



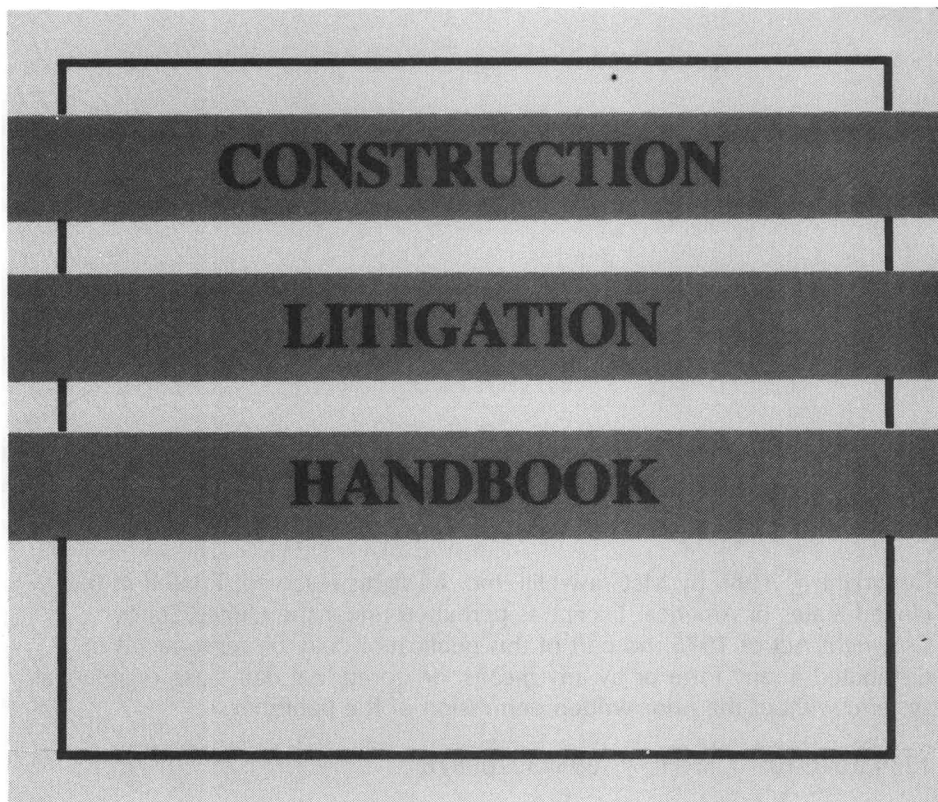
CONSTRUCTION

LITIGATION

HANDBOOK



JAMES ACRET



James Acret, Esq.
Member of the Los Angeles Bar

SHEPARD'S/McGRAW-HILL, INC.
P.O. Box 1235
Colorado Springs, Colorado 80901

McGRAW-HILL BOOK COMPANY
New York • St. Louis • San Francisco • Auckland • Bogotá • Colorado Springs
Hamburg • Johannesburg • London • Madrid • Mexico • Milan • Montreal
New Delhi • Panama • Paris • São Paulo • Singapore • Sydney • Tokyo • Toronto

Copyright © 1986 by McGraw-Hill, Inc. All rights reserved. Printed in the United States of America. Except as permitted under the United States Copyright Act of 1976, no part of this publication may be reproduced or distributed in any form or by any means, or stored in a data base or retrieval system, without the prior written permission of the publisher.

12345678910 SHHI 895432109876

Library of Congress Cataloging-in-Publication Data

Acret, James.

Construction litigation handbook.

Includes index.

1. Building—Contracts and specifications—United States. 2. Construction industry—Law and legislation—United States. 3. Actions and defenses—United States. I. Title.

KF902.A736 1986 343.73'07869 86-27956

ISBN 0-07-000229-0 347.3037869

ISBN 0-07-000229-0

This book is dedicated by the author to Sharon Smith,
who always helped.

Acknowledgments

The author is especially indebted to Robyn Schiffman, and Partrick Hartnett, fine young law students and researchers. Indispensable to the production of this work was Thomas D. Wogan, who helped in so many ways that I cannot recount them all here.

