

WINTER WEBINAR SERIES 2021

Construction Law

Investigating, evaluating and
resolving construction defect claims



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MEET THE PRESENTERS

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Expert witness for commercial and residential construction, roadway engineering, and construction site accidents

THE "FUZZY" SITUATION

The Thompson family hired XYZ Builders to construct a new house. XYZ builders obtained a policy from ACME Insurance to cover any losses that arose during the course of its construction of the house. It also hired multiple subcontractors to perform various parts of the project and required that each subcontractor be insured and indemnify XYZ from any losses due to the subcontractor's negligence. The city of Virginia Beach reviewed and approved engineering plans. City inspections took place at designated times throughout the process and each time, the project passed inspection. The house is completed and the sale goes through. After the sale, XYZ cancels its policy with ACME insurance. Three weeks after the sale of the house, floors in the house develop cracks, walls are cracking, and doors aren't opening or closing properly. The Thompson's consult an attorney who in turn retains an engineer to inspect the house. The engineer concludes the house was not designed properly to provide sufficient support for the amount of load on the foundation. The Thompson's file suit against XYZ builders for negligence, breach of contract, breach of implied warranty and seek damages of \$250,000. You are assigned to handle the claim for ACME Insurance.

WHAT DO YOU DO NEXT?

IS THERE A COMPENSABLE CLAIM?

Is there an occurrence? An occurrence is defined as “an accident that results in damage property or a person.” It must occur during the policy term.

Contractors typically do not have a policy that cover poor workmanship. For indemnity coverage to be triggered, there must be some incident that caused damage to property.

In our case, the plaintiff's engineer argued poor design caused the cracking floors. A claim for improper design implicates the coverage of the design professional (the architect or engineer). That policy does cover negligent work

STEP 2: EARLY INVESTIGATION



- Get your expert involved early
- Obtain critical documents

Contract Documents

- Prime/General Contractor Scope of work/responsibilities
- Subcontractor scope of work/responsibilities
- Engineer/Architect Contracts
- Engineering plans and specifications
- Construction Bid sheets/cost estimates
- Soil borings
- Site Surveys

Construction Documentation

- Meeting minutes
- Daily logs
- RFI's and responses
- RCO's and responses
- City/County Inspections
- Pay Requests
- As-Built Drawings

SITE INSPECTION

How did our home inspection match up with the plaintiff's allegations?

CRACKED EXTERIOR BRICK



CRACKED EXTERIOR BRICK



REAR DOOR OF RESIDENCE



GAP AT BASE OF DOOR WITH NO FLASHING



DETERIORATED FRAMING IN CRAWLSPACE BENEATH REAR DOOR



DETERIORATED FAMING AND SHEATHING AT REAR DOOR



1-INCH SILL PLATE AT FOUNDATION WALL



NOTCHED BEAMS



CMU PIER NOT SHOWN ON FOUNDATION PLAN



UNEVEN MASONRY JOINTS



CRACKED CEILING FINISH



CRACKED WALL FINISH



CRACKED TILE FLOORING



GAPS AT BASE OF FLOOR



HORIZONTAL SHIFT



SLOPING FLOORS



SLOPING FLOORS



CRACKED CONCRETE SIDEWALK



STEP THREE: WHO CAN I SUE?

- The inspection indicated the foundation was uneven, and the engineering plans were deficient.
- The client's business interests have to be considered. Often, suing down the chain is more acceptable than moving up the chain.
 - GC will sue SC, but SC's don't want to lose their stream of work by suing a GC.
 - Beware of bringing in the professionals. Suing an architect or an engineer can make you adverse to a sophisticated defendant.

NEGLIGENT DESIGN CLAIM

**How can you tell if the problems are
from poor work or poor design?**

DESIGN OR CONSTRUCTION ERROR?

