

Welcome to  
**HALL & COMPANY**  
Serving Architects, Engineers and Environmental Consultants  
AE Resource Webinar

**Understanding Claim Exposures and Contractual Risk Transfer**

Presented by  
**William S. Thomas, Esq.**  
Pitzer Snodgrass, P.C. thomas@pspclaw.com  
St. Louis, Missouri pspclaw.com

 trial tested.

---

---

---

---

---

---

---

---

---

---

**AIA Continuing Education**

*Hall & Company is a Registered Provider with the American Institute of Architects Continuing Education Systems. Credit earned based on the completion of this program will be reported to AIA/CES for AIA Members.*

*This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement for the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to the specific materials, methods, and services will addressed at the conclusion of this presentation.*

---

---

---

---

---

---

---

---

---

---

Alexander Pope  
"...to err is human..."



---

---

---

---

---

---

---

---

---

---

## Learning Objectives

- Clearer understanding of potential risks and exposures
- Appreciation of consequences of contract language
- Tools to identify and limit contractual risk exposures
- Mechanisms for shifting risk through contract provisions

---

---

---

---

---

---

---

---

## Understanding Potential Risks and Exposures

HALL & COMPANY

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

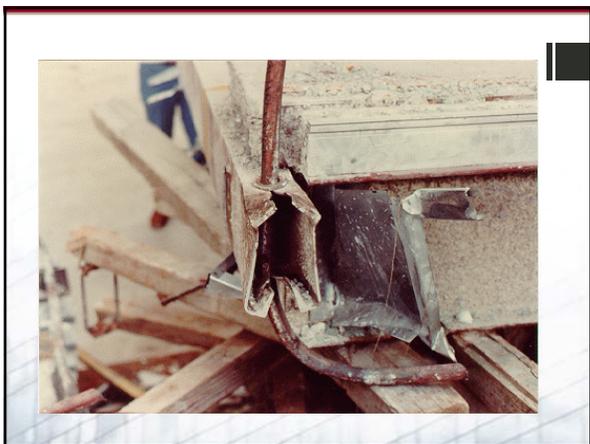
---

---

---

---

---



---

---

---

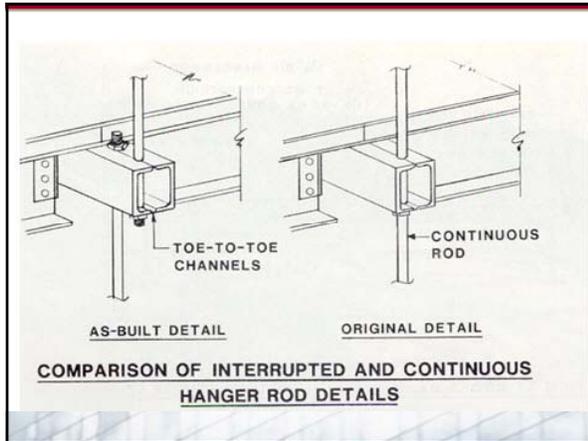
---

---

---

---

---



---

---

---

---

---

---

---

---

### Understanding Potential Risks and Exposures

- Who files claims against design professionals?
  - Third parties
  - Contractors
  - Your client

