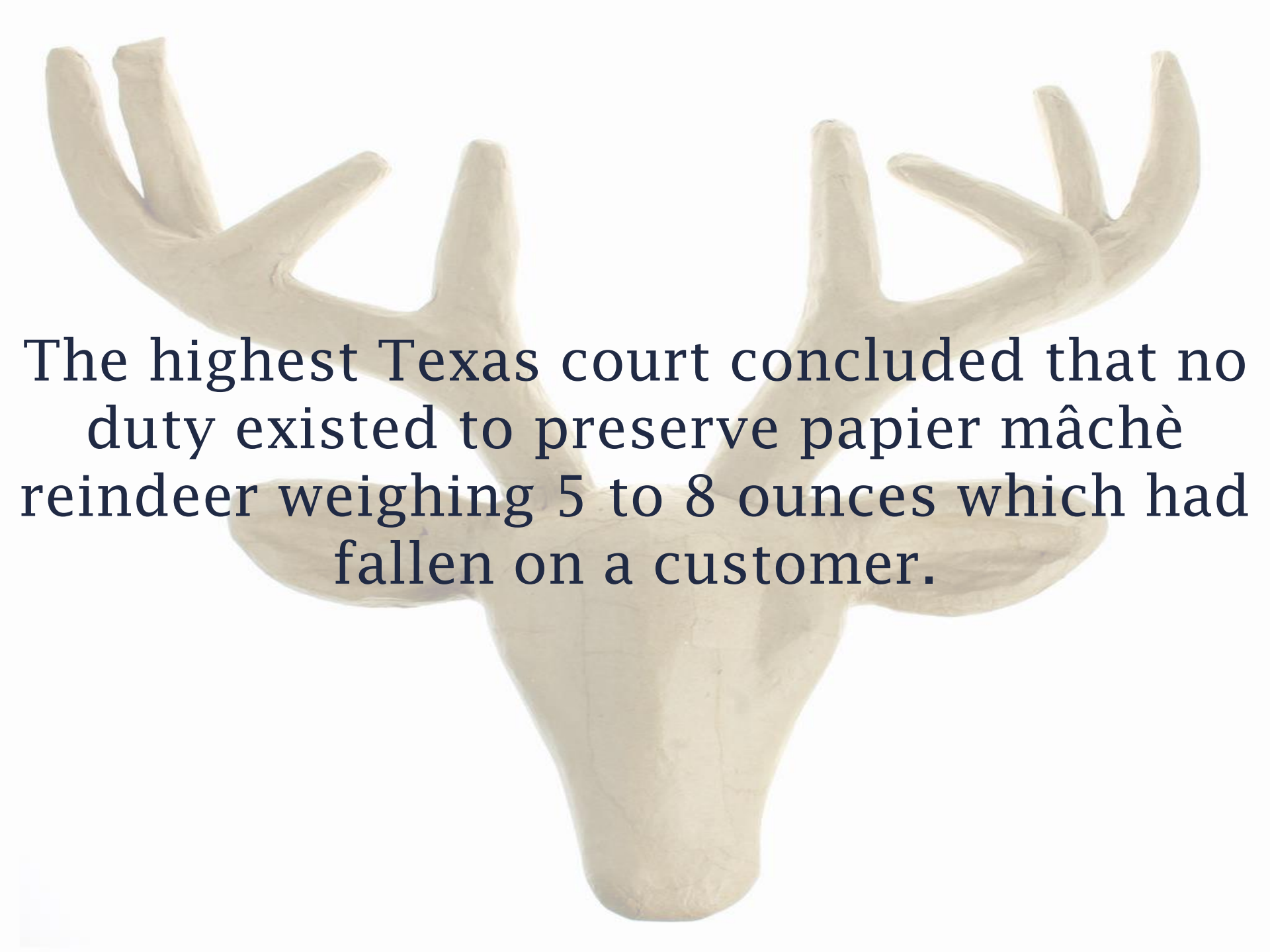
The duty to preserve, however, is not limitless. Litigants need to consider proportionality when determining the scope of the duty. The scope of preservation should be proportional to the amount in controversy and the burden of preservation. In the ESI context, if the cost of meeting the preservation obligation is a substantial fraction of the amount in controversy, or if the effort required to meet the preservation obligation is overly burdensome, a sound basis is recognized for approaching the opposing party, or the court, to limit or be relieved from the preservation duty.

Remedies – Order to the Disorder

Leveling the Playing Field

Hotel Discarded Shattered Glass

Mandarin Hotel was not sanctioned due to the availability of many other shower doors to conduct substantially the same inspection.



The highest Texas court concluded that no duty existed to preserve papier mâchè reindeer weighing 5 to 8 ounces which had fallen on a customer.

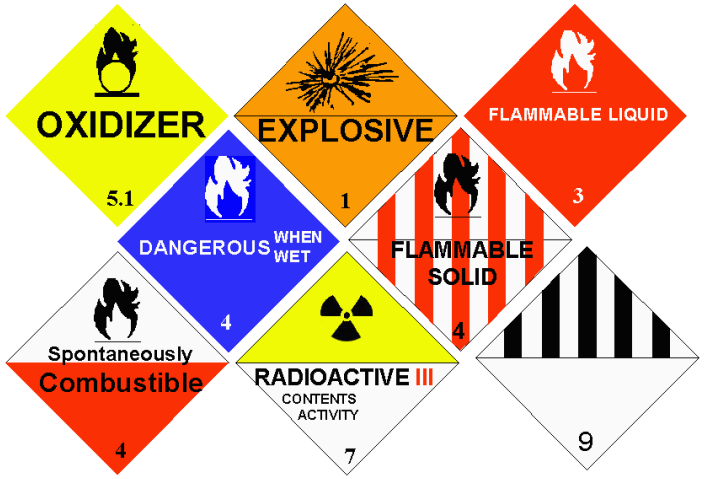
Robertet Flavors, Inc. v. Tri-Form Constr., Inc.

Decided by the Supreme Court of New Jersey in 2010

Different results for different defendants – CM, Designer, Trade, Manufacturer

Miner Dederick Constr., LLP - Texas

The Owner, Gulf, recycles spent catalyst from oil refineries, and the first step involves stockpiling the hazardous material



Defect under stockpile

Cannot disrupt business to allow inspection

Multi-Location Defect Context

These principles were applied in the "multiple location" defect context,

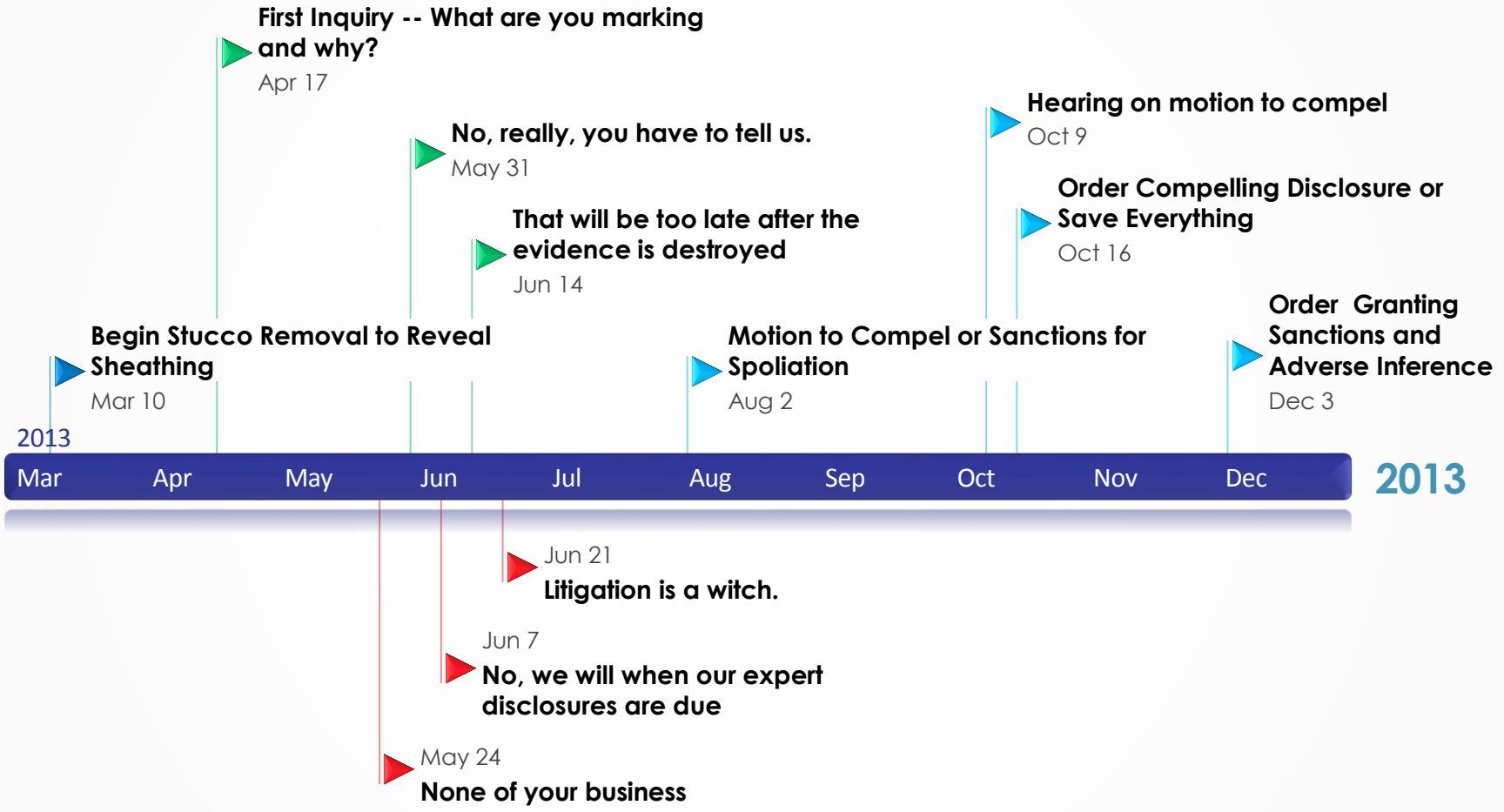
the New Jersey decision in
ManorCare Health Servs., Inc. v. Osmose Wood Pres., Inc.

Involved the issue of disclosure of timing and methodology for evaluating wood products used as roof sheathing.

Wisconsin

The failure to disclose a potential cause of water infiltration, despite identifying six other potential causes

Sanctioned with dismissal of the complaint for construction defects in
Harborview Office Center, LLC v. Camosy, Inc.


First Inquiry -- What are you marking and why?
Apr 17
No, really, you have to tell us.
May 31
That will be too late after the evidence is destroyed
Jun 14
Hearing on motion to compel
Oct 9
Order Compelling Disclosure or Save Everything
Oct 16
Order Granting Sanctions and Adverse Inference
Dec 3
Begin Stucco Removal to Reveal Sheathing
Mar 10
Motion to Compel or Sanctions for Spoliation
Aug 2
2013
Mar
Apr
May
Jun
Jul
Aug
Sep
Oct
Nov
Dec
2013
Jun 21
Litigation is a witch.
Jun 7
No, we will when our expert disclosures are due
May 24
None of your business

Preserving Evidence in Lost Productivity Case

USACE claimed the contractor failed to protect welding rods from moisture - a standard practice

2 miles of Flood Wall adjacent to the new Bayou Dupre Sector Gate

Did contractor preserve any of the welding rods?

Did the contractor preserve any of the heaters that protected the welding rods?

Did USACE grab sample and test any of the rods?


