



Advancing Relationships  
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Building Opportunities



*Facilities Management Council Program Series*

# CONSTRUCTION DEFECTS - *An Owner's Perspective*

*Presented by  
Dan A. Haynes, Esq.*

**PEPPER HAZARD** LLP  
A BUSINESS LAW FIRM

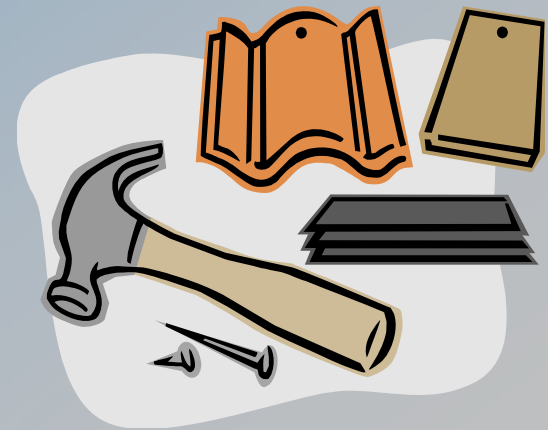
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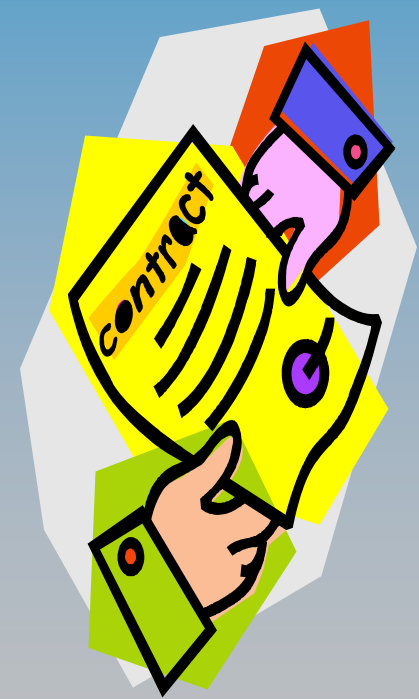
# Nature of Construction Defect Claims

- ◆ Sources
  - ◆ Exterior envelopes (façade, roofing, below grade waterproofing)
  - ◆ Structural
  - ◆ Remainder – delays, slip/fall, interior conditions
- ◆ Typical Causes
  - ◆ Improper design
  - ◆ Improper construction
  - ◆ Improper materials
  - ◆ Lack of maintenance
  - ◆ Unanticipated conditions



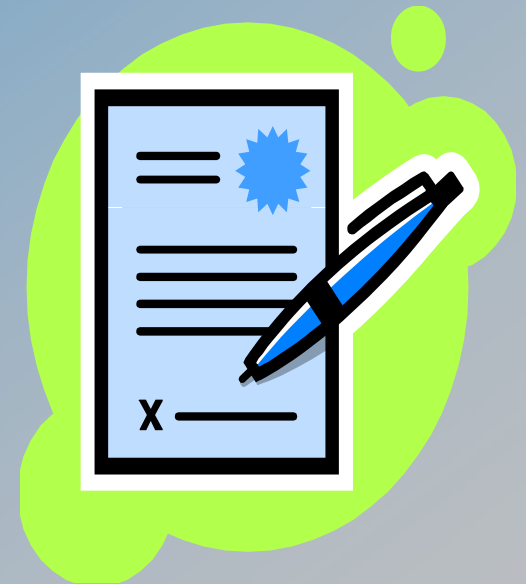
# Contractor Liability For Construction Defects

- ◆ Breach of Contract
  - ◆ Failure to satisfy performance specification
- ◆ Breach of Express Warranties
  - ◆ Of good quality and new
  - ◆ Free from defects not inherent in the quality required or permitted
  - ◆ Conform to the requirements of the Contract Documents



# Contractor Liability For Construction Defects – Cont'd

- ◆ Breach of Implied Warranties
  - ◆ Performance in a good and workmanlike manner
  - ◆ Operates similar to the tort of negligence
- ◆ Negligence
  - ◆ Economic loss doctrine considerations
- ◆ Unfair Trade Practice