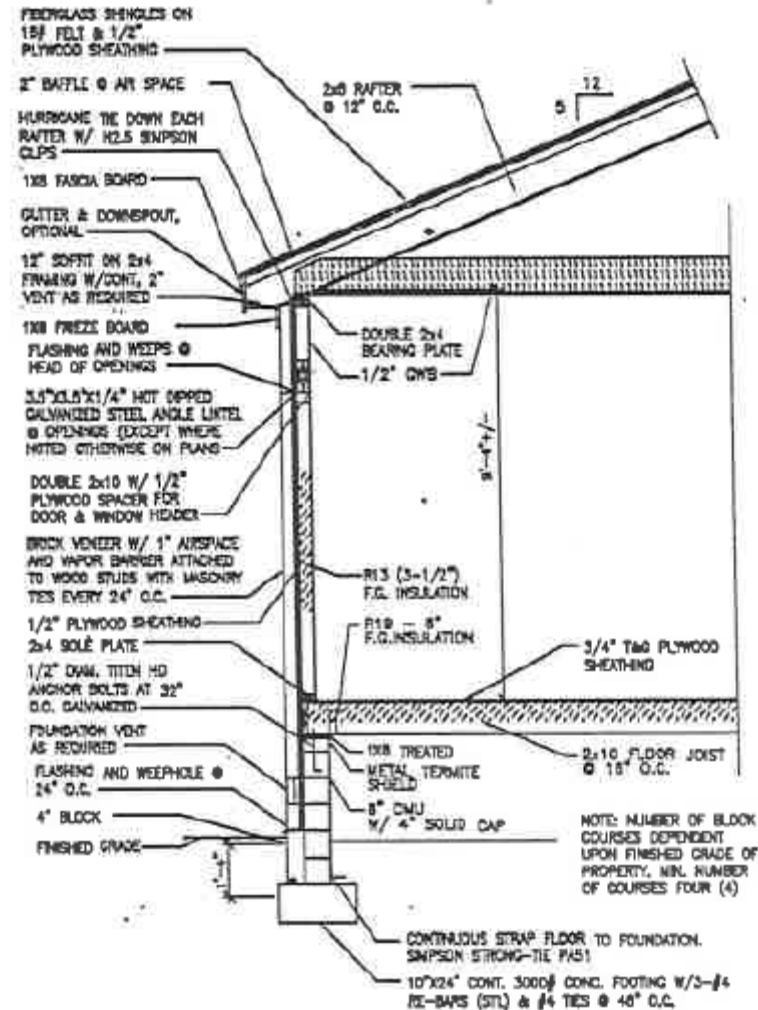
Omission – Omitting information that should have been included as part of scope, necessary part of construction (required as a part of another item), required by code, etc...

Error – Information presented incorrectly; design defect, wrong part, incorrect elevation, slope, etc...

Construction Inspections – items missing during construction inspections and/or defective item approved improperly (not strictly a design error, this is more a construction management error).

Documents to review – Contracts between owner and design engineer, approved design plans, information engineer relied on to complete design (soils information, site survey, owners conceptual design, communications between owner and designer), code review.

SECTION FROM PLAN SHOWING 1X8 SILL PLATE



TYPICAL WALL SECTION
 SCALE 1/2" = 1'-0"

[illegible]

CONTRIBUTION

If the plaintiff can recover against the defendant, then third party defendants should share in paying for the judgment.

To trigger coverage for the third party defendant, make sure the claim is for negligence that resulted in the event causing damage.

Breach of contract claim is often the stronger legal position, and should be included in the third Party Complaint, but those claims are typically not covered.

To survive demurrer to the negligence claim, position it as a derivative claim based on the homeowner's potential claim not asserted directly against the third party defendant.

EQUITABLE INDEMNIFICATION

- Available remedy when the named defendant is liable based on its relationship to the plaintiff, but was not negligent.
- This cause of action is potentially viable in construction cases because the law attaches implied warranties to work being done for consumers.
- The party seeking to prove equitable indemnification has to have “clean hands.” E.g., No knowledge of the poor workmanship by a subcontractor that was passed on to the new home owner.
- Equitable indemnification seeks to pass on the entire amount of the judgment onto the third party defendant.