02.21.2013
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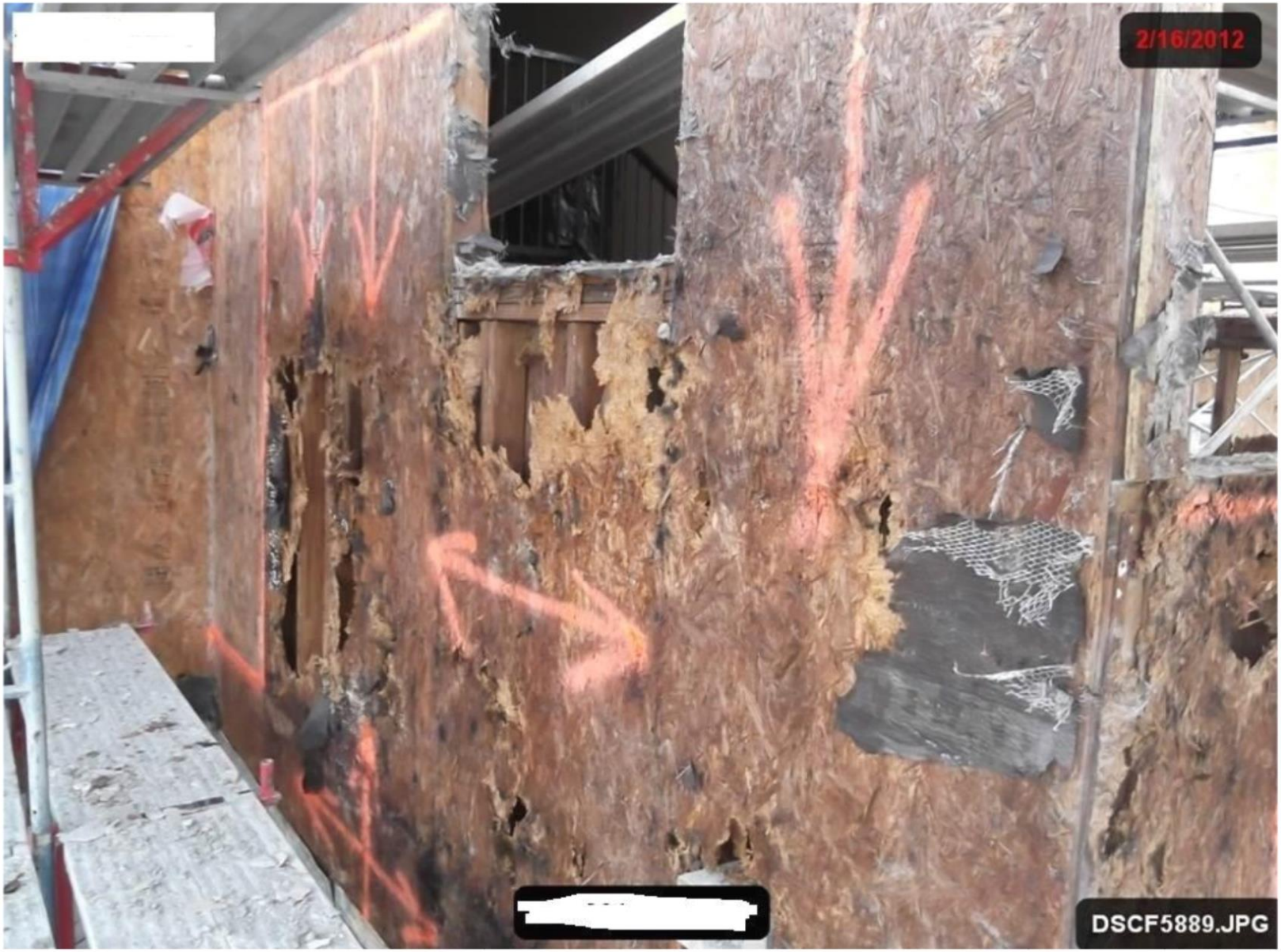
EXIT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Inadequate Sampling For Extrapolation

The New Take on Discovery – Initial Disclosures and ESI

Indeed, the spirit behind the concepts of voluntary production and cooperation, stemming from complexity of the unique and different forms of storage, preservation, etc., **has in many instances been extended to non-ESI discovery**.

Early discovery and disclosure of processes and methodologies for selecting and evaluating evidence may be a component of preservation.

Attorney Responsibility/Liability for Spoliation

Given the costs of litigation, it is not inconceivable that parties may fail or refuse to comply with the duty to preserve, thereby resulting in the spoliation of evidence.

Therefore an attorney should be mindful of the ethical duty to ensure compliance, and the options for an attorney when the client has destroyed or concealed relevant evidence.

Tips on Options to Consider to Avoid Spoliation in a Construction Matter

(1) Explain importance of preservation to clients.

(2) Provide timely notice of all construction defects to all potential parties. Follow contractual procedures in place. And, consider the terms of Chapter 558, Florida Statutes.

(3) Provide written notice to all opposing parties of their obligation to preserve and not alter relevant evidence.

(4) As to defects, provide "opposing parties" with the opportunity to inspect. Don't stop at first tier.

Tips on Options to Consider to Avoid Spoliation in a Construction Matter

(5) Provide written notice for all tests, removal and repairs to be conducted, making sure notice:

- provides reasonable notice of a possible claim, the basis for the claim and the existence of evidence relevant to that claim;
- describes the work to be performed;
- provides schedule of when work will be performed;
- provides ample opportunity for other parties to conduct their own inspection and testing prior to conducting testing, remediation and repair; and
- provides other parties the opportunity to be present for and participate in all testing, removal, and remediation efforts.

Tips on Options to Consider to Avoid Spoliation in a Construction Matter

(6) Document Basis of Methodology

(7) Fully document testing, repairs and remediation via photos, videos, written narratives, samples of damaged and defective materials, and expert reports as to cause of damage.

- If standards exist (e.g., ASTM), consider the applicability of the standard and the possible need for compliance.

- Document conditions before, during and after testing, repair and remediation.

- Document the testing methodologies used to evaluate defective item and the methodologies used to repair.

Tips on Options to Consider to Avoid Spoliation in a Construction Matter

(8) Preserve physical evidence.

(9) Prohibit testing that discards the sample specimen.

(10) Follow chain-of-custody documentation requirements.

(11) Notice an opportunity to observe all testing performed by opposing parties.

Tips on Options to Consider to Avoid Spoliation in a Construction Matter

(12) As to ESI, implement formal litigation hold as soon as litigation/claim reasonably probable.

- suspend document destruction policies;
- send out litigation hold communications and require confirmation of receipt;
- review the effectiveness of the litigation hold periodically throughout lawsuit;
- document steps taken to implement hold and maintain all litigation hold communications and confirmations in case need to present to court in response to spoliation claim;
- if overly burdensome and costly to retain certain ESI, seek consent from adversary or apply to court for relief;

Tips on How to Defend a Spoliation Charge

(1) Attempt to show good faith by demonstrating that the actions taken were pursuant to an established policy and/or were part of the regular course of business (*e.g.*, present document retention policy and documentation of litigation hold process).

(2) Demonstrate that the opposing party was not prejudiced by the spoliation (*e.g.*, they had opportunity to inspect the spoliated evidence, they acquiesced to the actions taken, there are other forms of evidence available to them to establish their case or defense).

Tips on How to Defend a Spoliation Charge

(3) Provide a reasonable explanation for the destruction of evidence (*e.g.*, need to remediate due to mold, fire or other safety issue; disproportionality and/or burdensomeness of preservation).

(4) Identify alternate sources of evidence available to the opposing party.

(5) Explain how the other remaining evidence available is sufficient and reliable.

10th Annual Construction Law Institute

2017
Wrappers Owners Manual

"an owners manual for those who Wrap"

Wrapper's OCIPs/CCIPs

Quick Start Ready Reference Guide

Scott P. Pence
813-229-4322
spence@carltonfields.com

Gary L. Smith CPCU AAI
850-591-7927
Gary.smith@ioausa.com

This information was correct as of the print date of 1/1/2017

Disclaimer

- This material has been designed for use in training programs on insurance. It is not intended to be used as a complete reference resource on the programs and coverages outlined herein. Unless indicated otherwise, the coverage discussion herein are based on various editions of "ISO Standard" policy forms. Programs, coverage, rules, and coverage interpretations presented in this publication may be different from those used by individual insurance companies writing these programs. Contact individual companies for details about their interpretations of the programs outlined herein and/or their own proprietary programs and contracts. The opinions expressed in this document are just that. No warranties, express or implied, of any kind are made, intended or inferred. The information contained herein is not legal advice, nor should it be taken as such. When such legal issue arise, proper advice should be sought, where applicable and appropriate, from qualified legal counsel.

Glossary

- SPONSOR – First Named Insured of the program.
- OCIP – Owner Controlled Insurance Program. Covers the Owner Contractor, and Enrolled Subcontractors of any tier.
- CCIP - Contractor Controlled Insurance Program. Covers The Contractor, and Enrolled Subcontractors of any tier. Can cover the Owner as an Additional Insured or as a Named Insured.
- WRAP – Generic Term for a OCIP, CCIP
- Participants – Parties covered under the Wrap.

Glossary

- GL Only – Wrap that only covers General Liability. Does not include Workers Comp.
- Combined Program – Covers General Liability and Workers Comp.
- Guaranteed Cost – Fixed Cost- Not Loss Sensitive.
- Loss Sensitive – High Deductible or Retention. Combined Programs usually have a $250,000 or greater Deductible. Ultimate premium reflective of losses.
- Enrollment – The process that Subcontractors and participants go through to enroll in the Wrap.
- Rolling Wrap – a program establishing coverage for more than one project.

Features & Benefits

- Insurance Design for All Participants
  - Higher Limits
  - Coverage Consistency
- Extended Products and Completed Operations Endorsement (Statue of Repose)
- Single Attorney Representation Possibility
- Coordinated Claims Process
- Cost Control Possible Savings
- Minimization of Cross Suits
- May Provide Broader Coverage

Attorney - Warnings & Precautions for Safe Usage

Do Not Operate Without a Qualified Construction Contract Lawyer

- "The Work Itself" Indemnity Provision and Article 3.18.1
- "The Work Itself" Insurance Provision and Article 11.1
- Waiver of Subrogation - Liability
- Additional Insured Specificity
- Contractual
- Proper Parties "Developer"
- Subcontract Flow Down Provisions
- Exhibits Missing (Exhibit L)

Owner - Warnings & Precautions for Safe Usage

Do Not Operate Without Knowing What the Sponsors Characteristics Are.

- Are you in the Drivers Seat or Passenger Seat
- Degree of Knowledge and Experience the sponsor possesses with This Product.
- Attitudes of Sponsor Regarding Issues such as Coverage, Cost and Administration.

Broker - Warnings & Precautions for Safe Usage

Do Not Operate Without a Qualified, Experienced Insurance & Risk Management Construction Specialist

- Contract Administration Expertise.
- Coverage Expertise
- Stability of Broker
- Risk Management & Loss Control Experience
- Experience as a Wrapper

Warnings & Precautions for Safe Usage

Quality Control

- Do not Operate Without an Experienced, Qualified Quality Control/Inspection Program

Administration

- Do not Operate Without an Experienced, Qualified Wrap Administrator.

Coverage Specifications

- GL – Covers Bodily Injury and Property Damage arising from the Insureds Operations and Completed Operations at the Project Site.
- Excess – Provides Additional Limits of Liability.
  - Follow Form vs. Excess
- Workers Comp – Covers Employees who are injured during the course of employment.

Coverage Specifications – Non Wrap

- BUILDERS RISK – Covers Property Damage to the Project During the Course of Construction.
  - LEG 3 – Broadened Faulty Workmanship.
- Pollution Liability – Covers Third-Party Bodily Injury, Property Damage, Defense and Cleanup as a result of pollution conditions (sudden/accidental and gradual) arising from contracting operations performed by or on behalf of the Contractor.
- Owners or Contractors Protective Professional Indemnity – Provides project owners with coverage needed when an A/E's own insurance is not adequate or becomes unavailable. Indemnifies the owner for damages or losses in excess of the A/E's available insurance.

Administration

- Determine the experience and stability of administrator
- Processor or Technical Assistance
- What Services will Administrator Perform
  - Certificate Review
  - Enrollment Verification
  - Coverage Review
  - Bid Credit Strategy, Implementation, Negotiation
  - Contract Provisions
  - Wrap Manual

Quality Control

Pricing

- Detail the product models available and list specific prices for each model and additional options.
  - OCIP,CCIP, PROJECT SPECIFIC, OWNERS INTEREST
- Establish Cost Comparisons with Traditional GC Placement or CCIP
  - Rate Range is a function of project size and type.
  - Commercial $3-$5 per 1,000 of Construction Cost
  - Residential $5 to $8 per 1,000 of Construction Cost
- Analyze Estimated Sub Credits
- ANALYZE BROKER COST

Availability

- Market Instability
- AVAILABLE STATES FLORIDA VS SOUTH CAROLINA VS New York
- CONDOS VS APARTMENTS VS COMMERCIAL
- Size of Project, Minimum Premiums
- Admitted vs. Non Admitted
- Loss Experience
- Quality Participants
- COST EFFICIENCY
- Describe Where, How product can be purchased, or Where to direct orders, BOR'S

Maintenance

- Performance Measures
  - Bid Credits
  - Deductible Allocation
- Broker Experience
- Term – Too Short
- Limited Work Agreements – Foundations covered under two policies

Maintenance

- Site Description
- Wrap Exclusion – See appendix
- Roadside Emergencies/Coverage Issues
  - Course of Construction Exclusions (COC) – See Appendix
  - Builders Risk Expiration
  - Cross Suits – See Appendix
- Exclusions J, K, L – See Appendix
- PROPER PARTICIPANTS
- AIR RIGHTS

Maintenance

- Warranty/Service work after expiration – See Appendix
- Offsite Fabrication
- Cranes
- Direct Purchased Materials.
- Builders Risk – Primary
- Project Abandonment
  - Running out of Money
  - Subs Lose Completed Operations

Property Damage During Construction

D. The following exclusion is added to **SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**:

This insurance does not apply to "property damage" to the project shown above or any part of the project shown above that occurs during the course of construction. The project shown above or part of the project shown above will be deemed to be within the course of construction until it satisfies the definition of "products-completed operations hazard" as defined in this endorsement.

