

Defending Against a High-Stakes, Bet-the-Company, Multi-Million Dollar Property Damage Claim

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In the words of the *Gambler*, you gotta know when to hold 'em, know when to fold 'em, know when to walk away and know when to run. However, when faced with a multi-million dollar property damage claim, before you fold 'em, or worse yet, run, let's see if there aren't still a few aces in the hole.

The name of the game is lawsuits and more often than not, it's not *if* you'll get sued, it's *when*. So let's say you deal into a multi-million dollar contract to build an apartment complex. At the table are the owner and its design professionals providing the plans and specifications, you, the general contractor, and the hired subcontractors to perform the work. You pray Lady Luck is on your side long enough to walk away a winner. Along the way, you could run into any number of bad beats – a bid bust by a subcontractor, cash flow problems from the owner, or differing site conditions requiring extra work. But today the tilt is property damage, and as the general contractor, the owner is looking for you to bankroll the millions of dollars in property damage suffered because of negligent construction.

As we all know, your first act should be to put your general liability insurance carrier on notice. Your insurance company will either allow you the choice of legal counsel, and/or will assign defense counsel to defend you. Next, counsel will evaluate the “risk transfer” to determine who else should share in the liability for the owner's alleged damages. The obvious first targets are the subcontractors who actually performed the alleged “defective” work. They too should have general liability insurance coverage, and, if negotiated under their subcontract agreement, an additional insured (AI) obligation. The subcontractor's AI may afford you, the general contractor, a defense paid for by the subcontractor's general liability insurance carrier.

If the project involves public works and

bad plans, you might be able to force the owner to call your bet under the *Spearin* Doctrine. The *Spearin* Doctrine¹ is essentially an “owner's” warranty regarding the sufficiency of certain types of plans and specifications.

This doctrine: 1) requires the owner to certify that design plans and specifications are suitable to create the end product; and 2) prevents the owner from contractually shifting all responsibility onto the con-

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tractor for defective plans and specifications. Applying the principles of the *Spearin* Doctrine, California courts have found that a contractor is not liable for construction defects when the defects are the result of insufficient owner-furnished plans and specifications.²

Along the same lines, you might also have a counterclaim against the owner for failing to disclose its superior knowledge regarding the project. California courts have found public entities liable to contractors, under a breach of contract theory, when public entities fail to disclose conditions for which they have superior knowledge.³

Sitting at the poker table we have the owner, the general contractor and the subcontractors – but is that really everyone? If the problem lies in bad plans and specifications, why haven't the design professionals, who actually created the defective plans and specifications, anted-up?



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If they were waiting for a formal invitation, it came last year in the form of a case entitled *Beacon Residential Community Assoc. v. Skidmore, Owings & Merrill, LLP*.⁴ In this case, the California Court of Appeals found that even without privity of contract, an architect can be held legally liable for negligently prepared plans – thus enlarging the scope of third parties to whom a design professional owes a duty of care.

In *Beacon*, plaintiffs alleged that the architects for the project caused multiple defects due to negligent architectural and engineering designs. The architects claimed they owed no duty of care to third parties, like the general contractor, who did not have a contract with the architect. The California Court of Appellate sided with the contractor and held that even without privity of contract, the architect could still be held liable to a third party for a negligent design that causes property damage.

So the next time you find yourself out of aces in a high-stakes, bet-the-company, multi-million dollar property damage claim, make sure all the right players are invited to the table, and that you've played your cards tactically regardless of the hand you are dealt. You might be surprised how proper strategy can ensure the right parties are covering your bet. ■

¹ As codified in California under the Public Contracts Code Sections 10120 and 1104.

² *Atowich v. Zimmer* (1933) 218 Cal. 763.

³ *Los Angeles Unified School District v. Hayward Construction Co* (2010) 49 Cal.4th739.

⁴ (2012) 2012 Cal.App.Lexis 1267.

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