Preface

Publication of this work will coincide with the author's thirtieth anniversary as a practitioner of construction law. During those years, source material in the field of construction disputes has become so vast that it has been necessary to omit from consideration most of the older cases.

I have attempted to organize this work so as to cover the important segments of the field of construction litigation in a balanced, understandable, and accessible way. The approach is more practical than scholarly. It is intended to serve as a useful tool.

James Acret
October, 1986

Contents

Summary

Acknowledgments

Preface

- 1 Elements and Formation of Contract**
- 2 Bids**
- 3 Interpretation of Contracts**
- 4 Exculpatory Clauses**
- 5 Illegality**
- 6 Changes, Modifications, and Extras**
- 7 Scheduling and Delay**
- 8 Breach of Contract**
- 9 Stopping the Work**
- 10 Rescission**
- 11 Damages for Breach of Contract**
- 12 Unjust Enrichment**

13	Negligence
14	Warranty and Strict Liability
15	Fraud and Misrepresentation
16	Other Causes of Action
17	Special Defenses
18	Indemnity
19	Insurance
20	Performance Bonds
21	Rights against Remote Parties
22	Statutes of Limitations
23	Release
24	Trial
	Table
	Index

Detailed

Acknowledgments

Preface

1 Elements and Formation of Contract

- §1.01 Mutual Assent**
- §1.02 Objective Manifestation**
- §1.03 Uncertainty**
- §1.04 Letters of Intent**
- §1.05 Failure to Read Contract**
- §1.06 Mistake**
- §1.07 Signature and Delivery**

- §1.08 Offer and Acceptance**
- §1.09 Estimate No Guarantee**
- §1.10 Promissory Estoppel**
- §1.11 Duress**
- §1.12 Consideration**
- §1.13 Oral Contract**
- §1.14 Intent to Reduce Oral Contract to Writing**

2 Bids

- §2.01 Bidding Practices**
- §2.02 Promissory Estoppel**
- §2.03 Subcontractor Claims**
- §2.04 Duty to Award to Low Bidder**
- §2.05 Mistake**

3 Interpretation of Contracts

- §3.01 Intention of the Parties**
- §3.02 Consumer Protection**
- §3.03 Plain Meaning of Words Employed**
- §3.04 Typewriting versus Printing**
- §3.05 Conditions Precedent**
- §3.06 Implied Covenants**
- §3.07 Incorporation by Reference**
- §3.08 Custom and Usage**
- §3.09 Interpretation by Architect or Engineer**
- §3.10 Interpretation by the Parties**
- §3.11 Interpretation by Court**
- §3.12 Interpretation against Drafter**
- §3.13 Parol Evidence Rule**
- §3.14 Drawings**
- §3.15 Precedence Clauses**
- §3.16 Severability**

4 Exculpatory Clauses

- §4.01 Notice of Claim**
- §4.02 Interpretation of Exculpatory Clauses**
- §4.03 Acceptance of the Work**

- §4.04 Payment upon Payment**
- §4.05 Duty to Inquire**
- §4.06 Disclaimers**
- §4.07 Satisfaction Clause**

5 Illegality

- §5.01 Illegal Object**
- §5.02 Monopolies**
- §5.03 Lack of License**
- §5.04 Lapse of License**

6 Changes, Modifications, and Extras

- §6.01 Definition of Extra Work**
- §6.02 Written Modification**
- §6.03 Oral Modification**
- §6.04 Covenant against Oral Modification**
- §6.05 Waiver**
- §6.06 Estoppel**
- §6.07 Abandonment**
- §6.08 Novation**
- §6.09 Separate Contract**
- §6.10 Written Notice Requirement**
- §6.11 Approval of Architect**
- §6.12 Excessive Changes**

7 Scheduling and Delay

- §7.01 Delay as a Breach of Contract**
- §7.02 Duty to Schedule**
- §7.03 Time of Essence Clause**
- §7.04 Acts of God**
- §7.05 Unanticipated Conditions**
- §7.06 Contractor's Duty to Inquire**
- §7.07 Written Notice Requirement**
- §7.08 No-Damage-for-Delay Clause**
- §7.09 Owner's Damages for Delay**
- §7.10 Rental Value**
- §7.11 Interest**
- §7.12 Liquidated Damages**

