

Design Professional Project



Legal Risks and Prevention

Presented By:
Geoffrey A. Bryce



Geoff Bryce

Managing Partner

Bryce Downey & Lenkov LLC

200 N. LaSalle Street, Suite

2700, Chicago, IL 60601

(312) 377-1501

gbryce@bdlfirm.com

www.BDLFIRM.com

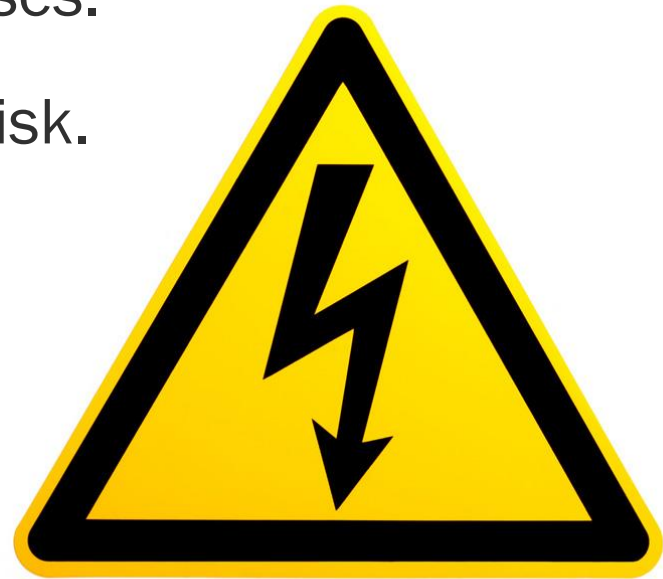


BRYCE DOWNEY & LENKOV
LLC

Legal Risks and Prevention

1. Liability to Third Party

1. Liability to Third Parties.
 - a. Work site accidents defenses.
 - b. Standard of care limiting risk.
 - c. Giving advice.
2. Construction defects.
 - a. Economic loss.
3. Trial strategies.

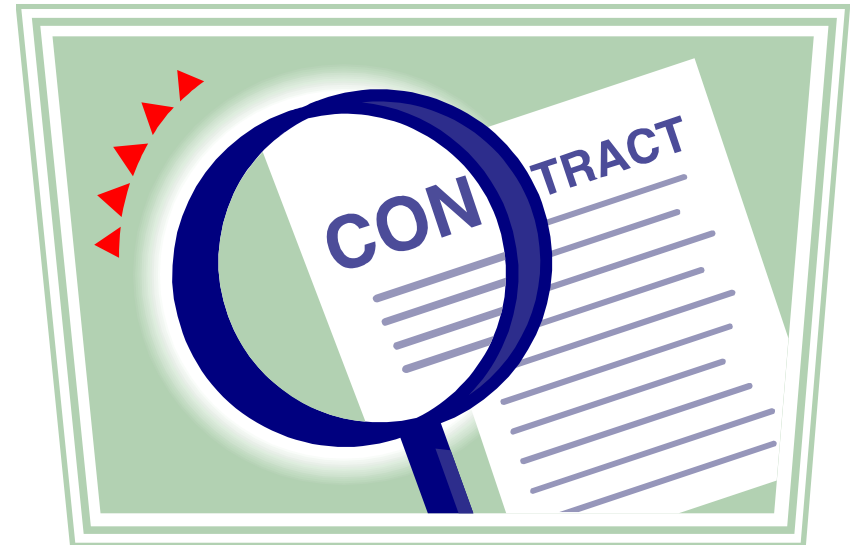


Legal Risks and Prevention

1. Liability to Third Party

But my liability is limited to my contract?

- ☞ Not to third-parties in tort.
- ☞ I want to be an additional Insured!



Legal Risks and Prevention

1. Liability to Third Party

- ⌘ Standard practice for contractors to name design professionals as additional insureds under the contractors CGL policy.
- ⌘ Does a CGL policy cover you?
- ⌘ Typical professional liability exclusion.
- ⌘ Typical AI exclusion.



Legal Risks and Prevention

1. Liability to Third Party

- ✎ Typical professional liability exclusion.
- ✎ CGL professional liability endorsement exclusion.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CONTRACTORS – PROFESSIONAL LIABILITY

* * *

- I. This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of or failure to render any professional services by your or on your behalf, but only with respect to either or both of the following operations:

Legal Risks and Prevention

1. Liability to Third Party

- a. Providing engineering, architectural or surveying services to others; and
 - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.
- II. Subject to Paragraph 3., below, professional services include:
 - a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
 - b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.
- III. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with construction work you performed.