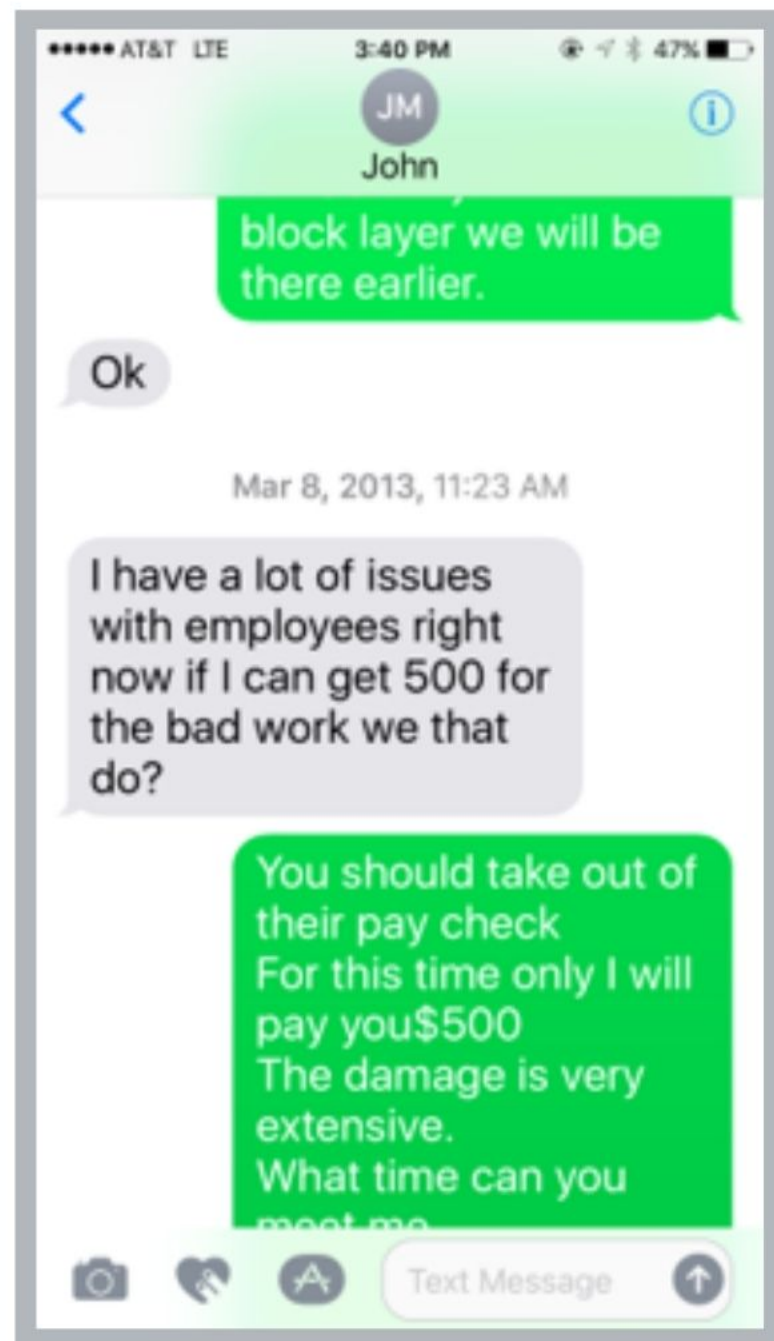
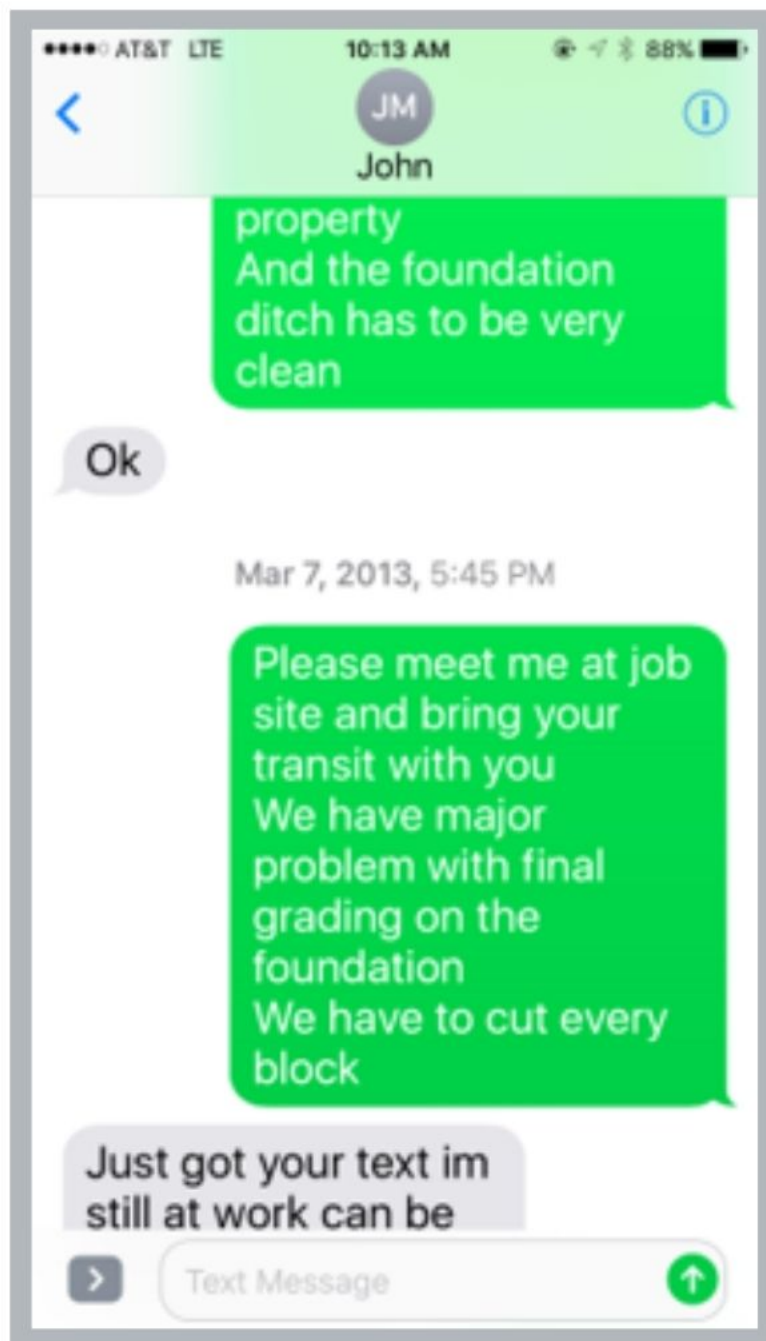