- §7.13 Lost Profit—Owner
- §7.14 Contractor's Damages
- §7.15 Productivity
- §7.16 *Eichleay* Formula
- §7.17 Lost Profit—Contractor
- §7.18 Allocation of Damages
- §7.19 Acceleration

8 Breach of Contract

- §8.01 Performance versus Breach
- §8.02 Excuse for Nonperformance
- §8.03 Substantial Performance
- §8.04 Part Performance
- §8.05 Payment
- §8.06 Conditions Precedent
- §8.07 Tortious Breach of Contract
- §8.08 Impossibility and Impracticability
- §8.09 —Excuses
- §8.10 Prospective Failure of Consideration and Anticipatory Breach of Contract
- §8.11 Waiver of Breach
- §8.12 Specific Performance
- §8.13 Risk of Loss

9 Stopping the Work

- §9.01 Practical Considerations
- §9.02 Abandonment of Work by Contractor
- §9.03 —Abandonment Excused or Justified
- §9.04 —Breaches of Contract and Continued Performance
- §9.05 Ejecting Contractor from the Job
- §9.06 Damages

10 Rescission

- §10.01 Mutual Rescission
- §10.02 Unilateral Rescission
- §10.03 —More on Rescission
- §10.04 Measure of Damages after Rescission

11 Damages for Breach of Contract

- §11.01 Compensatory Damages**
- §11.02 Liquidated Damages**
- §11.03 Contractual Limit on Damages**
- §11.04 *Hadley v Baxendale***
- §11.05 Proving Damages**
- §11.06 Interest**
- §11.07 —More on Interest**
- §11.08 Inflation Damages**
- §11.09 Lost Profits**
- §11.10 Total Cost Method**
- §11.11 Cost of Correction**
- §11.12 Cost of Completion**
- §11.13 Diminution in Value**
- §11.14 Attorneys' Fees**
- §11.15 Mitigation of Damages**
- §11.16 Punitive Damages**
- §11.17 Emotional Distress**

12 Unjust Enrichment

- §12.01 Unjust Enrichment**
- §12.02 Extra Work and Benefit to the Defendant**
- §12.03 The Quantum, Privity, Abandonment, and License**
- §12.04 Odd Cases**

13 Negligence

- §13.01 Duty of Care**
- §13.02 —Res Ipsa Loquitur, Permits, and Negligence**
- §13.03 Violation of Statute**
- §13.04 Proximate Cause**
- §13.05 Peculiar Risk Doctrine**
- §13.06 Comparative Negligence**
- §13.07 Implied Indemnity**
- §13.08 Contribution**
- §13.09 Good Faith Settlement**

- §13.10 Damages
- §13.11 Economic Loss
- §13.12 Contract and Negligence

14 Warranty and Strict Liability

- §14.01 Express Warranty
- §14.02 Implied Warranty
- §14.03 Warranty of Habitability
- §14.04 Warranty of Plans
- §14.05 Measure of Damages for Breach of Warranty
- §14.06 Strict Liability

15 Fraud and Misrepresentation

- §15.01 Elements
- §15.02 Concealment of Conditions
- §15.03 Fraud in the Inducement
- §15.04 Damages for Fraud

16 Other Causes of Action

- §16.01 Interference with Contract Relations
- §16.02 Unfair Competition
- §16.03 Class Action
- §16.04 Duty to Warn
- §16.05 Libel
- §16.06 Misuse of Construction Funds
- §16.07 Account Stated
- §16.08 Subrogation
- §16.09 Mechanics' Liens
- §16.10 Stop Notices
- §16.11 Equitable Liens
- §16.12 Negligent Inspection
- §16.13 Economic Duress
- §16.14 Nuisance
- §16.15 Attractive Nuisance
- §16.16 Guaranty of Promise of Another
- §16.17 RICO
- §16.18 Copyright

- §16.19 Uniform Commercial Code
- §16.20 Trustee
- §16.21 Agency
- §16.22 Nondelegable Duty
- §16.23 Conversion
- §16.24 Cardinal Change
- §16.25 Implied Contractual Indemnity