Cross Suits Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CROSS SUITS EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

In consideration of the premium charged, it is agreed that **SECTION IV. EXCLUSIONS**, is amended to include the following exclusion:

This insurance does not apply to any claim or "suit" based upon, arising out of, directly or indirectly, in whole or in part, or in any way involving the following:

Cross Suits

Any claim made or "suit" brought by any "Named Insured" under this Policy against another "Named Insured" under this Policy.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

Designated Project Endorsement

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATION OF COVERAGE TO DESIGNATED PROJECT ENDORSEMENT

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE FORM

In consideration of the premium charged, it is agreed that:

PROJECT SCHEDULE

Project Location:

Project Description:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

I. This insurance shall apply to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of construction operations, provided that:

1. Any construction operations only pertain to the project location and project description set forth in the PROJECT SCHEDULE above;
2. Any incidental construction operations only pertain to the project location and project description set forth in the PROJECT SCHEDULE above on adjacent properties with a maximum distance of one thousand (1,000) feet from such project address; or
3. Any off-site construction operations only: (i) pertain to the off-site locations as set forth in the OFF-SITE SCHEDULE below, and (ii) relate to the project location and project description set forth in the PROJECT SCHEDULE above.

OFF-SITE SCHEDULE

Off-Site Location(s):

Appendix

ISO Wrap Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description and Location of Operation(s):

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The following exclusion is added to paragraph **2.**, Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages):

This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

(1) Provides coverage identical to that provided by this Coverage Part;

(2) Has limits adequate to cover all claims; or

(3) Remains in effect.

Non ISO Wrap Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WRAP-UP EXCLUSION

This endorsement modifies the Conditions provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to any work performed at or for a project which is insured under a Consolidated (Wrap-Up) Insurance Program. This insurance shall have no obligation to defend or indemnify for any claim or any project where such Wrap-Up insurance exists or has ever existed.

This exclusion applies whether or not a claim is covered under such wrap-up insurance, the limits of such Wrap-Up insurance are exhausted, the carrier is unable to pay or for any other reason.

Non ISO Wrap Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION –OPERATIONS INCLUDED WITHIN A CONTROLLED INSURANCE PROGRAM

This endorsement modifies the insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

All other terms, provisions, exclusions, and limitations of the policy apply except as specifically stated below.

The following exclusion is added to SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, paragraph 2. Exclusions:

This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" if such operations were at any time included within a "controlled insurance program" for a construction project in which you are or were involved.

This exclusion applies whether or not the "controlled insurance program" provides:

(1) Coverage identical to that provided by this Coverage Form;

(2) Limits adequate to cover all claims; or

(3) Coverage that remains in effect.

This exclusion applies regardless of whether such operations are or were conducted by you or on your behalf.

This exclusion does not apply to your operations away from a "controlled insurance program" project site incidental to the support of such a project and not included within the "controlled insurance program".

This exclusion does not apply to the "products-completed operations hazard" if such operations were included within a "controlled insurance program" and coverage provided by the" controlled insurance program" for the "products-completed operations hazard" has terminated.

C. The following is added to Section V - Definitions

"Controlled insurance program" means a construction, erection or demolition project for which the prime contractor/project manager or owner of the construction project has secured general liability insurance covering some or all of the contractors or subcontractors involved in the project, otherwise referred to as an Owner Controlled Insurance Program (O.C.I.P.) or Contractor Controlled Insurance Program (C.C.I.P.).

Exclusions J, K, L

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Appendix

Repair/Warranty Work

LIMITED COVERAGE – REPAIR WORK

This endorsement changes the policy, please read it carefully.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

It is agreed that:

This insurance is extended for an additional period of time with respect to liability for "bodily injury" or "property damage" arising out of "repair work" performed by "employees" of the Named Insured or a licensed contractor enrolled in the wrap-up program during the policy period. The extension begins when the Designated Project or any part thereof has been put to its intended use or is occupied in whole or in part by any person or organization other than another contractor or subcontractor working on the same project, and ends at the earlier of:

a. The expiration of the statute of repose applicable to claims or "suits" alleging defective construction; or

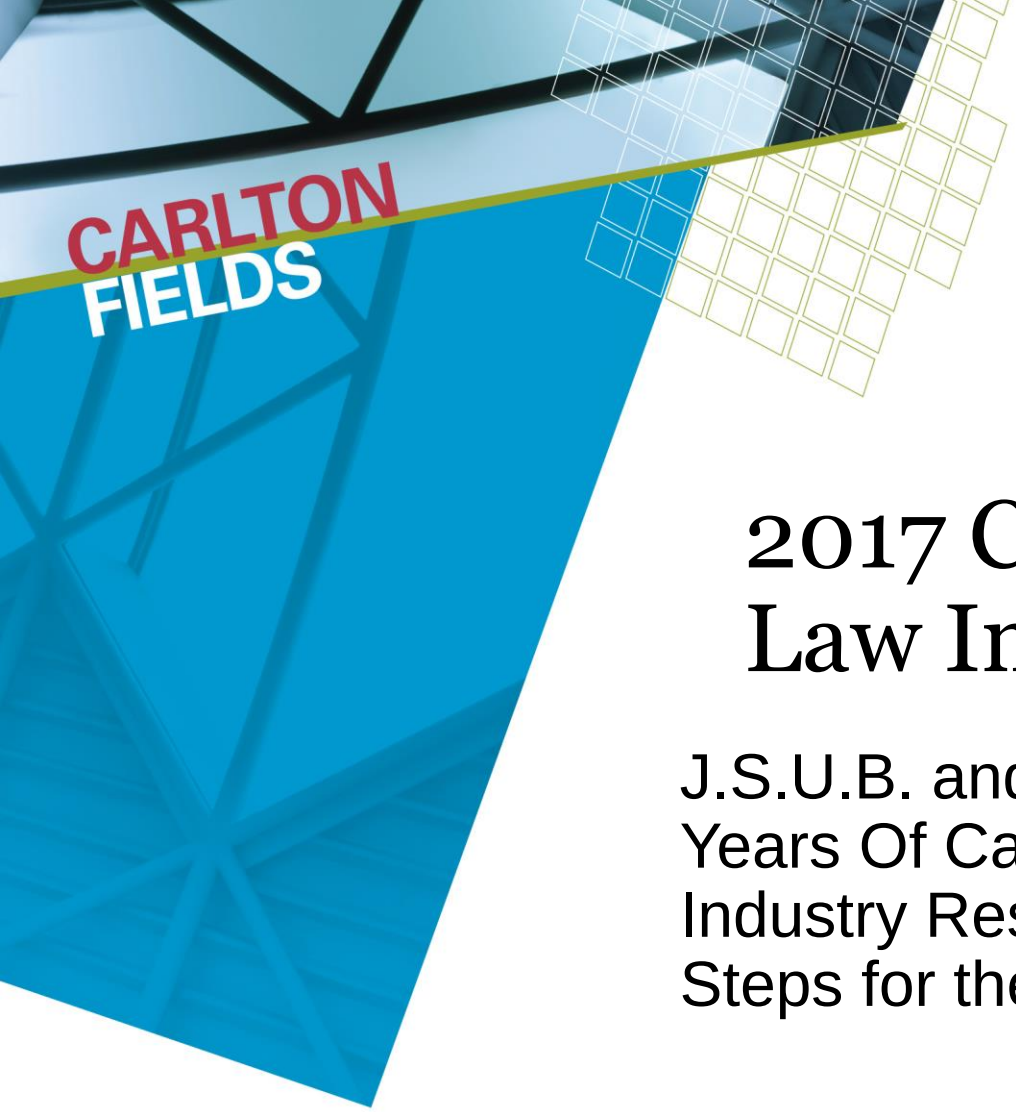
b. Limited Coverage – Repair Work Expiration Period of: _____ years.

Work performed under this coverage extension does not apply to liability included in the "products-completed operations hazard".

With respect to this endorsement, the following definition applies:

1. "Repair work" means the repair, correction or replacement of "your work" which is performed after "your work" was originally completed.

This endorsement does not change any other provision of the policy.



2017 Construction Law Institute

J.S.U.B. and its Progeny – Ten Years Of Case Law, Insurance Industry Response and Practical Steps for the Practitioner

Wm. Cary Wright, Esq.
Carlton Fields

James Leach, Esq.
Chief Executive Officer
FHB Insurance

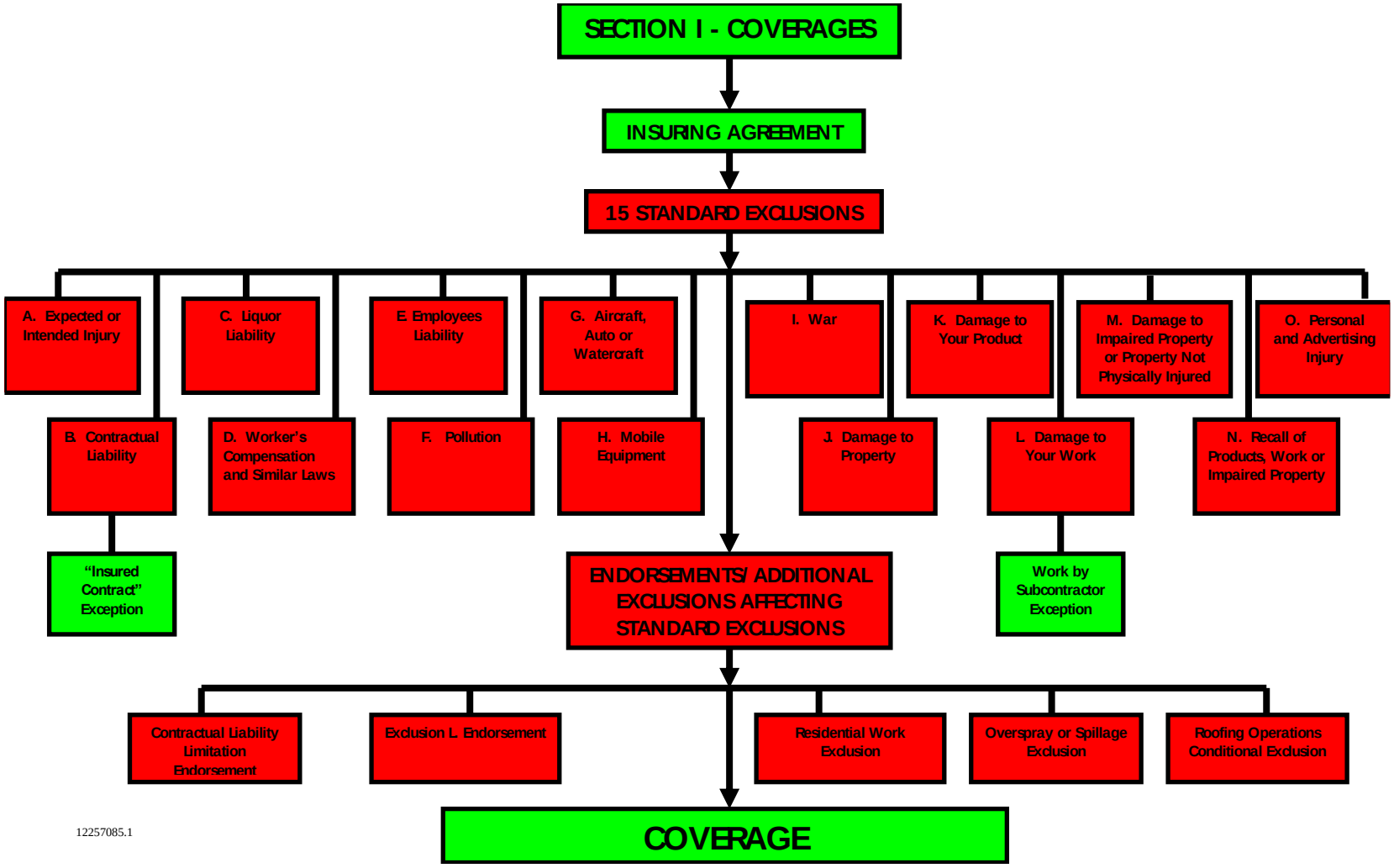
INSURANCE A RISK ALLOCATION MECHANISM

- Parties must know the risks associated with the Project.
- You cannot change the deal after the agreement is entered into.
- All parties allocate their risk based on the deal – a change in the deal can be deadly.

