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ARCHITECT AND ENGINEER LIABILITY: CLAIMS AGAINST DESIGN PROFESSIONALS

ROBERT F. CUSHMAN, ESQ.

THOMAS G. BOTTUM

Editors

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FOREWORD

There is hardly any meeting of engineers and architects, no matter the subject, which does not turn, at least in part, to a discussion of liability.

The reasons are clear—substantial increases in professional liability premiums in recent years (an average of 80 percent between 1981 and 1985), ever-higher minimum deductibles, which come out of the pocket of the architect-engineering firm before insurance covers the cost, new policy exclusions for claims involving pollution or asbestos, and, above all, a significant increase in average indemnity payments. Whereas a few years ago architect-engineering firms paid approximately 2–3 percent of gross billings for liability insurance, it is now expected that the average in 1987 will be more nearly 5–6 percent.

When confronted with the fact that roughly 50 percent of design firms can expect one or more claims in the next twelve months, it is not surprising that the situation is described as a crisis. An increasing number of design firms are going bare, either because they feel they cannot afford the premium or because of the unavailability of liability insurance in some areas of practice.

One result of this development has been the emergence of a host of articles, books, and seminars to discuss the many facets of the problem faced by architects and engineers. None, however, until this time, has attempted a truly comprehensive survey of the almost-endless variety of sources of claims and defensive tactics that design firms can use to minimize, if not eliminate, many claims or adverse court judgments.

This book makes that effort by being the most complete of any work to date to provide design professionals and their advising lawyers a guideline or check list of specific subject areas directly related to the liability problem. The table of contents speaks for itself, ranging from alternative dispute resolution techniques to the handling of shop drawings. Likewise, the authors of the various chapters are a well-rounded lot of experienced attorneys with hands on expertise through the handling of architects' and engineers' cases, including the all-important aspect of the drafting of sound contract documents. It would be unwise to cite any one chapter or subject as more important than another for special attention. There are actual cases pertinent to each topic, and the authors, happily, discuss these respective concerns on a pragmatic basis with chapter and verse, whether the point at issue is contract language or the terms of a liability insurance policy. Too often books or articles on this subject tend to be

highly generalized and philosophical, whereas this work tends to get down to earth with specific and detailed explanations on such matters as the use of expert witnesses, handling of shop drawings (which has emerged as a major issue since the Hyatt Hotel Case), the dichotomy in having the defense attorney selected by the insurance carrier but whose primary obligation is to represent the design professional above all others, the status of the state statutes of limitations, which have spawned numerous important court decisions. And so on and on.

Only a careful reading of the full text will indicate to the reader the roadblocks and warning signs on the slippery path of liability exposure. Needless to say, this is not a book which will prevent liability claims, or necessarily give the design professional a “perfect” answer to every problem in this minefield, but it provides the best written vehicle to date to inform and alert design professionals in the form of the proverbial ounce of prevention to cope with day-to-day professional practice issues from which emerge malpractice claims.

Washington, D.C.
April 1987

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PREFACE

Construction failures are increasing at an alarming rate. The complexity of today's sophisticated construction projects in itself leads to poor coordination between designers and contractors. Add to this the pressure of today's economy to get the most bang for the least bucks, and the reasons for these failures become apparent.

Negligence actions involving architects and engineers are also increasing at an alarming rate. Claims in astronomical figures for lost profits, loss of use, delays, disruption and loss of productivity are now everyday occurrences. Cross-complaints for comparative indemnity abound. In some cases, design professionals are added as defendants to lawsuits without significant merit to warrant such involvement. However, in other cases, serious design deficiencies may occur and come to light during the construction phase of a project, resulting in the filing of litigation or arbitration against the design professional. No matter what the case may be, most design professionals at one time or another will find themselves involved in a claim based upon allegations of negligence.

Double-digit inflation of the 1970s caused owners to examine carefully the methods by which buildings have been designed and constructed. Delivery systems such as fast track, phased construction, value engineering, and construction management have now become the vogue. These new concepts create new legal relationships and, as would be expected, new legal problems.

The recession of the 1980s has created its own set of problems. Cutbacks in public and private works have caused contractors to go out of business, and, when work is available, the bidder lists are long and the competition is fierce. Because each party in the construction process is on a tight budget, there is a profound unwillingness to voluntarily contribute to the solution of site problems. The trend toward more and more litigation of construction disputes is exacerbated by the present economic climate. The architect is always involved in the litigation.