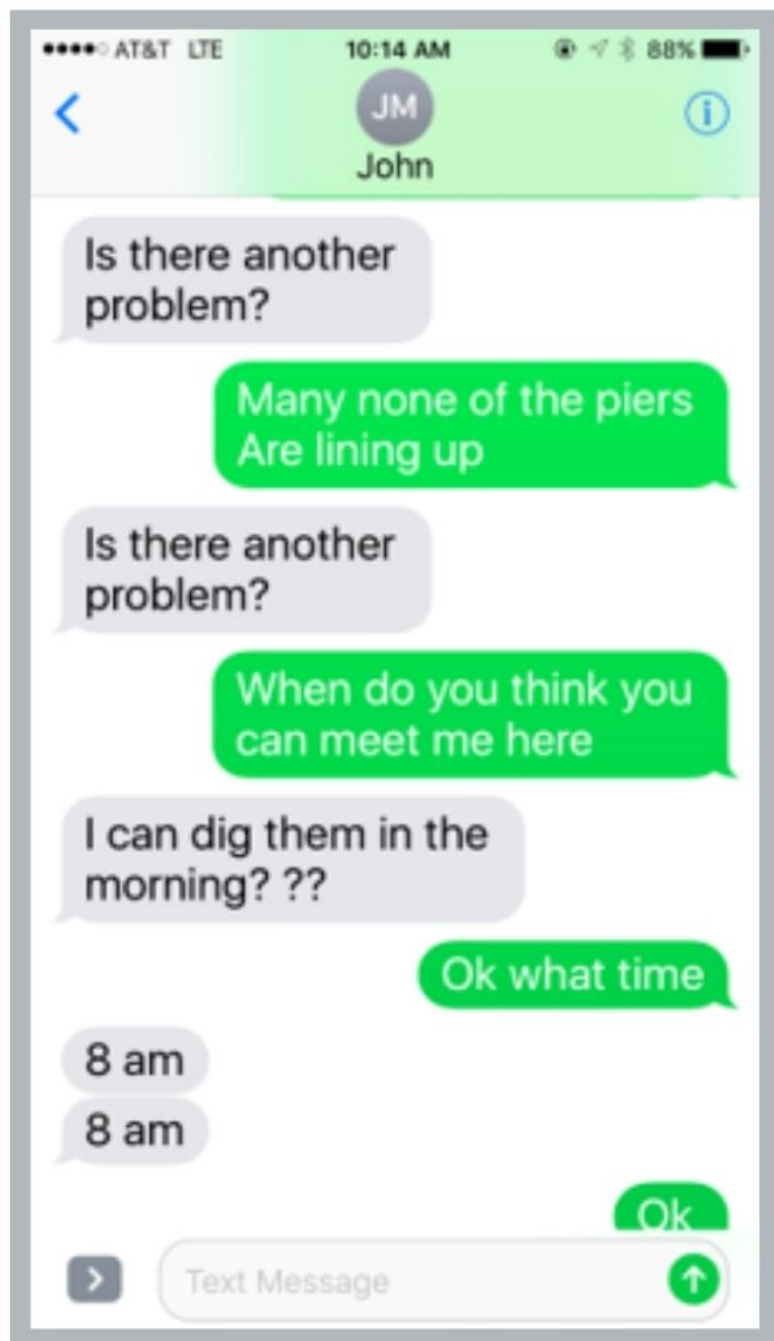
DID OUR GC HAVE CLEAN HANDS?