CGL POLICY

- Typically a standard ISO policy
- Duty to defend vs. duty to indemnify
- Contains standard exclusions
- Be aware of endorsements

STRUCTURE OF THE CGL POLICY – THE PATH TO COVERAGE



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CARLTON FIELDS

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROP... DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

b. This insurance applies to "bodily injury" and "property damage" only if:

c.

curred by any insured listed under Paragraph **1.** of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will

15 STANDARD EXCLUSIONS

- 2.a. – Expected or Intended Injury
- 2.b. – Contractual Liability
- 2.c. – Liquor Liability
- 2.d. – Worker's Compensation
- 2.e. – Employer's Liability
- 2.f. -- Pollution
- 2.g. – Aircraft, Auto or Watercraft
- 2.h. – Mobile Equipment

15 STANDARD EXCLUSIONS

- 2.i. – War
- 2.j. – Damage To Property
- 2.k. – Damage To Your Product
- 2.l. – Damage To Your Work
- 2.m. – Damage To Impaired Property Or Property Not Physically Injured
- 2.n. – Recall Of Products, Work Or Impaired Property
- 2.o. – Personal And Advertising Injury

"YOUR WORK" EXCLUSION IN STANDARD ISO POLICY

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. **Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

l. **Damage To Your Work**

"Property damage" to "your [illegible] out of it or any part of it and included [illegible] "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. **Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. **Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your p[illegible]

(2) "Your w[illegible]

(3) "Impair[illegible]

if such p[illegible] withdrawn from use because o[illegible] deficiency, condition i[illegible]

o. **Personal A[illegible]**

"Bodily inj[illegible] advertising[illegible]

Exclusions c[illegible] damage by fir[illegible] or temporarily of the owne[illegible] applies to this [illegible]

[illegible] to which [illegible] the right against an[illegible] However, the insur[illegible] damages [illegible] injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance ; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

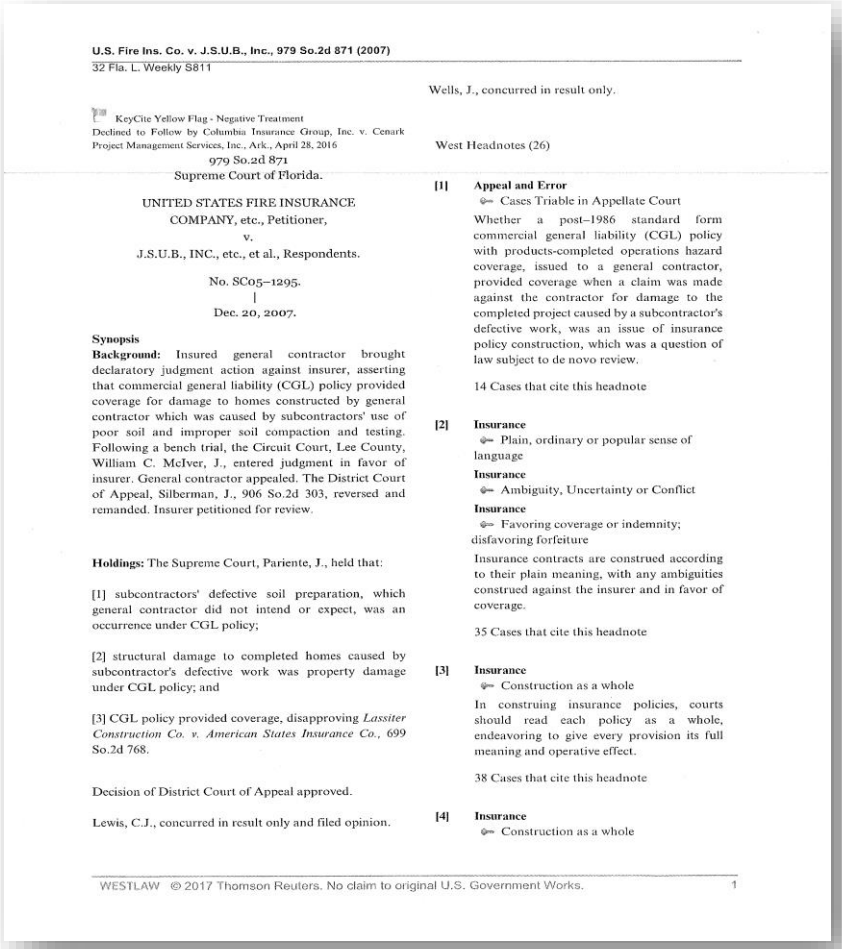
CARLTON FIELDS

FLORIDA'S SEMINAL CASES

- *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007)

- *Auto-Owners Insurance Company v. Pozzi Window Co.*, 984 So.2d 1241(Fla. 2008)

U.S. FIRE INS. CO. v J.S.U.B., INC., 979 So. 2d 871 (Fla. 2007)



U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871 (2007)
32 Fla. L. Weekly S811

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Columbia Insurance Group, Inc. v. Cenark Project Management Services, Inc., Ark., April 28, 2016

979 So.2d 871
Supreme Court of Florida.

UNITED STATES FIRE INSURANCE COMPANY, etc., Petitioner,
v.
J.S.U.B., INC., etc., et al., Respondents.

No. SC05–1295.
|
Dec. 20, 2007.

Synopsis
Background: Insured general contractor brought declaratory judgment action against insurer, asserting that commercial general liability (CGL) policy provided coverage for damage to homes constructed by general contractor which was caused by subcontractors' use of poor soil and improper soil compaction and testing. Following a bench trial, the Circuit Court, Lee County, William C. McIver, J., entered judgment in favor of insurer. General contractor appealed. The District Court of Appeal, Silberman, J., 906 So.2d 303, reversed and remanded. Insurer petitioned for review.

Holdings: The Supreme Court, Pariente, J., held that:

[1] subcontractors' defective soil preparation, which general contractor did not intend or expect, was an occurrence under CGL policy;

[2] structural damage to completed homes caused by subcontractor's defective work was property damage under CGL policy; and

[3] CGL policy provided coverage, disapproving *Lassiter Construction Co. v. American States Insurance Co.*, 699 So.2d 768.

Decision of District Court of Appeal approved.

Lewis, C.J., concurred in result only and filed opinion.

Wells, J., concurred in result only.

West Headnotes (26)

[1] **Appeal and Error**
Cases Triable in Appellate Court
Whether a post–1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provided coverage when a claim was made against the contractor for damage to the completed project caused by a subcontractor's defective work, was an issue of insurance policy construction, which was a question of law subject to de novo review.
14 Cases that cite this headnote

[2] **Insurance**
Plain, ordinary or popular sense of language
Insurance
Ambiguity, Uncertainty or Conflict
Insurance
Favoring coverage or indemnity; disfavoring forfeiture
Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage.
35 Cases that cite this headnote

[3] **Insurance**
Construction as a whole
In construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.
38 Cases that cite this headnote

[4] **Insurance**
Construction as a whole

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CARLTON FIELDS

U.S. FIRE INS. CO. v. J.S.U.B., INC.

- Subcontractor's faulty workmanship caused damage to the general contractor's work
  - Subcontractor used poor soil and improper soil compaction and testing
  - Caused damage to foundations, drywall, and other interior portions of the homes
  - Damage appeared after completion of the project and delivery of the homes

U.S. FIRE INS. CO. v. J.S.U.B., INC.

- **Issue:** "Whether a post-1986 standard form commercial general liability policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage for damage to the completed project caused by a subcontractor's defective work."

- **Brief Answer:** Yes!

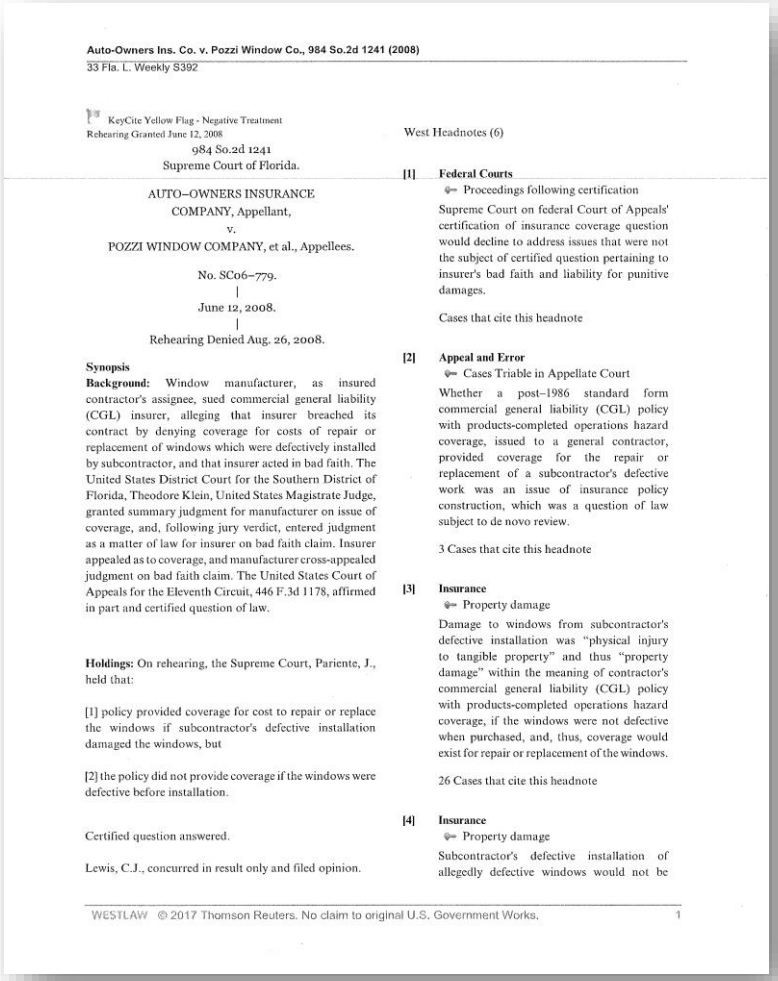
U.S. FIRE INS. CO. v. J.S.U.B., INC.

- Analysis:
  - Standards for construing insurance contracts
    - Construed according to plain meaning
    - Ambiguities construed against the insurer and in favor of coverage
    - Exclusionary clauses cannot create coverage, but policies must be construed *in pari materia*
  - Evolution and Origin of CGL Policies
    - Traces standard policy forms which began in 1940 through the 1986 CGL Policy Form
    - Explains Business Risk Exclusions and insurance industry's narrowing of these exclusions.

U.S. FIRE INS. CO. v. J.S.U.B., INC.

- Analysis:
  - Distinguished *LaMarche v. Shelby Mutual Insurance Co.*, 390 So.2d 325 (Fla. 1980)
  - Faulty Workmanship Constitutes an "Occurrence"
    - "Faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute and 'accident' and, thus, an 'occurrence' under a post-1986 CGL policy."
  - Improper Soil Preparation Caused "Property Damage"

AUTO-OWNERS INS. CO. v. POZZI WINDOW CO., 984 So. 2d 1241 (Fla. 2008)



Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So.2d 1241 (2008)
33 Fla. L. Weekly S392

KeyCite Yellow Flag - Negative Treatment
Rehearing Granted June 12, 2008

984 So.2d 1241
Supreme Court of Florida.

AUTO–OWNERS INSURANCE COMPANY, Appellant,
v.
POZZI WINDOW COMPANY, et al., Appellees.

No. SC06–779.
|
June 12, 2008.
|
Rehearing Denied Aug. 26, 2008.

Synopsis

Background: Window manufacturer, as insured contractor's assignee, sued commercial general liability (CGL) insurer, alleging that insurer breached its contract by denying coverage for costs of repair or replacement of windows which were defectively installed by subcontractor, and that insurer acted in bad faith. The United States District Court for the Southern District of Florida, Theodore Klein, United States Magistrate Judge, granted summary judgment for manufacturer on issue of coverage, and, following jury verdict, entered judgment as a matter of law for insurer on bad faith claim. Insurer appealed as to coverage, and manufacturer cross-appealed judgment on bad faith claim. The United States Court of Appeals for the Eleventh Circuit, 446 F.3d 1178, affirmed in part and certified question of law.

Holdings: On rehearing, the Supreme Court, Pariente, J., held that:

[1] policy provided coverage for cost to repair or replace the windows if subcontractor's defective installation damaged the windows, but

[2] the policy did not provide coverage if the windows were defective before installation.

Certified question answered.

Lewis, C.J., concurred in result only and filed opinion.

West Headnotes (6)

[1] **Federal Courts**
Proceedings following certification

Supreme Court on federal Court of Appeals' certification of insurance coverage question would decline to address issues that were not the subject of certified question pertaining to insurer's bad faith and liability for punitive damages.

Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

Whether a post–1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provided coverage for the repair or replacement of a subcontractor's defective work was an issue of insurance policy construction, which was a question of law subject to de novo review.

3 Cases that cite this headnote

[3] **Insurance**
Property damage

Damage to windows from subcontractor's defective installation was "physical injury to tangible property" and thus "property damage" within the meaning of contractor's commercial general liability (CGL) policy with products-completed operations hazard coverage, if the windows were not defective when purchased, and, thus, coverage would exist for repair or replacement of the windows.

26 Cases that cite this headnote

[4] **Insurance**
Property damage

Subcontractor's defective installation of allegedly defective windows would not be

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CARLTON FIELDS

AUTO-OWNERS INSURANCE COMPANY v. POZZI WINDOW COMPANY

- Facts:
  - Owner purchased custom-made windows
  - Subcontractor installed windows
  - Factual dispute whether windows were defective when installed or were damaged by defective installation

AUTO-OWNERS INSURANCE COMPANY v. POZZI WINDOW COMPANY

- Analysis:
  - If the windows were defective when installed, there was no “property damage” and thus no coverage.
  - However, if the subcontractor’s defective installation caused damage to the non-defective windows there was “property damage” under the terms of the CGL policies and thus coverage for the costs of repair and replacement of the windows.

PALM BEACH GRADING V. NAUTILUS INSURANCE COMPANY, 434 Fed. Appx.829 (11TH Cir. 2011)

- Facts:
  - Subcontractor defectively installed defective sewer pipe which had to be dug up, repaired and reburied in certain sections.
  - The repair work damaged other components of the project, including for example, digging through and breaking apart the surrounding subgrade, road, curbing, sidewalk and asphalt.