---

---

---

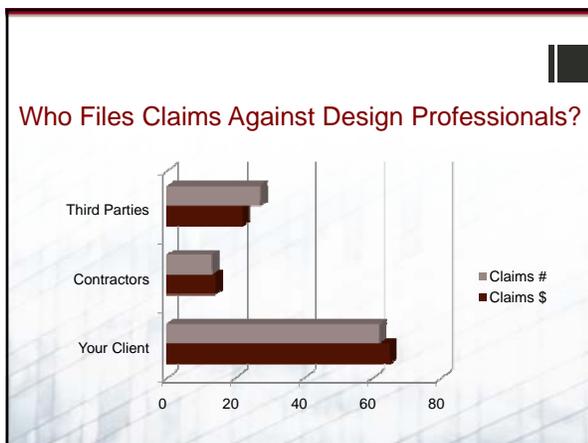
---

---

---

---

---



---

---

---

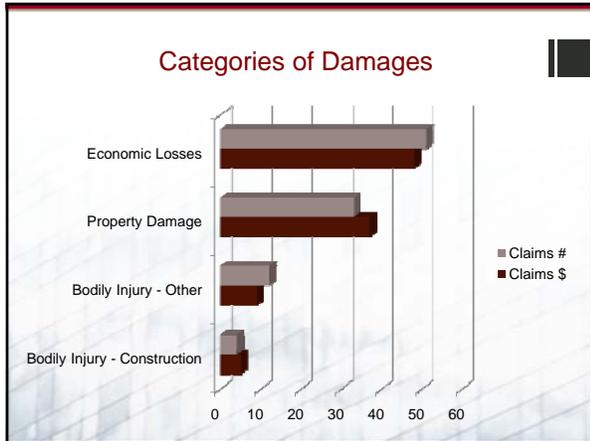
---

---

---

---

---



---

---

---

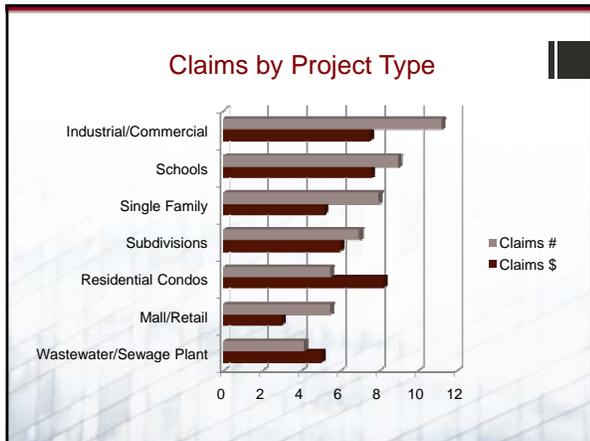
---

---

---

---

---



---

---

---

---

---

---

---

---

### Understanding Potential Risks and Exposures

- What "costs" can you expect?
  - Deductible out-of-pocket expense
  - Non-productive time of staff
  - Increased premiums
  - Loss of outstanding fees
  - Client relationships
  - Bad publicity
  - Reputation of firm

---

---

---

---

---

---

---

---

## Understanding Potential Risks and Exposures

- What things might not be expected?
  - Board complaint
  - Non-covered claims
    - Contractual liability
    - Admitted liability
    - Governmental/Statutory penalties
  - Demands for indemnity and defense
  - Possible personal liability

---

---

---

---

---

---

---

---

## Consequences of Contract Language

HALL & COMPANY

---

---

---

---

---

---

---

---

### Trench Collapse Kills Two In Millstadt



Recommend Tweet 0 Share New (0)



By: Sean Conroy  
March 11, 2009  
MILLSTADT, IL (KTVI - myFOXst.com)—  
A call for help at 3 PM leads to an evening-long effort to free two men from beneath several hundred pounds of saturated soil in Millstadt. The sub-contractors were digging a trench for the Millstadt Sewer Plant when the walls came crashing down.  
As first the work to free the men was feverish then the work turned frustrating as a rescue effort quickly turned into a recovery job looking for bodies not survivors.  
"It has been a fairly slow and tedious process because of the nature of the trench collapse and the size of the hole," says St. Clair Special Emergency Services Deputy Chief Brian Donley.

Topics  
Illinois  
Death

---

---

---

---

---

---

---

---

April 15, 2011, St. Clair County, Illinois jury verdict  
 \$3.7 million to family of worker killed in trench collapse

The screenshot shows a news article with the headline "Jury sides with victim in deadly Hillside trench collapse". The text mentions a \$3.7 million verdict for the family of a worker killed in a trench collapse. It also includes a small photograph of a construction site.

---

---

---

---

---

---

---

---

---

---

### Consequences of Contract Language

- Contracts 101
- Every word in your contract potentially has consequences
- "4 Corners Rule"
- No "parol evidence"

---

---

---

---

---

---

---

---

---

---

### Contracts 101

- Overview of Basic Contract Law Concepts
- Formation:
  - Offer
  - Acceptance
  - Certainty of Terms
  - Intention to Perform
  - Consideration

---

---

---

---

---

---

---

---

---

---

## Contracts 101

- What if there is not a formal "contract?"
- "the circumstances and conduct of the parties demonstrate a reasonable inference that there was a mutual understanding and agreement that one party perform and that another pay for that performance..."