When a design professional is sued, usually one of two reactions occur. Either the design professional feels that he is the sole cause of all the problems on the project, or that he is the only truly innocent party in the entire matter. While there are cases in which these extreme positions may in fact be correct, in many instances the reality of the situation lies somewhere between the two extremes. That is why it is important for the design professional to know the legal standards to which he will be held when confronted with such litigation.

It is also important for the design professional to know that when a claim is made against him, he should promptly notify his insurance carrier or attorney to insure that his legal rights are protected. Because of the tendency for design professionals to react in one of the two extremes mentioned previously, it is imperative that no speculations or admissions be made until a thorough review of the situation is concluded. This book reviews the analytical process of determining facts, culpability, and resolution.

Various avenues of dispute resolution are covered, including litigation and arbitration. Both forums bring unique characteristics to the dispute resolution process. However, these forums should not be considered equally acceptable in all cases. When choosing a forum for dispute resolution, careful consideration must be given to the facts of the case, the damages being sought, and the legal issues involved. While arbitration may present a speedier approach to dispute resolution, it is not necessarily the most advantageous approach. In some instances, litigation may prove to be the better method of settling the dispute at hand. It is important for the design professional to know the differences in the two forums and how these differences may affect the ultimate outcome of a given case and how legal rights may be affected. Legal rights may be waived by the design professional by agreeing prematurely to one forum over the other.

Some comment will be made with respect to professional liability insurance—what it covers and what it does not cover. While not all professional liability policies are the same, general coverage applications are discussed. The design professional should never make the assumption that he is covered for every contingency or situation. However, by knowing the insurance coverage and the legal mechanics related to the resolution of disputes, a better working relationship among the insured, insurer, and defense counsel will be realized if a claim for professional malpractice is made.

We have assembled a most experienced group of construction litigators as co-authors. Litigators who have represented architects, owners, and contractors, and who have sued architects, owners, and contractors are included. They share their experiences to show how architects can best avoid costly and time-consuming litigation, or, if necessary, best protect themselves if litigation is unavoidable. They share their experiences as to when and how to sue design professionals if the legitimate construction interests of owners and contractors and other third parties require litigation.

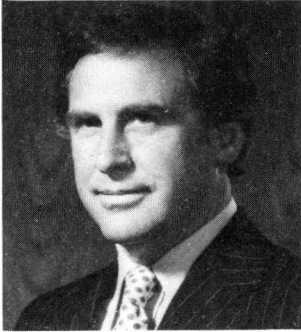
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Mr. Cushman is a nationally recognized lecturer on all phases of real estate, construction, and surety law and serves as General Counsel of the American Construction Owners Association. He is the editor and coauthor of *Doing Business in America*, *The Businessman's Guide to Construction*, *The Business Insurance Handbook*, *High Tech Real Estate*, *Teleports and the Intelligent City*, and *The Handbook for Raising Capital* (Dow Jones-Irwin); *The Construction Management Formbook* and *The Construction Business Formbook* (McGraw-Hill); *The Construction Industry Formbook* (Shepard's/McGraw-Hill); and the following titles by John Wiley & Sons: *Property Management Handbook*, *Construction Litigation: Representing the Contractor*, *Construction Litigation: Representing the Owner*, *Handling Fidelity and Surety Claims*, *Handling Property and Casualty Claims*, and *Hazardous Waste Disposal and Underground Construction Law*.



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SHORT REFERENCE LIST

Shortened forms and references are used throughout this text for authorities and organizations frequently referred to. The shortened forms and references are as follows:

Short Reference	Full Reference
Abbreviated owner-contractor agreement	AIA Document A177-1980, Abbreviated Owner-Contractor Form
AISC	American Institute of Steel Construction
Architect-engineer agreement	AIA Document C141, Standard Form of Agreement Between Architect and Engineer
ASCE	American Society of Civil Engineers
Construction management agreement	AIA Document B801, Standard Form of Agreement Between Owner and Construction Manager (1980 ed.)
Contractor-subcontractor agreement	AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor
EJCDC	Engineers' Joint Contract Document Committee
EJCDC General Conditions	Engineers' Joint Contract Documents Committee, General Conditions for the Construction Contract (1983 ed.)

Short Reference	Full Reference
General Conditions	AIA Document A201-1976, General Conditions of the Contract for Construction. Also AIA Document A201/CM-1980, General Conditions—Construction Management Edition
Owner-architect agreement	AIA Document B141, Standard Form of Agreement Between Owner and Architect
Owner-contractor agreement	AIA Document C141, Standard Form of Agreement Between Architect and Engineer
Owner-engineer agreement	EJCDC Form 1910-1, Standard Form of Agreement Between Owner and Engineer for Professional Services (1984 ed.)

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