PALM BEACH GRADING V. NAUTILUS INSURANCE COMPANY, 434 Fed. Appx. 829 (11th Cir. 2011)

- Holding:
  - No coverage - the repair costs did not constitute "property damage" within the meaning of the policy because the defective pipe did not cause damage independent of the repair and replacement of the pipe.
  - For example, the pipes never burst, caused sinkholes, or caused back-ups.

AMERISURE MUT. INS. v. AUCHTER CO., 673 F.3d 1294 (11th Cir. 2012)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Carithers v. Mid-Continent Casualty Company, M.D.Fla., March 11, 2014

673 F.3d 1294
United States Court of Appeals,
Eleventh Circuit.

AMERISURE MUTUAL INSURANCE COMPANY, a foreign corporation, Amerisure Insurance Company, a foreign corporation, Plaintiffs–Appellees,
v.
AUCHTER COMPANY, a Florida corporation, Defendant,
Amelia Island Company, a Florida corporation, Defendant–Appellant.

No. 10–10960.
|
March 15, 2012.

Synopsis

Background: The United States District Court for the Middle District of Florida, No. 3:08-cv-00645-TJC-TEM, Timothy J. Corrigan, J., granted summary judgment in favor of insurer on its suit seeking declaratory judgment that commercial general liability (CGL) policy with products-completed operations hazard (PCOH) coverage issued to a general contractor did not provide coverage to contractor for damage to project component caused by subcontractor's defective work.

[Holding:] The Court of Appeals, Tjoflat, Circuit Judge, held that owner's claim against general contractor for project's defective roof was not a claim for "property damage" within the plain wording of post–1986 (CGL) policy with PCOH coverage issued to general contractor.

Affirmed.

Hill, Circuit Judge, filed opinion concurring dubitante.

Carnes, Circuit Judge, filed opinion dissenting.

West Headnotes (2)

[1] **Insurance**
Property damage
Insurance
Products and completed operations hazards

Under Florida law, unless the defective component results in physical injury to some other tangible property, i.e., other than to the component itself, there is no coverage under a post–1986 commercial general liability (CGL) policy with products-completed operations hazard (PCOH) coverage issued to a general contractor, which provides coverage when a claim is made against the contractor for damage to the part of the completed project performed by a subcontractor; there is no coverage if there is no damage beyond the faulty workmanship, i.e., unless the faulty workmanship has damaged some "otherwise nondefective" component of the project, and if a subcontractor is hired to install a project component and, by virtue of his faulty workmanship, installs a defective component, then the cost to repair and replace the defective component is not "property damage."

16 Cases that cite this headnote

[2] **Insurance**
Property damage
Insurance
Products and completed operations hazards

Under Florida law, owner's claim against general contractor for project's defective roof was not a claim for "property damage" within the plain wording of post–1986 commercial general liability (CGL) policy with products-completed operations hazard (PCOH) coverage issued to general contractor; subcontractor's defective installation of roof did not cause "physical injury to tangible property" as required to trigger coverage

CARLTON FIELDS

AMERISURE MUT. INS. v. AUCHTER CO., 673 F.3d 1294 (11th Cir. 2012)

- Facts
  - Roof tiles were delivered to project and paid for by Owner.
  - Subcontractor installed roofing substrate and tiles.
  - Storm blew off a small portion of the tiles.
  - Due to the interlocking nature of the tiles, the entire roof had to be replaced.
  - No "other property" damage other than to the tiles and substrate.
  - Arbitrator found in favor of Owner for $2.1 million for general contractor's breach of contract.

AMERISURE MUT. INS. v. AUCHTER CO., 673 F.3d 1294 (11th Cir. 2012)

- Analysis
  - Under Florida law, unless defective component results in physical injury to some other tangible property (other than the component itself), there is no coverage.
  - Fact that Owner purchased the tiles separately was irrelevant - - tiles were part of the component - - i.e., the roof.
  - The Owner was not entitled to a new roof because most of the tiles were not damaged. Owner's claim was for correcting subcontractor's defective work, not damage to "other property."

CARITHERS V. MID-CONTINENT CASUALTY CO., 782, F. 3d 1240 (11th Cir. 2015)

2014 WL 11332308
Only the Westlaw citation is currently available.
United States District Court,
M.D. Florida,
Jacksonville Division.

Hugh A. Carithers and Katherine,
S. Carithers, Plaintiffs,
v.
Mid-Continent Casualty Company, Defendant.

Case No. 3:12-cv-890
|
Signed 02/10/2014
|
Filed 03/11/2014

MEMORANDUM AND ORDER

Paul A. Magnuson, United States District Court Judge

*1 The Court held a bench trial in this matter on February 11 and 12, 2014. The only question at issue is whether Defendant Mid–Continent Casualty Company had the duty to indemnify its insured for the damage caused to Plaintiffs' residence. In the following findings of fact and conclusions of law the Court determines that Defendant had the duty to indemnify its insured.

FACTS

From April 2004 to June 2005, homebuilder Cronk Duch Miller & Associates, Inc., its related entities, [1] and various subcontractors built a home in Atlantic Beach, Florida, for Plaintiffs Hugh and Katherine Carithers. Beginning in March 2005, Cronk Duch was insured under a Commercial General Liability insurance policy issued by Defendant Mid–Continent Casualty Company. (Def.'s Ex. 7 (2005–2006 Policy).)

1 Those entities are Cronk Duch Architecture, LLC, Cronk Duch Craftsmen, LLC, Joseph S. Cronk, Cronk Duch Partners, LLC, and Cronk Duch Holdings, Inc. The Court will refer to these related entities as Cronk Duch.

Shortly after Plaintiffs moved to the home, things were not as they should be. Brand-new ceiling fans stopped working, the tile patio began to crack, and coating applied to the brick exterior of the home began to fade. Not until 2010, however, when Plaintiffs first noticed water damage inside their garage did Plaintiffs understand that all of the home's problems were due to negligent construction. (Tr. at 53.) In 2010, Plaintiffs consulted with a general contractor named Brian Wingate. (*Id.* at 52.) He examined the home and concluded that Cronk Duch's subcontractors had performed their duties negligently in four ways: first, the subcontractors had installed the tile with inadequate adhesive and over an inadequate base, which caused the tile to crack (*id.* at 82); second, the subcontractors had not installed any surge protection in the home's electrical system, causing appliance motors to burn out prematurely (*id.* at 86); third, the exterior brick coating had been applied incorrectly, causing the coating to wash off and permanently damaging the brick (*id.* at 87–88); and finally, a balcony attached to the garage had been defectively constructed, allowing water to seep into the ceiling and walls of the garage and causing wood rot in the structure (*id.* at 76 et seq.). According to Mr. Wingate, all of the damage began to occur almost immediately after the home's construction in 2005. (*Id.* at 104.) Plaintiff Hugh Carithers's unrebutted testimony was that the tile, balcony, electrical, and Boral coating were all items completed toward the end of construction, in the spring of 2005. (*Id.* at 30, 65–66.)

Plaintiffs brought a state-court lawsuit against Cronk Duch, seeking to recoup the cost of repairing the damage the subcontractors wrought. (Def.'s Ex. 1 (3rd Am. Compl. in *Carithers v. Cronk Duch Miller & Assocs.*, 2011–CA–002429 (Fla. 4th Cir.Ct.)).) Cronk Duch tendered the lawsuit to Mid–Continent, but Mid–Continent refused to provide a defense to Cronk Duch. Plaintiffs and Cronk Duch ultimately entered a consent judgment of slightly more than $90,000 (Pls.' Ex. 1), with Cronk Duch assigning Plaintiffs its rights against Mid–Continent. (Pls.' Ex. 3.)

*2 Plaintiffs then brought this lawsuit, and cross-Motions for Summary Judgment followed. The only issue the Motions addressed was whether Mid–Continent had the duty to defend Cronk Duch in Plaintiffs' state-court case. The Court determined that the relevant trigger for damage was the injury-in-fact trigger, and therefore that the damages occurred for purposes of the insurance policy in 2005. (Mem. Op. & Order (Docket No. 97) at 4.) The

CARLTON FIELDS

CARITHERS v. MID-CONTINENT CASUALTY COMPANY, 782 F.3D 1240 11TH CIR. 2015)

- Facts:
  - Incorrect application of exterior brick coating caused property damage to the brick.
  - The use of inadequate adhesive and an inadequate base in the installation of tile caused property damage to the tile.
  - Incorrect construction of a balcony, which allowed water to seep into the ceilings and walls of the garage leading to wood rot, caused property damage to the garage.

CARITHERS v. MID-CONTINENT CASUALTY COMPANY, 782 F. 3d 1240 11th Cir. 2015)

- Bound by *Auchter* decision, so defects must be viewed from the perspective of a component
  - No coverage for damaged brick
  - No coverage for damaged tile
  - BUT there is coverage for the balcony because it had to be rebuilt in order to repair the garage

PAVARINI CONST (SE) v. ACE AMERICAN INSURANCE COMPANY, 161 F. Supp.3d (S.D. Fla. 2015)

- 516 Unit Condominium
- Pavarini - general contractor
- Alan W. Smith, Inc. (AWS) – subcontractor who installed CMU walls and reinforcing steel
- TCOE Corporation – subcontractor who supplied reinforcing steel within cast-in-place concrete columns, beams, and shear walls

PAVARINI CONST (SE) v. ACE AMERICAN INSURANCE COMPANY, 161 F. Supp.3d (S.D. Fla. 2015)

- Significant reinforcing steel either omitted entirely or improperly installed in building
- Building's compromised structural support system resulted in excess movement of building components
  - Stucco debonding and cracking on walls
  - Cracking of cast-in-place concrete elements
  - Cracking of mechanical penthouse enclosure
  - Resulting in water intrusion

PAVARINI CONST (SE) v. ACE AMERICAN INSURANCE COMPANY, 161 F. Supp. 3d (S.D. Fla. 2015)

- Issue
  - Whether the CGL policy provided coverage for installation of a structural steel panel system to provide the required structural support in the absence of functional steel beams?

PAVARINI CONST (SE) V. ACE AMERICAN INSURANCE COMPANY, 161 F. Supp.3d (S.D. Fla. 2015)

- Holding:
  - There is coverage because the building had to be stabilized in order to adequately repair the non-defective project components (e.g., damage to stucco, penthouse enclosure, and critical concrete structural elements).
  - Plaintiff entitled to approximately $23 million in damages

CORE CONSTRUCTION SERVICES SOUTHEAST, INC. v. CRUM & FORSTER SPECIALTY INS. CO., 658 Fed. Appx. 534 (11th Cir. 2016)

658 Fed.Appx. 534
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

Core Construction Services Southeast, Inc., a Florida Corporation, d.b.a. Core Construction, f.k.a. Southern Gulf West Construction, Inc., Plaintiff–Appellant,
v.
Crum & Forster Specialty Insurance Company, Defendant–Appellee.

No. 16-10030
|
Non-Argument Calendar
|
Date Filed: 09/28/2016

Synopsis

Background: General contractor on condominium development project brought action against insurer of its subcontractor's commercial general liability (CGL) policy, alleging that insurer breached the policy by refusing to defend or indemnify contractor as an additional insured in underlying action by condominium development owner seeking damages for allegedly defective roofs on condominiums. The United States District Court for the Middle District of Florida, Gregory A. Presnell, J., 2015 WL 8043940, granted summary judgment in favor of insurer. Contractor appealed.

[Holding:] The Court of Appeals held that owner's claim for project's defective roof was not a claim for "property damage" within meaning of the policy.

Affirmed.

West Headnotes (1)

[1] Insurance
Property damage

Under Florida law, condominium development owner's claim against general contractor alleging that, due to subcontractor's negligent and defective installation of roofs on condominiums, owner had to repair and replace roofs of the condominiums resulting in damages in excess of $2,500,000, was not a claim for "property damage" within the meaning of commercial general liability (CGL) policy issued to contractor's subcontractor, and thus, insurer owed no duty to defend or indemnify contractor as an additional insured in the underlying action; owner did not allege that the completed project, that is, any part of the buildings or development other than the roof, was damaged by the defective roof.

Cases that cite this headnote

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:14–cv–01790–GAP–KRS

Attorneys and Law Firms

Benjamin C. Hassebrock, Stephen Anthony Marino, Jr., Michal Meiler, Rochelle Wimbush, Ver Ploeg & Lumpkin, PA, Miami, FL, for Plaintiff–Appellant

Holly S. Harvey, Michael Charles Gordon, Clyde & Co US LLP, Miami, FL, for Defendant–Appellee

Mark Andrew Boyle, Sr., Alexander Brockmeyer, Molly Ann Chafe Brockmeyer, Boyle & Leonard, PA, Fort Myers, FL, for Amici Curiae Florida Home Builders *535 Association, National Association of Home Builders

Before TJOFLAT, WILLIAM PRYOR and JILL PRYOR, Circuit Judges.

CARLTON FIELDS

CONSTRUCTION SERVICES SOUTHEAST, INC. v. CRUM & FORSTER SPECIALTY INS. CO., 658 Fed. Appx. 534 (11th Cir. 2016)

- Facts:
  - Damage to the roof system of condominium complex in the aftermath of Hurricane Wilma
  - Roof installed by subcontractor
  - Repairs costs approximately $2.5 million

- Allegations in complaint:
  - Plaintiff "only asserted that the roofs had been damaged, rather than asserting that the roofs had caused damage to other elements of" the buildings."