---

---

---

---

---

---

---

---

## Every Word Has Meaning

- Memorialization of the "meeting of the minds"
- Repository of the project basics
- Potential source of liability

---

---

---

---

---

---

---

---

## "Standard of Care"

- Contract may incorporate a "standard of care"
- Design professionals owe a duty to furnish plans with a reasonable degree of technical skill
- However, absent a "special agreement," design professionals do not imply or guarantee perfect results
- Carry this theme throughout the contract as a test of performance

---

---

---

---

---

---

---

---

## “Standard of Care”

- “Standard of Care”
- Legal Definition:
  - The design professional owes a duty to exercise that degree of skill, learning and care ordinarily exercised and practiced by other design professionals under the same or similar circumstances of rendering services as a professional.

---

---

---

---

---

---

---

---

## “Standard of Care”

- Standard of care can be heightened, expanded
- “Specialist” “highest” “best”
- Should not make warranties
- Typically are no implied warranties or strict liability for professional services agreement

---

---

---

---

---

---

---

---

## Every Word Has Meaning

- Pay close attention to every word:
  - “Supervise”
  - “Inspect”
  - “Certify”
  - “Guarantee”
  - “Warranty”
  - “Highest”
  - “Best”
  - “Any and All”

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

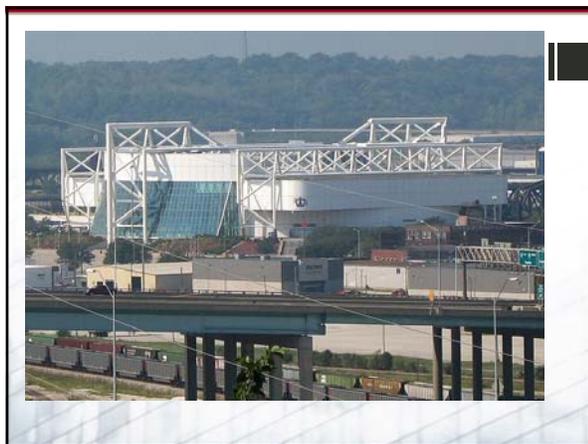
---

---

---

---

---



---

---

---

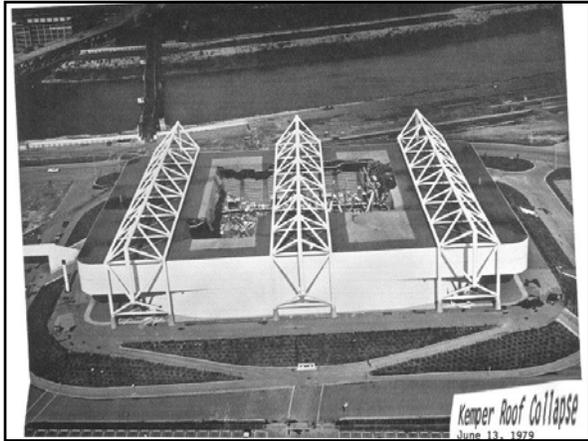
---

---

---

---

---



---

---

---

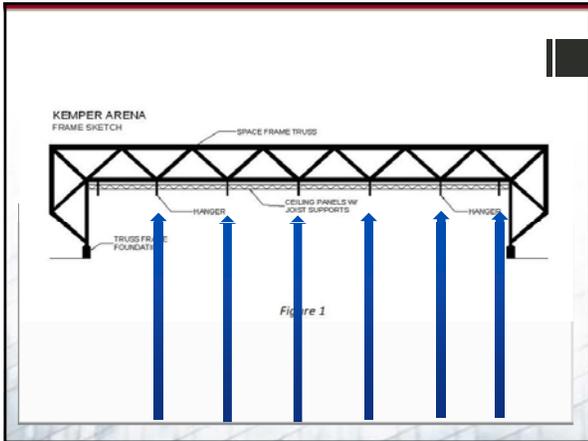
---

---

---

---

---



---

---

---

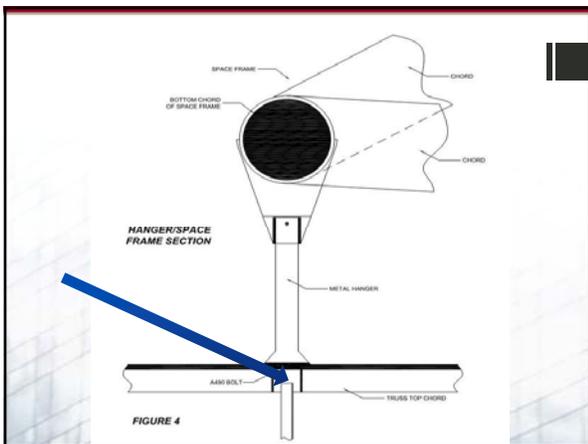
---

---

---

---

---



---

---

---

---

---

---

---

---

## Scope of Work

- Should set out in detail in the proposal and carry into the contract exactly what IS and what IS NOT included in the scope of work
- Typically, are not required to do more than your scope
- Litigants always try to expand that duty

---

---

---

---

---

---

---

---

## Contracting Parties

- Who are "parties" to the agreement
- Who did you contract with
- Are there "third parties" to the agreement – Third Party Beneficiaries
- Many form agreements address this issue and indicate there are no third parties
- Allow for assignment of contract

---

---

---

---

---

---

---

---

## Choice of Law

- A critical issue if there are multiple states involved, parties to the contract, subcontractors, location of the project
- Analyze the coverage and contract issues in light of the various state laws regarding choice of law provisions in the contract

---

---

---

---

---

---

---

---

## Incorporation by Reference

- "Master Agreement" will incorporate by reference a Owner/Contractor or Owner/Developer agreement, or some other document