Legal Risks and Prevention

1. Liability to Third Party

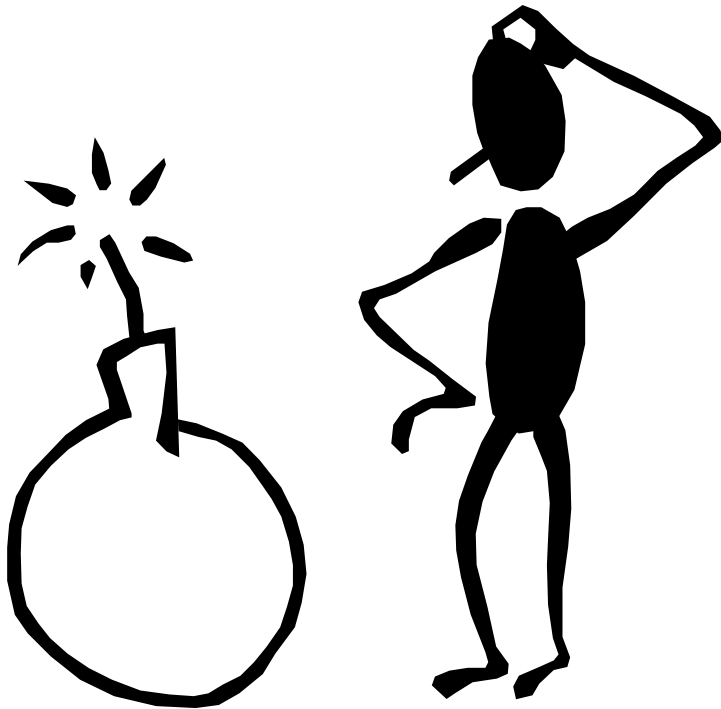
∞ Typical AI exclusion

This insurance provided to the additional insured does not apply to:

- a. “Bodily injury”, “property damage” or “personal and advertising injury” arising out of the:
 - 1) Rendering of, or failure to render, any professional architectural, engineering or surveying services, including:
 - a) The preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
 - b) Supervisory, inspection, architectural or engineering activities.

Legal Risks and Prevention

1. Liability to Third Party



- a. Sole negligence or willful misconduct of, or for defects in design furnished by, the additional insured or its “employees”.
- b. “Bodily injury” or “property damage” arising out of “your work” included in the “products-completed operations hazard”.

Legal Risks and Prevention

1. Liability to Third Party

- ✎ No CGL coverage.
- ✎ Case law.
- ✎ Split decisions.



Legal Risks and Prevention

1. Liability to Third Party

☞ *St. Hudson Engineering v. Pennsylvania National Mutual Casualty Company*, 388 N.J. Super 592, 909 A.2d 1156 (N.J.Ct.App 2006).



Legal Risks and Prevention

1. Liability to Third Party

- ✎ A pier collapsed in the Delaware River killing 3 workers.
- ✎ Workers sued several parties including the engineer.
- ✎ Contractor named engineers AI on Contractor's CGL policy.
- ✎ Carrier sought declaration that CGL policy did not cover "professional liability".



Legal Risks and Prevention

1. Liability to Third Party

- ☞ Claim against engineering firm was failure to warn of collapse hazard.
- ☞ Court held covered because claim did not fall into “work” performed by engineers as defined in the policy.
- ☞ Policy construed to provide broadest coverage.



Legal Risks and Prevention

1. Liability to Third Party



- ✎ *North Counties Engineering, Inc. v. State Farm General Insurance Company*, (2014) 224 Cal.App.4th 902, 169 Cal.Rptr.3d 726.
- ✎ Held exclusion did not apply to what the engineers were alleged to have omitted.
- ✎ Failure to recommend additional permits.
- ✎ For construction defects (engineers did actual construction work).

Legal Risks and Prevention

1. Liability to Third Party



- Key is:
- What is the duty of care and how is it defined?

Legal Risks and Prevention

1. Liability to Third Party



- ∞ New York, Illinois, Texas, California.
- ∞ Generally that degree of skill and care practiced by similarly situated design professionals in the community where the project is located.
- ∞ “under a duty to exercise ordinary reasonable care, technical skill and ability and diligence...” (Illinois).
- *Miller v. De Witt*, 59 Ill.App.2d 38, 89-91 (1965) *aff'd. in part and rev'd. in part* (1967), 37 Ill.2d 273; see also *Polak v. Person*, 232 Ill. App. 3d 505, 514, 597 N.E.2d 810, 815 (1st Dist. 1992)