CONSTRUCTION SERVICES SOUTHEAST, INC. v. CRUM & FORSTER SPECIALTY INS. CO., 658 Fed. Appx. 534 (11th Cir. 2016)

- Following *Auchter*, The Court Held:
  - Insurer owed no duty to provide a defense to general contractor because the complaint against it did not allege a claim for "property damage."

INSURANCE INDUSTRY'S RESPONSE

- Modify the language of Exclusion 2.l. to delete the "exception to the exclusion" language

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion **l.** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

J.B.D. CONST., INC. v. MID-CONTINENT CAS. CO., 571 Fed. Appx. 918 (11th Cir 2014)

J.B.D. Const., Inc. v. Mid-Continent Cas. Co., 571 Fed.Appx. 918 (2014)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Auto-Owners Insurance Company v. Elite Homes, Inc., M.D.Fla., February 3, 2016

571 Fed.Appx. 918

This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)
United States Court of Appeals, Eleventh Circuit.

J.B.D. CONSTRUCTION, INC., a Florida corporation, Plaintiff–Counter Defendant–Appellant,
v.
MID–CONTINENT CASUALTY COMPANY, an Ohio Corporation, Defendant–Counter Claimant–Appellee.

No. 13–10138.
|
July 11, 2014.

Synopsis
Background: Insured general contractor brought state-court action against commercial general liability (CGL) insurer, alleging insurer breached its duty to defend and indemnify insured in an underlying action arising from damage caused by water leaks in roof of a fitness center insured constructed. Insurer removed action to federal court. The United States District Court for the Middle District of Florida, No. 8:11–cv–00293–TGW, entered summary judgment for insurer, and insured appealed.

Holdings: The Court of Appeals, Fuller, District Judge, held that:

[1] policy's "your work" exclusion barred coverage of costs to repair damage to fitness center;

[2] insurer had a duty to defend insured; and

[3] insurer's mailing of a check to reimburse insured's counsel was not an accord and satisfaction curing insurer's breach of its duty to defend.

Affirmed in part, reversed in part, and remanded.

West Headnotes (3)

[1] Insurance
Products and Completed Operations Hazards

Under Florida law, commercial general liability (CGL) policy's "your work" exclusion barred coverage of costs incurred by insured general contractor to repair damage to a fitness center arising from its and its subcontractors' defective work on center's roof, windows, and doors; insured undertook construction of entire fitness center, and, thus, exclusion applied to damage to completed center and its components.

3 Cases that cite this headnote

[2] Insurance
Products and Completed Operations Hazards

Under Florida law, allegation that insured general contractor's defective work on a fitness center resulted in damage to "other property" potentially fell within coverage of insured's commercial general liability (CGL) policy, thus triggering insurer's duty to defend; allegation potentially included damage to non-fitness center property that fell outside of policy's "your work" exclusion.

9 Cases that cite this headnote

[3] Accord and Satisfaction
Remittances on condition

Under Florida law, commercial general liability (CGL) insurer's mailing of a check to reimburse insured general contractor's counsel for his services in an underlying

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CARLTON FIELDS

J.B.D. CONST., INC. v. MID-CONTINENT CAS. CO., 571 Fed. Appx. 918 (11th Cir 2014)

- Facts:
  - Contractor built fitness center which attached to a pre-existing atrium.
  - Complaint alleges only damage to the fitness center
  - Portions of fitness center constructed by subcontractor
  - Insurance policy deleted the subcontractor exception to Exclusion 2(l)

J.B.D. CONST., INC. v. MID-CONTINENT CAS. CO., 571 Fed. Appx. 918 (11th Cir 2014)

- Holding:
  - The "your work" exclusion, absent the subcontractor's exception, bars coverage for damages to the completed fitness center or its components arising from the general contractor's or its subcontractor's work.

FHB INSURANCE

SOLUTIONS FOR THE CONSTRUCTION INDUSTRY

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Contracts: Avoiding TORT and Litigation

BLUEPRINT TO PROTECT YOUR BUSINESS

CARLTON FIELDS

The implied warranty laws [TORT]
are the friend of lawyers; not businessmen.

They lead to a jury of homeowners, who don't know
a rebar from a Hershey bar.

Issues in the **Homebuilding Industry**

- Significant increase in construction defect claims and related litigation [caveat venditor replaced caveat emptor]
- Builders are liable for Implied Warranty Laws in most states
- TORT or CONTRACT. Your only two options.
- Insurance/warranty companies eliminating critical coverage: Soil movement and construction defects from the work of subcontractors [two prime examples]

Legal Issues in the **Home building Industry**

- Who determines the “Legal Liability” of builders and contractors? Contract and an industry professional? Or a jury of homeowners?
- Mediate, arbitrate or litigate?
- Some states are ruling that faulty workmanship will be paid from the builders assets and not the insurance policy!
- Caveat emptor has been gone for decades.

General Liability Insurance

General Liability Insurance
How does it work?

- Provides legal liability protection for “premise operation” claims which “occur” during construction, i.e., bodily injuries, resulting damages, etc.
- Provides legal liability protection for claims arising after the home is sold, which “occurs” during the policy period – typically construction defect issues.
- Distinguish from what a WARRANTY covers.

General Liability Insurance
What else?

- Three ADDITIONAL CONTRACTS are also needed
  - Subcontractor agreements
  - Sales agreement; be sure dispute resolution in sync with warranty contract
  - Third-party warranty to replace implied warranty law/tort exposures

- These contracts are critical to protecting the assets of home builders from TORT/lawyers/litigation!

Comprehensive Sales Contract **with every homeowner**

- Have your attorney draw up the sales contract to ensure you are protected (versus a Realtor® form. Guess who that one protects?)
- Does the sales contract have arbitration language?
- The signed sales contract is key documentation; be sure it is consistent with the warranty

- Email me; or go to NAHB/contracts new web site [all contracts]

Essential Elements of a **Written Warranty**

- Mandatory and binding arbitration protected under the Federal Arbitration Act
- Language of HUD and Code of Federal Regulations
- Coverage for claims from soil movement
- Clear and fair determination of the builders responsibility
- Coordination of claims, complaints and disputes between the warranty and the general liability insurance
- Consider third party warranty; to avoid the legal threat: ‘self serving’

Liability Conclusions

- Your assets and net worth are exposed (caveat venditor)
- A proactive asset protection program can reduce your exposures
- Your general liability and warranty may be offering less coverage than you think (coverage for soils? Subcontractors?)
- Claims and lawsuits not covered by warranties or insurance will be paid by YOU (faulty workmanship?)
- The “price” of a well defined asset protection program is far less than the “cost” of claims and lawsuits!

When do structural claims occur

70% occur after the 4th year

% of Paid Structural Claims received each Year of the 10-yr Warranty Period

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What Has Florida Learned About Public/Private Partnerships and What is Next?

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Introduction and Types of Project Models

- Although relatively new to the United States, P3s have been a favored delivery method for generations in Europe, Canada, and Australia
  - During our recession, public funding dried up
  - Bad experiences in delivering assets on time and on budget
  - Existing infrastructure sorely in need of repair
- Many states, including Florida, passed legislation empowering P3s and establishing uniform procedures

Introduction and Types of Project Models *(continued)*

- P3s take numerous shapes, sizes and structures
  - Standard model involves private sector designing, building, financing, operating and maintaining a public facility, usually for a lifecycle of multiple decades
  - Aligned system of incentives encourages the private sector to perform

Introduction and Types of Project Models *(continued)*

- Usually initially financed by the private sector, but ultimately funded by the public sector over the lifecycle of the project
  - Public sector's appropriated payments
  - Revenue generated from the asset
  - New market tax credits
  - Tax increment financing
  - EB5 visa program payments
  - Lease payments from third party tenants
  - Grants and loans
  - Portion of savings realized by public owner through increased program efficiency, lower maintenance costs, energy usage, or taxes

Introduction and Types of Project Models *(continued)*

- Historically in United States, most P3 projects have been in transportation sector
  - I-595 reversible toll lanes in Fort Lauderdale
  - I-4 Ultimate Project in Orlando
  - Port of Miami Tunnel
  - Public sector pays for project out of availability payments or funded by toll revenue

Introduction and Types of Project Models *(continued)*

- Higher education
  - Residence halls at FAU, FIU, UCF, USF and FSU
  - Joint campus of Broward College and FIU in Miramar
  - FIU partnered with Royal Caribbean Cruise Lines for performance rehearsal and training complex
  - University of Florida created live/work/study space and new business incubator complex

Introduction and Types of Project Models *(continued)*

- Counties, cities and municipalities
  - Palm Beach convention center hotel
  - Saint Petersburg/Tampa Ferry
  - Parking garages with mixed-use, revenue-generating spaces
  - City halls and downtown redevelopment projects
  - City of Altamonte Springs has creatively partnered with the private sector on a few local risk-sharing agreements

Introduction and Types of Project Models *(continued)*

- Public sector transfers construction and long term performance responsibilities to the private sector
  - Financing is accessed from the taxable and tax-exempt debt markets, combined with equity
  - County/municipal transactions historically have tended to be more of a land sale with development and lease obligations

Summary of State Legislation

- Section 255.065, Fla. Stats.
  - Applies to counties, municipalities, school districts, and any other political subdivision of the state; any public body, corporate and politic; and any regional entity serving a public purpose

Summary of State Legislation *(continued)*

- Permits public entities to procure P3 projects either through receipt of unsolicited proposals or by procuring competitive bids through traditional procurement methods
  - Unsolicited proposals must be accompanied by an application fee as set by public agency
  - Unless waived by public entity, unsolicited proposal must include conceptual design of facility, construction schedule, description of method by which private entity proposes to secure necessary property interests, description of private entity's general plans for financing project and proposed user fees, lease payments or other service payments
  - If public entity is interested in pursuing unsolicited proposal, it must first obtain competitive bids by publishing notice in Florida Administrative Register and newspaper of general circulation at least once a week for two weeks

Summary of State Legislation *(continued)*

- Time frame for competitive bidding must be no less than 21 days and no more than 120 days after initial date of publication, unless otherwise approved by majority vote of public agency's governing body
- Unsolicited proposal is exempt from public records until public entity provides notice of intended decision to award project
  - Or until public entity provides notice of intended decision concerning reissued competitive solicitation or withdraws reissued competitive solicitation
  - Exempt for no longer than 90 days after initial notice by public entity rejecting all proposals
  - If public entity does not issue competitive solicitation, ceases to be exempt 180 days after receipt of unsolicited proposal by such entity

Summary of State Legislation *(continued)*

- If solicited project includes design work, solicitation must include design criteria package
  - Licensed design professional who prepares design criteria package shall be retained through completion of design and construction of project
- Public entity will rank proposals in order of preference
  - Considerations include bidders' professional qualifications, general proposed business terms, innovation in design, cost reduction terms, and finance plans
  - Public entity may begin negotiating with highest ranked firm
    - may terminate negotiations and begin negotiating with second ranked firm

Summary of State Legislation *(continued)*

- Discretionary interim agreement
  - Covers due diligence type matters for which private sector may be compensated
- Comprehensive agreement
- Private financing agreement for project involving liens on property are authorized, but all liens must be paid in full before required transfer of ownership or operation of facility back to public entity
  - No project financing arrangement may require public entity to 1) indemnify financing source, 2) subject public entity's facility to liens, or 3) require public entity to secure financing by mortgage or security interest that could result in loss of fee ownership

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Where Are We and What Is Next For Florida

- Without full understanding of true value and benefit of P3 delivery model, it is difficult for public sector officials to effectively support and sell decision to utilize P3
  - From private sector's perspective, one of the biggest concerns is level of public sector partner's commitment to P3s
    - Very expensive and risky for private sector partners to pursue
  - Public agency project champion
  - Public sector needs to engage with political and impacted stakeholders early

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Where Are We and What Is Next For Florida *(continued)*

- Overemphasis on need for project-derived revenue stream
- Miami-Dade County's Public/Private Partnership Task Force
- Energy savings and optimization transactions
  - Payment to private partners includes percentage of realized energy or maintenance cost savings
  - Focus on implementing newer technologies
  - Require longer time frames to realize savings

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Where Are We and What Is Next For Florida *(continued)*

- Interest in P3s from cities and counties has increased within past couple of years
  - Have tended to be more real estate development deals than P3s
  - City of Pittsburgh successfully transformed transitional neighborhood with P3 redevelopment project
  - Long Beach, California is developing a new City Hall and Civic Center through an Availability Payment P3

Where Are We and What Is Next For Florida *(continued)*

- Public education from kindergarten through twelfth grade
  - Lack of public funding, combined with fact that lower education facilities are not revenue generating
    - Parcels of property transferred to developer
    - Mixed-use
    - In Canada, P3 availability payment model

Where Are We and What Is Next For Florida *(continued)*

- Applicability to smaller projects
  - Very expensive for private sector to pursue
  - On smaller project, risk premium for bidding costs is less able to be overcome by cost or risk transfer efficiencies
  - Most developers state P3s are inappropriate for any project less than $50,000,000
    - Traditional real estate opportunities with element of risk transfer may be appropriate for smaller projects
    - Alternative solution is to “bundle” multiple smaller projects into single P3 transaction

Risk Transfer

- One of the biggest benefits of P3s
- Risks in delivery of facility include cost and schedule overruns, land acquisition and entitlements, and availability of labor and materials
- Risks in operations include poor upkeep, public sector immunity from debt service liability, capital replacement risk, performance standards and quality, service failures due to poor response from private sector, condition of facility at end of contract term, and lower than expected facility usage by public and corresponding revenue.