# Designer Liability For Construction Defects

- ◆ Professional Malpractice
  - ◆ Standard of care which a skilled designer of ordinary prudence, engaged in the same line of business, would have exercised in the same or similar circumstances
- ◆ Breach of Express Warranty
- ◆ Breach of Implied Warranty
- ◆ Negligent Misrepresentation



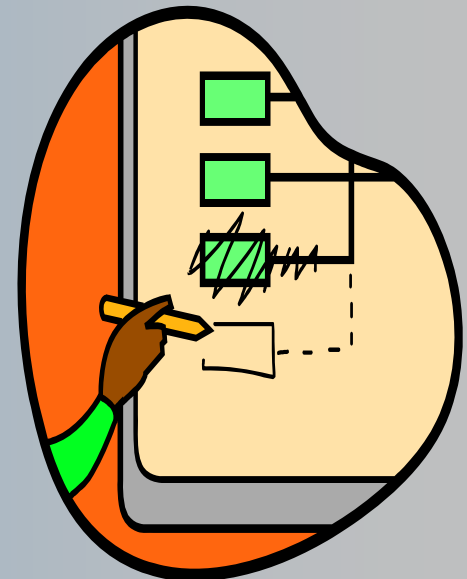
# Liability of Manufacturers And Suppliers For Construction Defects

- ◆ Breach of Contract
- ◆ Third party beneficiary
- ◆ Breach of Express Warranty
- ◆ Breach of Implied Warranties
  - ◆ Merchantability
  - ◆ Fitness for particular purpose
- ◆ Negligence
- ◆ Fraud



# Owner Remedies - Contractor

- ◆ Unilateral Directive
- ◆ Owner's Right to Reject
- ◆ Owner's Right to Correct
- ◆ Call Back Warranty
- ◆ Payment Withholding
- ◆ Claim for Damages
- ◆ Termination



# Owner Remedies - Designer

- ◆ Unilateral Directive
- ◆ Payment Withholding
- ◆ Claim for Damages
- ◆ Termination



# Latent Defect Considerations

- ◆ Statutes of limitation
- ◆ Completed operations insurance
- ◆ Surety bonds
- ◆ Professional liability insurance
  - ◆ Claims made issues
  - ◆ Extended reporting period



# Role of the Performance Bond Surety

- ◆ Duties arise upon default termination of contractor
- ◆ Responsibility for contractor's deficiencies
- ◆ Surety Defenses
  - ◆ Notice
  - ◆ Opportunity to perform
  - ◆ Material alteration
  - ◆ Defenses of principal



# Role of Insurance

## A. Builder's Risk

1. Non-standardized forms
2. Defective workmanship exclusion  
“making good faulty workmanship” v.  
“resulting damage”
3. Consequential loss exclusion

## B. Commercial General Liability

1. No occurrence
2. “Your Work” exclusion
3. Faulty workmanship exclusion



# Practical Guidelines

- A. Enumerate express warranties
  - 1. Designer gap liability concern
- B. Ensure Owner's express right to correct
- C. Define independent right of Owner to withhold monies
- D. Specify adequate commercial general liability insurance coverage
  - 1. Primary and non-contributing
  - 2. Additional insured
  - 3. Completed operations coverage
- E. Specify adequate builder's risk insurance coverage
  - 1. Responsibility for deductible
  - 2. Waivers of subrogation



# Practical Guidelines – Cont'd

- F. Specify adequate professional liability insurance coverage for designer and consultants
- G. Ensure adequate performance bond forms
  1. Express time for surety response
  2. Avoid private statute of limitations
  3. Provide coverage for warranties, delay and latent defects
- H. Be wary of limitations of liability
- I. Avoid waiver language in final payment provisions
- J. Don't waive rights through actions or inactions



# Practical Guidelines – Cont'd

- K. Send timely notices when problems are identified
- L. Provide for mandatory provisions to be included in subcontracts and purchase orders e.g., third party beneficiary status, direct warranties, dual obligee status under bond
- M. Specify minimum requirements for manufacturer and supplier warranties; with subcontractor/contractor to remain liable for deviations therefrom.
- N. Ensure consistency of dispute resolution processes between construction and design agreements.





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