Inspection Evidence

DID GC KNOW ABOUT FOUNDATION/SURVEY PROBLEMS?

Foundation and framing
modifications from
original design plans

GC text messages with
mason and surveyor
discussing errors



CONTRACTUAL INDEMNIFICATION

Arises from contractual language that explicitly grants one party the right to pass on the defense and indemnity of a lawsuit to another party and its insurer.

These claims almost universally run down the chain. The general contractor typically requires the subcontractor to sign off on an indemnification agreement before starting work.

Often paired with a requirement that the general contractor will be named on the subcontractors policy as an additional insured. However, the policy controls the coverage, not the contract. If the GC is not named as an AI, the GC has a breach of contract action against the sub, but does not get the coverage that it should have received under the terms of the contract.

THE ANTI-INDEMNITY TRAP

- Virginia, and many other states, have enacted statutes to prevent subcontractors from assuming too much liability. Va. Code § 11-4.1
- Virginia falls into the category of states that prevent the subcontractor from assuming liability for the indemnitee's sole negligence or partial negligence. In other words, indemnitee can only pass on liability to sub if the indemnitee was not negligent.
- Other states stop at preventing the subcontractor from assuming liability for the indemnitee's sole negligence, but do allow indemnification for joint negligence.
- The Virginia statute does not bar agreements by insurance companies, so a defendant could benefit from being named as an additional insured, even if they are not able to enforce the sub to formally indemnify them.

PROVING CAUSATION

Further testing, calculations and modeling after initial inspection

Review code requirements vs plans and as built conditions

Calculations for floor framing/beam spans

Review soils information to eliminate other causes/contributors

CALCULATING DAMAGES

What information is necessary to calculate the cost of repairs?

- Review original bids for unit cost information, items included
- Compare repair cost estimates from contractor/other parties
- Direct cost of repairs – repair in place, remove and replace, need to modify design due to unforeseen/changed site conditions, removal and reinstallation of other items that are related and/or in the way, sequential construction items (one part must be done first).
- Reduced property values due to incorporated repairs (need letter of final inspection stating repairs were done properly). Think of it like the Carfax information, you want to know if the car had been previously wrecked and repaired, same for a home. Any home sold with a mortgage from a bank will require a home inspection that may uncover issue related to construction design defects that have been repaired.

WORKING TOWARDS RESOLUTION

- We know who caused the problems, and how much the problems will cost to repair. How can we get the case settled?
- Construction claims involve litigants that had an amicable business relationship before the case arose.
- Business interests of both parties can be used to establish a framework for settlement if the parties are willing to work together in the future. Sometimes, a traditional mediation locks the parties into an adversarial framework that makes the case harder to settle.
- Discounts on services from a sub to a GC can be more valuable to the GC than direct payment. It can enable them to be the low bidder on a job or multiple jobs that will bring in more profits than the case settlement. Of course, these arrangements have to be in good faith based on the actual value of the claim and cannot be used in a way that would violate anti-trust laws.



QUESTIONS?

WE'D LOVE TO HEAR FROM YOU!

Thank you!

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