Risk Transfer *(continued)*

- Risks in maintenance include public sector's diversion or reduction of maintenance staff and higher than expected levels and costs of maintenance
- Political risk includes public opinion or political opposition against project, turnover of commission members supporting project, changes in laws and tax policies, project resistance from unions or internally within public agency, and risks of getting approval from Tallahassee or Division of Bond Finance

Risk Transfer *(continued)*

- Allocate risks among partner best able to manage them
- Risks that cannot be well managed by the public sector or the private partner are often shared
- Insurance helps in covering risks
- If well structured, cost associated with transferring risks to various partners will be lower than the true cost of retained risks
  - In competitive environment, cost is often mitigated through innovation, effective management plans, design decisions, and construction approaches

2016 LEGISLATIVE & CASE LAW UPDATE

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MEASURE OF DAMAGES

GRAY V. MARK HALL HOMES, INC., 185 SO. 3D 651 (FLA. 2D DCA 2016).

- IN A CASE WHERE THE COST OF REPAIRS WOULD CONSTITUTE ECONOMIC WASTE, THE MEASURE OF DAMAGES IS "THE DIFFERENCE BETWEEN THE VALUE THAT THE PRODUCT CONTRACTED FOR WOULD HAVE HAD AND THE VALUE OF THE PERFORMANCE THAT HAS BEEN RECEIVED."

- APPLYING GROSSMAN HOLDINGS LTD. V. HOURIHAN, 414 SO. 2D 1037 (FLA. 1982)

INSURANCE - TRIGGERS TO DUTY TO DEFEND

AUTO-OWNERS INSURANCE COMPANY V. ELITE HOMES, INC., 160 F.SUPP.3D 1307 (U.S.D.C. M.D. FLA. 2016).

- GENERAL RULE IS THAT INSURANCE COMPANY'S DUTY TO DEFEND IS DETERMINED SOLELY FROM THE ALLEGATIONS IN THE COMPLAINT AGAINST THE INSURED, NOT BY THE ACTUAL FACTS OF THE CAUSE OF ACTION AGAINST THE INSURED, THE INSURED'S VERSION OF THE FACTS, OR THE INSURED'S DEFENSES.
- ANY DOUBT REGARDING DUTY TO DEFEND IS RESOLVED IN FAVOR OF INSURED.
- UNSUPPORTED AND CONCLUSORY “BUZZ WORDS” IN A COMPLAINT ARE INSUFFICIENT TO TRIGGER AN INSURER'S DUTY TO DEFEND; INFERENCES, TOO, ARE NOT ENOUGH.

STATUTE OF LIMITATIONS

BROCK V. GARNER WINDOW & DOOR SALES, INC., 187 SO. 3D 294 (FLA. 5TH DCA 2016).

- 4-YEAR STATUTE OF LIMITATIONS APPLIES TO CONSTRUCTION CONTRACTS, EVEN WHEN CONTRACTOR IS UNLICENSED.
- SECTION 489.128, FLORIDA STATUTES, PREVENTS AN UNLICENSED CONTRACTOR FROM ENFORCING A CONTRACT, BUT IT DOES NOT PREVENT AN UNLICENSED CONTRACTOR FROM DEFENDING AGAINST AN ACTION TO ENFORCE A CONTRACT BY THE OWNER.

STATUTORY ATTORNEY FEES WORKER'S COMPENSATION CASES

CASTELLANOS V. NEXT DOOR COMPANY, 192 SO. 3D 431 (FLA. 2016).

- §440.34, FLORIDA STATUTES, WHICH ELIMINATES THE REQUIREMENT OF A REASONABLE ATTORNEYS' FEE TO THE SUCCESSFUL CLAIMANT, IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSES OF BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS.

FAILURE TO TIMELY COMMENCE ACTION ON LIEN TRANSFER BOND

HILLER V. PHOENIX ASSOCIATES OF SOUTH FLORIDA, INC., 189 SO. 3D 272 (FLA. 2D DCA 2016).

- FAILURE TO BRING TIMELY ACTION AGAINST SURETY ON LIEN TRANSFER BOND AFTER THE TRANSFER RESULTS IN THE EXTINGUISHMENT OF THE RIGHT TO MAKE A CLAIM ON THE BOND AND THE LIEN.

DUTY OF GOOD FAITH AND FAIR DEALING

UNDERWATER ENGINEERING SERVICES, INC. V. UTILITY BOARD OF THE CITY OF KEY WEST, 194 SO. 3D 437 (FLA. 3D DCA 2016).

- IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS INTENDED TO PROTECT THE REASONABLE EXPECTATIONS OF THE CONTRACTING PARTIES IN LIGHT OF THEIR EXPRESS AGREEMENT.
- FAILURE TO PROVIDE NOTICE OF DEFECT AND OPPORTUNITY TO REPAIR, AS REQUIRED BY CONTRACT, WAIVES CLAIM FOR DAMAGES.

PRE-JUDGMENT INTEREST

ARIZONA CHEMICAL COMPANY, LLC V. MOHAWK INDUSTRIES, INC., 197 SO. 3D 99 (FLA. 1ST DCA 2016).

- **FLORIDA'S "LOSS THEORY" OF PREJUDGMENT INTEREST**
  - PREJUDGMENT INTEREST BEGINS TO ACCRUE ON THE DATE PLAINTIFF SUFFERED THE PECUNIARY LOSS FOR WHICH PLAINTIFF IS BEING COMPENSATED – NOT FROM THE DATE OF THE BREACH.
  - THE PURPOSE OF AWARDING PREJUDGMENT INTEREST IS TO MAKE THE PLAINTIFF WHOLE, NOT FOR THE PLAINTIFF TO OBTAIN A WINDFALL OR FOR THE COURT TO PENALIZE THE DEFENDANT.

- **EQUITABLE EXCEPTION TO THE LOSS THEORY**
  - COURTS SOMETIMES CALCULATE PREJUDGMENT INTEREST FROM A DATE LATER THAN THE DATE OF THE PLAINTIFF'S ACTUAL LOSS, WHERE UNIQUE FACTS AND "CONSIDERATIONS OF FAIRNESS" MILITATE AGAINST CALCULATING PREJUDGMENT INTEREST FROM THE DATE OF ACTUAL LOSS.

INSURANCE – DUTY TO DEFEND CHAPTER 558 NOTICE OF DEFECTS

- **ALTMAN CONTRACTORS, INC. V. CRUM & FORSTER SPECIALTY INSURANCE COMPANY, 832 F. 3D 1318 (11TH CIR. 2016).**

- 11TH CIRCUIT CERTIFIED THE FOLLOWING QUESTION OF LAW TO THE FLORIDA SUPREME COURT:

  IS THE NOTICE AND REPAIR PROCESS SET FORTH IN CHAPTER 558 OF THE FLORIDA STATUTES A "SUIT" WITHIN THE MEANING OF THE CGL POLICIES ISSUED BY C&F TO ACI?

INSURANCE – DUTY TO DEFEND AND EXCLUSIONS

EVANSTON INS. COMPANY v. DIMUCCI DEV. CORP. OF PONCE INLET, INC., 2017 WL 477649, AT *1 (M.D. FLA. FEB. 6, 2017).

- **DUTY TO DEFEND ("EIGHT–CORNERS RULE"):** THE TEST FOR DETERMINING WHETHER AN INSURER OWES A DUTY TO DEFEND IS RESOLVED BY COMPARING THE FACTS ALLEGED IN THE UNDERLYING COMPLAINT AGAINST THE COVERAGE PROVIDED UNDER THE POLICY TERMS. IF THE FACTUAL ALLEGATIONS "FAIRLY AND POTENTIALLY BRING THE SUIT WITHIN POLICY COVERAGE, THEN THE DUTY TO DEFEND IS TRIGGERED, AND IF THE ALLEGATIONS " 'LEAVE ANY DOUBT REGARDING THE DUTY TO DEFEND, COURTS MUST RESOLVE SUCH DOUBT IN FAVOR OF THE INSURED REQUIRING THE INSURER TO DEFEND.

- **POLICY EXCLUSIONS:** INSURER FACES A "HEAVY" BURDEN TO DEMONSTRATE THAT THE ALLEGATIONS OF THE UNDERLYING COMPLAINT ARE "CAST SOLELY AND ENTIRELY WITHIN THE [YOUR WORK EXCLUSION] AND ARE SUBJECT TO NO OTHER REASONABLE INTERPRETATION." ANY DOUBTS MUST BE RESOLVED AGAINST INSURER.

INSURANCE – DUTY TO DEFEND

CORE CONSTRUCTION SERVICES SOUTHEAST, INC. V. CRUM & FORSTER SPECIALTY INSURANCE COMPANY, 658 FED.APPX. 534 (11TH CIR. 2016).

- THERE IS NO COVERAGE FOR "PROPERTY DAMAGE" WHEN A CLAIM SEEKS SOLELY "THE COSTS OF REPAIRING AND REPLACING THE ACTUAL DEFECTS IN CONSTRUCTION.
- INSURER OWES NO DUTY TO DEFEND WHEN THE UNDERLYING COMPLAINT DOES NOT ALLEGE A CLAIM FOR "PROPERTY DAMAGE."

TIME FOR FILING CLAIM UNDER CONSTRUCTION INDUSTRY RECOVERY FUND

STASINOS V. STATE, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 41 FLA. L. WEEKLY D2317 (FLA. 4TH DCA OCTOBER 13, 2016).

- SECTION 489.141(1)(F), FLORIDA STATUTES, PROVIDES THAT A CLAIM MUST BE "MADE WITHIN 1 YEAR AFTER THE CONCLUSION OF ANY CIVIL, CRIMINAL, OR ADMINISTRATIVE ACTION OR AWARD IN ARBITRATION BASED ON THE ACT."
- CLAIMANTS MUST EXHAUST ALL EFFORTS TO RECOVER THEIR DAMAGES IN ORDER TO BE ELIGIBLE TO SEEK A CLAIM UNDER THE RECOVERY FUND. § 489.141(1)(E).
- CLAIM MADE WITHIN ONE YEAR OF CONCLUSION OF CONTRACTOR'S BANKRUPTCY PROCEEDING WAS TIMELY EVEN THOUGH CLAIM WAS FILED MORE THAN 3 YEARS AFTER RECEIVING RELIEF FROM AUTOMATIC STAY AND 2 YEARS AFTER ENTRY OF JUDGMENT. BANKRUPTCY CASE WAS A "CIVIL ACTION" UNDER THE MEANING OF THE STATUTE.

FACT ISSUES MUST BE DETERMINED BY JURY

BEST DRYWALL SERVICES, INC. v. BLASZCZYK, 207 SO. 3D 271, 272 (FLA. 2D DCA 2016).

- IF THERE ARE CONFLICTS IN THE EVIDENCE OR DIFFERENT REASONABLE INFERENCES THAT MAY BE DRAWN FROM THE EVIDENCE, THE ISSUE IS FACTUAL AND SHOULD BE SUBMITTED TO THE JURY, NOT THE COURT.

FRAUDULENT LIEN MUST BE WILLFUL

GATOR BORING & TRENCHING, INC., V. WESTRA CONSTRUCTION CORP., 41 FLA. L. WEEKLY D2269 (FLA. 2D DCA OCTOBER 5, 2016).

- UNDER SECTION 713.31(2), [A] CLAIM OF LIEN THAT OVERSTATES THE AMOUNT CLAIMED IS NOT NECESSARILY FRAUDULENT, UNLESS THE EXAGGERATION WAS MADE WILLFULLY.
- A GOOD FAITH DISPUTE AS TO THE AMOUNT OWED DOES NOT RENDER A LIEN FRAUDULENT (EVEN WHERE THE LIEN IS REDUCED BY $676,566.90).

INSURANCE COVERAGE – CONCURRENT-CAUSATION DOCTRINE

SEBO V. AMERICAN HOME ASSURANCE COMPANY, INC., --- SO. 3D ---, 2016 WL 7013859 (FLA. DECEMBER 1, 2016).

- FOR PURPOSES OF DETERMINING APPROPRIATE THEORY OF RECOVERY TO APPLY WHEN MULTIPLE PERILS CONVERGE TO CAUSE A LOSS AND AT LEAST ONE OF THE PERILS IS EXCLUDED FROM AN INSURANCE POLICY, AND NO SINGLE CAUSE CAN BE CONSIDERED THE SOLE OR PROXIMATE CAUSE, IT IS APPROPRIATE TO APPLY THE CONCURRING CAUSE DOCTRINE, RATHER THAN THE EFFICIENT PROXIMATE CAUSE DOCTRINE. INSURANCE COVERAGE MAY EXIST WHERE AN INSURED RISK CONSTITUTES A CONCURRENT CAUSE OF THE LOSS EVEN WHEN IT IS NOT THE PRIME OR EFFICIENT CAUSE.