17 Special Defenses

- §17.01 Privity
- §17.02 Compliance with Plans
- §17.03 Completion and Acceptance
- §17.04 Statute of Frauds
- §17.05 Sovereign Immunity
- §17.06 Res Judicata
- §17.07 Payment as a Defense
- §17.08 Waiver as a Defense
- §17.09 Mitigation of Damages
- §17.10 Certificate of Compliance
- §17.11 Prevention of Performance
- §17.12 Act of God
- §17.13 Contractor's Duty to Investigate
- §17.14 Immunity
- §17.15 Mutuality
- §17.16 Usury
- §17.17 Caveat Emptor
- §17.18 Decision by Architect or Engineer

18 Indemnity

- §18.01 Express Indemnity
- §18.02 Indemnity against Own Wrongdoing
- §18.03 —Indemnity against Own Negligence
Enforced
- §18.04 Interpretation

19 Insurance

- §19.01 Interpretation of Insurance Contracts
- §19.02 Property Insurance, Builder's Risk
Insurance, and All Risk Insurance

- §19.03 Duty to Obtain Insurance
- §19.04 Subrogation
- §19.05 —Indemnity, Liability, and Insurers
- §19.06 Property Damage
- §19.07 Bodily Injury
- §19.08 Completed Operations
- §19.09 Work Products Exclusion
- §19.10 —Other Property, Ambiguity, and
Other Cases
- §19.11 —More on Exclusion
- §19.12 Sistership Exclusion
- §19.13 Workmanship Warranty
- §19.14 Liability Assumed by Contract
- §19.15 Accident
- §19.16 Occurrence
- §19.17 Care, Custody, and Control
- §19.18 Duty to Defend
- §19.19 Apportionment of Costs of Defense
- §19.20 Obligation to Provide Independent
Counsel
- §19.21 Reservation of Rights
- §19.22 Notice of Loss

20 Performance Bonds

- §20.01 Damages
- §20.02 Interpretation
- §20.03 Exoneration
- §20.04 Bad Faith of Surety
- §20.05 Effect of Judgment against Principal

21 Rights against Remote Parties

- §21.01 Introduction
- §21.02 Third-Party Beneficiary
- §21.03 —More on Third-Party Beneficiary
- §21.04 Implied Warranty
- §21.05 Strict Liability
- §21.06 Liability of Prime Contractor
- §21.07 Liability of Subcontractor
- §21.08 Liability of Architect or Engineer

§21.09 Liability of Supplier

22 Statutes of Limitations

§22.01 Introduction

§22.02 Applicable Statute

§22.03 Limitation by Contract

§22.04 Statutes of Repose

§22.05 Commencement of Period

§22.06 Estoppel to Assert Statute of Limitations

23 Release

§23.01 Effectiveness of Release

§23.02 Accord and Satisfaction

§23.03 Release of Joint Tortfeasor

24 Trial

§24.01 Evidence

§24.02 Expert Testimony

§24.03 Trial Practice

Table

Cases

Index

Elements and Formation of Contract

1

- §1.01 Mutual Assent
- §1.02 Objective Manifestation
- §1.03 Uncertainty
- §1.04 Letters of Intent
- §1.05 Failure to Read Contract
- §1.06 Mistake
- §1.07 Signature and Delivery
- §1.08 Offer and Acceptance
- §1.09 Estimate No Guarantee
- §1.10 Promissory Estoppel
- §1.11 Duress
- §1.12 Consideration
- §1.13 Oral Contract
- §1.14 Intent to Reduce Oral Contract to Writing

§1.01 Mutual Assent

The economic affairs of the world would soon descend into torpor and confusion if persons of business did not fulfill their commercial promises. It would be virtually impossible to conduct any business if the proprietor could not depend upon delivery of supplies, performance of labor, and payment of bills. Thus, when one addresses the question of the performance of promises, economic as well as moral issues are at stake. It may be a sin to break a promise, but respect for commercial promises is also a practical necessity of commercial life. Since law must be practical, it requires the enforcement of commercial promises.

Construction litigation usually deals with disputes that arise out of, or at least in the presence of, contractual relationships. The very word *contractor* signifies the dependence of the construction industry on the enforceability of contracts.