

A Perfect Storm

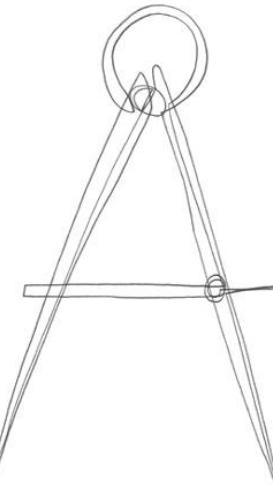
Lessons Learned from a Project Gone Wrong

Risk Control for Architects, Engineers and Environmental Professionals

The Resort at Pelican Hill, Newport Coast, California

September 23, 2016

beazley



A “Messy” opportunity for Mr. Clean Environmental



beazley

Messy makes a big Claim

Due to alleged design and construction errors by Mr. Clean and Goliath on the project, Messy demands millions in compensation for...

- Damage to Messy's property
- Costs to design, build and operate the system
- Millions of "lost profits" due to the delay in completing remediation of the property
- Messy's attorneys' fees

OH DEAR DID WE NEGLECT
TO READ THE CONTRACT
THOROUGHLY?



Mr. Clean's contract with Messy

- Standard of care
- Limitations of liability
 - Consequential damages waiver
- Dispute resolution
 - Attorney fee shifting

Standard of Care

- The appropriate standard – “that level of usual and customary professional skill and care **ordinarily exercised** by professionals rendering **similar** services in the same geographic area”
- It is **not** the “highest” or “best” standard of care
- It is **not** a standard of perfection

Standard of Care - Examples

- "The Design Professional's services shall be performed in a manner consistent with that degree of skill and care ordinarily exercised by practicing design professionals performing similar services in the same locality, at the same site and under the same or similar circumstances and conditions. The Design Professional makes no other representations or warranties, whether expressed or implied, with respect to the services rendered hereunder."
- EJCDC, E-500, Section 6.01A: "The standard of care for all professional engineering and related services performed or furnished by the Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. The Engineer makes no warranties, expressed or implied, under this Agreement or otherwise, in connection with Engineer's services.

Watch Out: Standard of Care



- Warranties, guarantees, certifications
- Perform services to the “highest”, “best”, “first-class”, “first-rate” standard of care as opposed to ordinary, reasonable standard
- Perform in accordance with Client’s standards
- Fiduciary duty obligations
- **Suggested qualifying language for Client standards:** “...nothing herein shall be construed as holding Design Professional to a standard of care that is more stringent than the general accepted standard of professional skill and care ordinarily exercised by similarly situated professionals...”

Limitation of Liability

- Will it provide any (significant) protection?
 - Limitation amount options
- Be aware of any exceptions to the limitation
- Is it enforceable?

Tips:

- Include Design Professional/Consultant's officers, directors, employees, agents, and consultants
- Include all causes of action
- Ensure the limitation amount is reasonable

Limitation of Liability - Example

"To the fullest extent permitted by law, the total liability, in the aggregate, of Design Professional and Design Professional's officers, directors, employees, agents, and consultants to Client and anyone claiming by, through or under Client, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Design Professional's services, the Project or this Agreement, from any cause or causes whatsoever, including but not limited to, negligence, strict liability, breach of contract or breach of warranty shall not exceed the total compensation received by Design Professional under this Agreement, or the total amount of \$_____, whichever is greater."

Waiver of Consequential Damages

- “Neither the Client nor the Consultant shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.”

Dispute Resolution

Push for mediation as condition precedent to litigation

Mediation:

- Voluntary
- Non-binding
- Confidential
- Opportunity for Creative Resolution

Arbitration:

- No rules of evidence or discovery
- Binding
- Arbitrary Decisions
- No appeal



Dispute Resolution - Example

"Prior to the initiation of any legal proceedings, the parties agree to submit all claims, disputes or controversies arising out of or in relation to the interpretation, application or enforcement of this Agreement to non-binding mediation.

Mediation shall be conducted under the auspices of the American Arbitration Association or such other mediation service or mediator upon which the parties agree. The party seeking to initiate mediation shall do so by submitting a formal written request to the other party to this Agreement. This Article shall survive completion or termination of this Agreement, but under no circumstances shall either party call for mediation of any claim or dispute arising out of this Agreement after such period of time as would normally bar the initiation of legal proceedings to litigate such a claim or dispute under the applicable law."

Watch Out: Attorney-Fee-Shifting



"In the event that the Client or Design Professional shall retain the services of an attorney in order to bring a legal action against the other, including any action for non-payment or breach of this Agreement, the Client and Design Professional agree that the prevailing party shall be entitled to recover from the non-prevailing party its costs of enforcing or defending same, including but not limited to, reasonable attorney's fees, expert witness fees and court costs."

- **Loser pays the winner's fees**
 - Keep or delete?
 - **Pro**—beneficial if you prevail
 - **Con**—problematic from insurability perspective
 - Ultimately, it's a business decision, but could be costly!

Mr. Clean's subcontract with Goliath

- Scope of services – who's responsible?
- Indemnity obligations

Scope of Services: “CDC”

www.xkcd.com



- **Clarity**
 - Avoid ambiguous language
 - Consider the client’s level of sophistication
- **Definition**
 - Write a detailed scope that can help manage expectations
 - Clearly define limits of your basic services
 - Clearly define – by inclusion– the services you will provide
 - Also list excluded services, but clarify that list is not all-inclusive
 - Avoid open-ended scope
- **Competency**
 - Manpower and skill set to carry out scope
 - Use consultants as necessary

Watch Out: Indemnity



- Potentially creates liability not based on your fault:
 - “any claim that arises in connection with Design Professional’s services”
 - “any claim not caused by the negligence of the party indemnified”
- Potentially eliminates benefit of other party’s contribution to the cause of damage
 - “claims caused by Consultant’s negligence regardless of the negligence of the party being indemnified”

Watch Out: No Good Deed Goes Unpunished...

- After the incident, Messy insists that Mr. Clean (and Goliath) help Messy assess the damage and persuade the regulators that the project should continue... what should they do?



"

- ✓ Notify your brokers and insurers ASAP
 - ✓ Use Pre-Claims Assistance
- ✓ Consider having counsel in the background
 - ✓ Avoid any "admissions of liability"

Copyright & Legal Disclaimer

- This Presentation is protected by US and International Copyright laws. The reuse, duplication or reproduction in whole or in part, other than distribution for informational purposes within your own firm, is prohibited without the written approval of Beazley Group.
- This material is intended for informational purposes on the subject and should not be taken as legal advice. Please consult appropriate advisors for guidance applicable to your individual circumstances and/or state requirements.