- Care should be used to review any and all documents that are made a part of your contract
- "Flow down provisions"
- Require the same of your sub consultants

---

---

---

---

---

---

---

---

## Instruments of Service

- Claims for copyright infringement
- Ownership of Instruments of Service
  - Unauthorized use or reuse
- Indemnities

---

---

---

---

---

---

---

---

## Scope of Work Liabilities

- Your responsibilities possibly impose liability
  - Certification of Payment
  - Review of Shop Drawings
  - On-Site Observation
  - Final Inspection
  - Punch List Creation
  - Safety
  - Budget/GMP issues
  - Schedule

---

---

---

---

---

---

---

---

## Shifting Risk Through Contract Provisions

HALL & COMPANY

---

---

---

---

---

---

---

---

## Shifting Risk Through Contract Provisions

- Indemnity Clauses
- Permissibility of indemnity in contracts is generally governed by state statute
- Totally shift risk from one party to another
- Different types of Indemnity Clauses
  - Broad Form
  - Intermediate Form
  - Limited

---

---

---

---

---

---

---

---

## Indemnity Clauses

- "Broad Form"
- The Indemnitor assumes an unqualified obligation to hold harmless the indemnitee for all liability, regardless of fault
- Even if the indemnitee is solely at fault, the indemnitor still has the obligation to indemnify
- Effectively shifts the entire risk of loss from one party to the other

---

---

---

---

---

---

---

---

### “Broad Form” Indemnity Clauses

- Shall indemnify...whether caused in whole or in part by the negligence of the Indemnitee...It is specifically understood that this indemnity shall be interpreted as indemnifying the Indemnitee from its own sole and /or partial negligence.”

---

---

---

---

---

---

---

---

### Indemnity Clauses

- “Intermediate Form”
- The Indemnitor assumes an obligation to hold harmless the indemnitee for all liability, unless the indemnitee is 100% at fault
- Any amount of fault on the part of the indemnitee obligates them to cover the entire loss

---

---

---

---

---

---

---

---

### “Intermediate Form” Indemnity Clauses

- Shall indemnify...whether caused in part by the negligence of the Indemnitee...This clause is not intended to indemnify the Indemnitee for claims, damages, losses and expenses caused by the sole negligence of the Indemnitee.”

---

---

---

---

---

---

---

---

## Indemnity Clauses

- "Limited Form"
- Referred to as the "comparative fault" indemnification agreement
- All parties to the agreement are only responsible for indemnity to the extent of their own liability, on a comparative basis of fault

---

---

---

---

---

---

---

---

## "Limited Form" Indemnity Clauses

- "Shall indemnify...but only to the extent caused in whole or in part by the negligent acts or omissions of Indemnitor...under a comparative basis of fault."