Legal Risks and Prevention

1. Liability to Third Party

- ✂ NY – the standard of professional care usually exercised by such professionals in the community. *Id.*
 - *Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Associates, P.C.*, 91 N.Y.2d 256, 257 (1998) *Hotel Utica, Inc. v. Armstrong*, 62 A.D.2d 1147, 404 N.Y.S.2d 455 (4th Dep't 1978); *Westmount Intern. Hotels, Inc. v. Sears-Brown Associates, P.C.*, 65 N.Y.2d 618, 491 N.Y.S.2d 150, 480 N.E.2d 739 (1985).
- ✂ CA – is the level of skill and competence among the members of the profession in the community.
 - *Paxton v. Alameda County*, 119 Cal.App.2d 393, 406 (1953); *Montijo v. Swift*, 219 Cal.App.2d 351 (1963).

Legal Risks and Prevention

1. Liability to Third Party



- ⌘ Can my common law tort duty be limited to what my contract defines as my responsibility?
- ⌘ Does this give me protection?
- ⌘ Yes.

Legal Risks and Prevention

1. Liability to Third Party

- ∞ Illinois
- ∞ *Thompson v. Gordon*
- ∞ Defendant was driving a car and swerved to avoid hitting another car and vaulted over the median and landed on Thompson car killing the driver.
- ∞ Drivers estate sued the engineers who recently designed a bridge replacement.
- ∞ Plaintiff claimed engineer should have provided a median barrier.
- ∞ Engineer only agreed to design a median replacement.
- ∞ Engineer not liable.
- ∞ Duty of engineer defined by professional service agreement.



Legal Risks and Prevention

1. Liability to Third Party

- ✎ But my liability is limited to the amount of my contract?
- ✎ Not to third parties in tort liability.
- ✎ Simply state affirmatively: - “we, _____, have no onsite safety responsibilities.” Project safety is professional responsibility.



Legal Risks and Prevention

1. Liability to Third Party

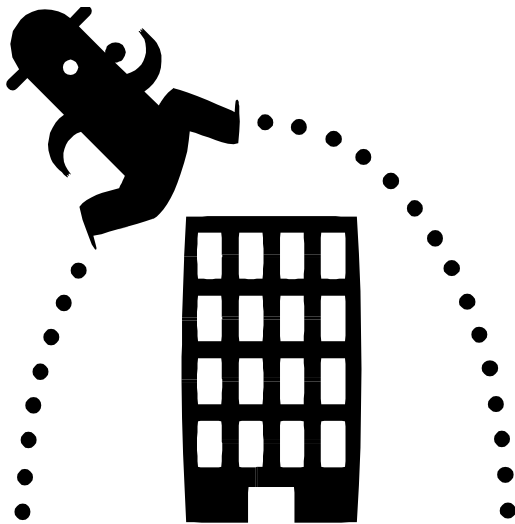
§ 3.6.1.2 of B101

- The Architect shall advise and consult with the Owner during the Construction Phase Services.
- The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement.
- The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work,
- nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.
- The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

Legal Risks and Prevention

2. Economic Loss as Construction Defects

Case Study:



- ⌘ Engineer hired to do a one day observation of 8 story 100 year old masonry building converted from a warehouse to apartments.
- ⌘ After inspection the developer converts building to condominium units.
- ⌘ Engineers report not clear whether statements are fact or opinion.
- ⌘ Can engineer be sued for negligence in failing to report the nature and extent of major defects?

Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ⌘ Exception: Negligent misrepresentation.
 - *Tolan and Son, Inc. v. KLLM Architects*, 308 Ill.App.3d 18, 719 N.E.2d 288 (1st Dist. 1999).
- 1) Defendant is in the business of supplying information for the guidance of others in their business dealings.
- 2) Defendant provided information that constitutes a misrepresentation.
- 3) Defendant supplied the information for guidance in the Plaintiff's business dealings.

Legal Risks and Prevention

2. Economic Loss as Construction Defects

- 4) Courts must undertake a “precise, case-specific inquiry.”
- 5) The determination is dependent “upon the nature of the information at issue * * * and its relation to the kind of business being conducted.”
- 6) An allegation that defendant is in the business of providing information for the guidance of others is a legal conclusion that plaintiff must support with well-pleaded factual allegations.

Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ✂ What can I do to reduce risk?
- ✂ Contractual limit on damages recoverable.



Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ✎ Contractual liability limits damages to amount of contract?
- ✎ New York – Yes
- ✎ Illinois – Yes
- ✎ Texas – Yes
- ✎ California – Yes



Legal Risks and Prevention

2. Economic Loss as Construction Defects

☞ Contract administration.

☞ AIA A201 §.