RECOVERY AGAINST SUBCONTRACTOR BOND

ARCH INSURANCE COMPANY V. JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC., --- F.SUPP.3D ---, 2016 WL 7324144 (U.S.D.C. S.D. FLA., DECEMBER 12, 2016.

- AS A GENERAL RULE, A SURETY'S LIABILITY ON A BOND IS DETERMINED STRICTLY FROM THE TERMS AND CONDITIONS OF THE BOND AGREEMENT.
- GENERAL CONTRACTOR, AS OBLIGEE UNDER SUBCONTRACTOR BOND, CANNOT RECOVER AGAINST SURETY BECAUSE IT FAILED TO (1) FAILED TO SATISFY SEVERAL CONDITIONS PRECEDENT TO SUSTAIN A CLAIM UNDER THE BOND; AND (2) UNILATERALLY COMPLETED THE SUBCONTRACT WITHOUT ALLOWING ARCH THE OPPORTUNITY TO EXERCISE ITS COMPLETION RIGHTS AS REQUIRED BY THE BOND.

CONSTRUCTION DEFECTS – CONTRACTUAL RIGHT TO CURE

MAGNUM CONSTRUCTION MANAGEMENT CORP. V. THE CITY OF MIAMI BEACH, FLORIDA, --- SO. 3D ---, 2016 WL 7232268 (FLA. 3D DCA DECEMBER 14, 2016).

- FAILURE TO COMPLY WITH CONTRACTUAL REQUIREMENT THAT GENERAL CONTRACTOR BE GIVEN NOTICE AND OPPORTUNITY TO CURE DEFECTS IN PLAYGROUND PRECLUDED CITY FROM RECOVERING FROM GENERAL CONTRACTOR FOR THE DEFECTS

- NO SPECULATION ALLOWED WHEN DETERMINING DAMAGES

PREVAILING PARTY ATTORNEY FEES UNDER SECTION 713.31, F.S.

NEWMAN V. GUERRA, --- SO. 3D ---, 2017 WL 33702 (FLA. 4TH DCA, JANUARY 4, 2017).

- PURSUANT TO SECTION 713.31(2)(C), AN OWNER AGAINST WHOSE INTEREST IN REAL PROPERTY A FRAUDULENT LIEN IS FILED MAY RECOVER ATTORNEY'S FEES ONLY IF THE LIENOR WHO FILES A FRAUDULENT LIEN IS NOT THE PREVAILING PARTY. THUS, A LIENOR WHO FILES A FRAUDULENT LIEN COULD STILL BE THE PREVAILING PARTY. “SIGNIFICANT ISSUES” TEST OF *PROSPERI* APPLIES IN DECIDING ENTITLEMENT TO “PREVAILING PARTY” ATTORNEY'S FEES UNDER SECTION 713.31.

ATTORNEY'S FEES - MILLER ACT CLAIM

RMP CAPITAL CORP. V. TURNER CONSTRUCTION CO., --- FED. APPX. ---, 2017 WL 244066 (11TH CIR. JANUARY 20, 2017).

- THE MILLER ACT DOES NOT PROVIDE FOR PREVAILING PARTY ATTORNEY'S FEES. BUT FEES ARE RECOVERABLE WHEN PROVIDED FOR IN THE CONTRACT.
- EVEN GENERAL CONTRACTORS AND THEIR SURETIES CAN RECOVER ATTORNEY'S FEES WHERE A CONTRACT ALLOCATES ATTORNEY'S FEES TO THEM.

THE END

SEE YOU NEXT YEAR!

FLORIDA APPEALS IN CONSTRUCTION CASES:

GETTING AND PRESERVING THE WIN

KIM ASHBY
FOLEY & LARDNER, LLP

WHAT ORDERS ARE APPEALABLE

- FINAL V. NON-FINAL ORDERS
- DEFINITION OF FINALITY: WHETHER JUDICIAL LABOR IS ENDED
- WHETHER THERE ARE RELATED CLAIMS LEFT BETWEEN THE SAME PARTIES IN THE SAME TRANSACTION
- ATTORNEY'S FESS AND COSTS EXEMPTED
- PREJUDGMENT INTEREST? MCGURN V. SCOTT, 626 So. 2d 321

FINAL PLENARY APPEAL OF ALL PRIOR RULINGS

- ALL ORDERS AND RULINGS MADE BY THE LOWER COURT ARE REVIEWABLE BY TIMELY APPEAL OF A FINAL ORDER, INCLUDING:
- ORDERS DENYING DISPOSITIVE MOTIONS
- ORDERS ON DISCOVERY ISSUES AND EXCLUSION OF EVIDENCE
- DAUBERT MOTIONS AND RULING ON EXPERTS
- JURY INSTRUCTIONS

FINAL ORDERS THAT EXONERATE ANOTHER PARTY

- FINAL ORDERS ENTERED IN FAVOR OF A *FABRE* DEFENDANT
- FAILURE TO APPEAL THE RULING IN FAVOR OF A *FABRE* DEFENDANT- RES JUDICATA THAT DEFENDANT IS NOT LIABLE IN WHOLE OR IN PART
- CALENDAR NOTICE OF APPEAL-CONSIDER THE STAY OF THE CASE PENDING THE OUTCOME OF APPEAL

APPEALABLE NON-FINAL ORDERS- BEFORE FINAL JUDGMENT

- RULE 9.130(A)(3)-
  - VENUE/FORUM NON CONVENIENS
  - INJUNCTIONS
  - JURISDICTION OF PERSON
  - RIGHT TO IMMEDIATE POSSESSION OF PROPERTY
  - APPOINTMENT OF RECEIVER
  - ENTITLEMENT TO ARBITRATION
  - CERTIFY A CLASS
  - SOVEREIGN IMMUNITY OR WORKERS COMP IMMUNITY, AS A MATTER OF LAW

APPEALABLE NON-FINAL ORDERS- AFTER FINAL JUDGMENT

- RULE 9.130(A)(5)-ORDERS ENTERED ON AUTHORIZED AND TIMELY MOTIONS FOR RELIEF FROM JUDGMENT (RULE 1.540)
- MOTIONS FOR REHEARING DO NOT TOLL THE TIME FOR TAKING AN APPEAL
- IN THE ABSENCE OF A STAY- EXECUTION ON THE FINAL JUDGMENT CAN CONTINUE
- TRIAL COURT DOES NOT LOSE JURISDICTION

CERTIORARI-REVIEW OF NON-FINAL ORDERS NOT APPEALABLE AS OF RIGHT

- RULE 9.100- ORIGINAL PROCEEDINGS
- ORIGINAL JURISDICTION ARISES IN APPEALS COURT BY FILING PETITION NO LATER THAN THE 30TH DAY AFTER ENTRY OF ORDER
- SEPARATE PETITIONS FOR SEPARATE ORDERS OF TRIAL COURT
- NAME ALL PARTIES BELOW AS RESPONDENTS IF YOU ARE PETITIONER
- DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW
- IRREPARABLE HARM

WHO ARE THE PROPER PARTIES

- SPECIFICALLY NAME ALL PARTIES TO THE ACTION AGAINST WHOM RELIEF IS SOUGHT
- SOME DCA'S REQUIRE ALL PARTIES TO BE NAMED FOR CONFLICT PURPOSES-DOCKETING STATEMENT
- RULE 9.020- APPELLANT/APPELLEE; PETITIONER RESPONDENT
- INTERVENORS-MUST HAVE STANDING BY VIRTUE OF THEIR BEING NAMED OR MADE A PARTY BELOW

PARTIES TO NON-FINAL APPEALS

- NOTICE OF APPEAL FORM- RULE 9.900(C)
- JURISDICTION DIVESTED FROM TRIAL COURT FOR THE ISSUES AND PARTIES WHICH ARE ON APPEAL AS OF RIGHT
- TRIAL COURT MAINTAINS JURISDICTION OF MATTERS NOT ON APPEAL, BUT CANNOT ENTER A FINAL JUDGMENT

PARTIES WITH RIGHT TO INTERVENE

- NONPARTIES WHO MAKE NO EFFORT TO INTERVENE AT TRIAL COURT GENERALLY HAVE NO STANDING TO INTERVENE
- PUTATIVE INTERVENING PARTY CAN FILE A SEPARATE PETITION FOR CERTIORARI AND MOTION TO CONSOLIDATE- TALLAHASSEE DEMOCRAT, INC. V. O'GRADY, 421 SO. 2D 58 (FLA. 1ST DCA 1982)

AMICUS CURIAE

- RULE 9.370- AMICUS APPEARS ONLY BY LEAVE OF COURT
- MOVANT MUST HAVE DEFINABLE INTEREST IN OUTCOME OF CASE
- AMICUS BRIEF DUE NO LATER THAN 10 DAYS AFTER THE BRIEF OF THE PARTY SUPPORTED BY AMICUS

WHEN-THE IMPORTANT DATES

- NOTICE OF APPEAL-30 DAYS FROM RENDITION
- PETITION FOR CERTIORARI-PETITION/BRIEF AND APPENDIX FILED IN 30 DAYS
- RECORD ON APPEAL-10 DAYS
- DESIGNATION TO REPORTER-10 DAYS
- INITIAL BRIEF- 70 DAYS OR 15 (NON-FINAL)
- APPENDIX-FILED WITH PETITION OR NON-FINAL INITIAL BRIEF
- ANSWER BRIEF-20+5 DAYS FOLLOWING INITIAL BRIEF
- REPLY BRIEF- 20+5 DAYS AFTER ANSWER BRIEF

WHEN- TOLLING MOTIONS

- RULE 9.300- EXTENSIONS-DO NOT FILE ON DAY BRIEF IS DUE
- MOTIONS WHICH DO NOT TOLL TIME-
  - STAY PENDING APPEAL
  - ORAL ARGUMENT
  - JOINDER OR SUBSTITUTION OF PARTIES
  - AMICUS CURIAE
  - ATTORNEY'S FEES
  - ADMISSION OR WITHDRAWAL
  - SANCTIONS
  - MEDIATION- IF FILED MORE THAN 30 DAYS AFTER NOA

WHERE-FILING IN THE RIGHT COURT

- NOTICE OF APPEAL-LOWER TRIBUNAL
- PETITION FOR CERTIORARI-APPELLATE COURT
- DIRECTIONS TO CLERK-LOWER TRIBUNAL
- DESIGNATION TO COURT REPORTER-REPORTER FILES RESPONSE RE TIMING
- NOTICE TO INVOKE DISCRETIONARY JURISDICTION-FLORIDA SUPREME COURT

WHERE-ORAL ARGUMENT

- CONFIRM THE COURT LOCATION
- LAW DAY, SPECIAL SESSIONS
- CHECK IN WITH CLERK OR DEPUTY
- SEND YOUR TRIAL COUNSEL EMAIL OR TEXT
- SMILE- YOU ARE ON CAMERA

WHY-DETERMINE THE DESIRED OUTCOME

- REVERSAL FOR ENTRY OF JUDGMENT IN YOUR FAVOR
- REVERSAL AND REMAND FOR NEW TRIAL
- REVERSAL FOR NEW TRIAL ON LIMITED ISSUES
- ATTORNEY'S FEES REVERSAL AND EXPOSURE
- RES JUDICATA FOR OTHER COLLATERAL CASES
- STARE DECISIS FOR OTHER UNRELATED MATTERS FOR CLIENT OR INDUSTRY

APPELLATE ATTORNEY'S FEES

- MOTIONS FOR ATTORNEY'S FEES – FILED WITH APPELLATE COURT
  - AT THE TIME FOR SERVICE OF REPLY BRIEF
  - AT THE TIME FOR SERVICE OF PETITIONER'S REPLY
  - STATE THE BASIS FOR ENTITLEMENT TO FEES WITH ATTACHMENTS
  - APPELLATE COURT USUALLY REMANDS FOR AWARDS OF AMOUNT OF FEES

ORAL ARGUMENT

- REQUEST FOR ORAL ARGUMENT- SEPARATE FILING
- NO LATER THAN 10 DAYS AFTER THE LAST BRIEF
- INCLUDE WHY ORAL ARGUMENT SHOULD BE GRANTED
- 20 MINUTES PER SIDE-FINAL
- 3RD DCA 10 MINUTES PER SIDE-NON-FINAL

STAYS/SUPERSEDEAS BONDS

- MOTIONS FOR STAY/SUPERSEDEAS BOND
- BOND- AUTOMATIC IF PROPER AMOUNT IS POSTED WITH A MONEY JUDGMENT- RULE 9.200
- MOTION FOR STAY IF ANY EQUITABLE RELIEF IS REQUESTED-FILED FIRST IN TRIAL COURT RULE 9.310
- DENIAL OF STAY IS REVIEWABLE ON MOTION TO APPELLATE COURT RULE 9.310(F)
- BOND SURETY CANNOT BE RELATED TO APPELLANT