---

---

---

---

---

---

---

---

## Indemnity Clauses – "Broad Form" Unenforceable

- |                          |                  |
|--------------------------|------------------|
| ▪ Alaska                 | ▪ Maryland       |
| ▪ Arizona (private work) | ▪ Michigan       |
| ▪ Arkansas               | ▪ New Jersey     |
| ▪ California             | ▪ South Carolina |
| ▪ Georgia                | ▪ South Dakota   |
| ▪ Hawaii                 | ▪ Tennessee      |
| ▪ Idaho                  | ▪ Virginia       |
| ▪ Indiana                | ▪ West Virginia  |

---

---

---

---

---

---

---

---

### Indemnity Clauses – “Broad” or “Intermediate Form” Unenforceable

- Arizona (public work)
- California (residential)
- Colorado
- Connecticut
- Delaware
- Florida (public work)
- Illinois
- Kansas
- Kentucky
- Louisiana
- Massachusetts
- Minnesota
- Mississippi
- Missouri
- Montana
- Nebraska
- New Hampshire
- New Mexico
- New York
- North Carolina
- Ohio
- Oklahoma
- Oregon
- Rhode Island
- Texas (public work)
- Utah
- Washington

---

---

---

---

---

---

---

---

### Indemnity Clauses – No Statute

- Alabama
- D.C.
- Iowa
- Maine
- Nevada
- Vermont
- Wyoming

---

---

---

---

---

---

---

---

### Indemnity Clauses

- Should be mutual
- Show up in a number of forms and places
  - Liability issues
  - Insurance
  - Instruments of Service
  - “Using my fee as your insurance policy”
- Include “cost of claim” damages, and are used as a hammer to settle
- Resist over-aggressive language
- Try to get the Contractor to indemnify designers

---

---

---

---

---

---

---

---

## “ai Status”

- “ai” = “additional insured”
- Most contracts have an indemnity agreement and an insurance provision requiring additional insured status
- “Belt & Suspenders” Approach
- Make sure both are compatible with applicable state law
- Ideally, the scope of coverage afforded covers the obligations assumed by the contract

---

---

---

---

---

---

---

---

## “ai Loophole”

- While most states prohibit broad or intermediate form indemnity, some do not prohibit requiring a party in a contract to provide equivalent levels of insurance coverage

---

---

---

---

---

---

---

---

## Limiting Risk in Contracts

- Limitation of Liability Clauses
- Recognize the limited role of the professional in the “grand scheme of things”
- If properly worded, not hidden, and negotiated, should be enforceable

---

---

---

---

---

---

---

---

## Limiting Risk in Contracts

- Limitation of Consequential Damages Clauses
  - Limit recovery of "consequential damages"
  - Loss of use, loss of profit, delay, etc.
  - Again, must be clear, unambiguous, and not against public policy
- Waiver of subrogation clauses
  - Should be mutual

---

---

---

---

---

---

---

---

## Limiting Risk in Contracts

- Betterment Clause
- "Betterment" defined
- Should not be put in a better place than you would have been absent some mistake
- Basis: unjust enrichment

---

---

---

---

---

---

---

---

## Limiting Risk in Contracts

- "Certificate of Merit" Provisions
- Many States have these requirements for professional liability claims
- Promoted by AIA and other Professional Organizations
- Similar to doctors in most states

---

---

---

---

---

---

---

---

**Dispute Resolution Clauses**

- Arbitration
- Mediation
- Are valid and enforceable

---

---

---

---

---

---

---

---

**HALL & COMPANY**  
Serving Architects, Engineers and Environmental Consultants

**QUESTIONS AND ANSWERS**

[www.hallandcompany.com](http://www.hallandcompany.com)

---

---

---

---

---

---

---

---

Thank You

**HALL & COMPANY**  
Serving Architects, Engineers and Environmental Consultants

AE Resource Webinar

**Understanding Claim Exposures and Contractual Risk Transfer**

Presented by  
**William S. Thomas, Esq.**  
Pitzer Snodgrass, PC. [thomas@pspclaw.com](mailto:thomas@pspclaw.com)  
St. Louis, Missouri [pspclaw.com](http://pspclaw.com)

**PITZER SNODGRASS, P.C.** Trial Version

---

---

---

---

---

---

---

---