Legal Risks and Prevention

2. Economic Loss as Construction Defects

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and

(Continued)

Legal Risks and Prevention

2. Economic Loss as Construction Defects

(Continued)

inspections, to correction of minor deviations from the Contract Documents prior to completion and to specification qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance for a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means...

Legal Risks and Prevention

2. Economic Loss as Construction Defects

§ 9.10 FINAL COMPLETION AND FINAL PAYMENT

§ 9.10.1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, after approval by Owner the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's onsite visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

Legal Risks and Prevention

2. Economic Loss as Construction Defects



- ☞ There is a risk.
- ☞ Re-word AIA A201.
- ☞ Compare AIA A201 with B101.

Legal Risks and Prevention

2. Economic Loss as Construction Defects



- ∞ Limit damage to contract value; or
- ∞ Limit to amount of E&O coverage.

Legal Risks and Prevention

2. Economic Loss as Construction Defects

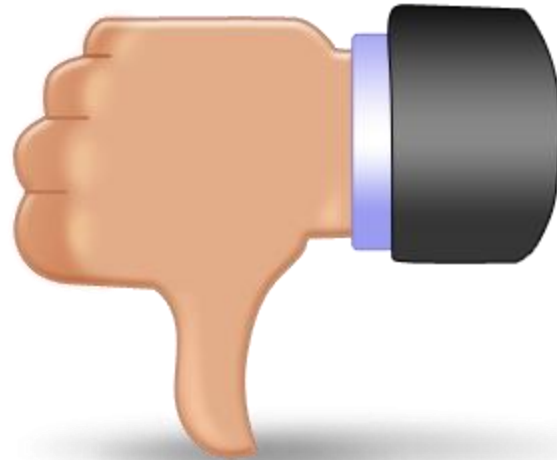
- ⌘ What kind of damages can an owner claim?
- ⌘ Can an owner claim lost profit, repair or replacement costs against the design professional?



Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ✎ Illinois – No
- ✎ Texas – No
- ✎ California – No
- ✎ New York – No



Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ✎ Owner cannot recover economic loss.
- ✎ Breach of contract damages only.



Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ⌘ That does not mean the design profession will not face some risk.
- ⌘ Does the owner of a Burger King owe a duty to a patron to design a facility capable of protecting the patron from an out of control automobile which crashes through the walls of the restaurant?
- ⌘ Yes, *Marshall v. Burger King*, Ill.Sup. Cite 856 N.E.2d 1048 Ill.Sup. (2006), *Marshall v. Burger King*, 222 Ill.2d 422, 856 N.E.2d 1048 (2006).



Legal Risks and Prevention

2. Economic Loss as Construction Defects

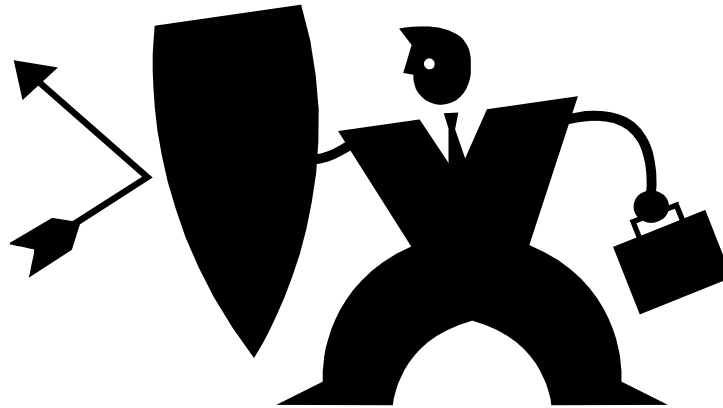
- ✂ Plaintiff's decedent was sitting inside the Burger King and was struck and killed when an automobile driven by Defendant crashed through the wall and struck the decedent.
- ✂ The accelerator stuck.
- ✂ Court ruled Burger King did not “exercise due care” in the design, construction and maintenance of its restaurant.



Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ✂ What would you expect Burger King to do as to the design professional?
- Third party complaint.
- What can you do to protect yourself.



Legal Risks and Prevention

2. Economic Loss as Construction Defects

- ✎ Indemnity? Would client give indemnity to you?
- ✎ Agreement to name design professional as AI? – No help
- ✎ Does scope of duty come at play? - Yes
- ✎ What does the contract say?
- ✎ Can I limit my exposure to contract sum? As between you and your client but not third parties.



Questions?



Geoff Bryce

Managing Partner

Bryce Downey & Lenkov LLC

200 N. LaSalle Street, Suite

2700, Chicago, IL 60601

(312) 377-1501

gbryce@bdlfirm.com

www.BDLFIRM.com



BRYCE DOWNEY & LENKOV
LLC