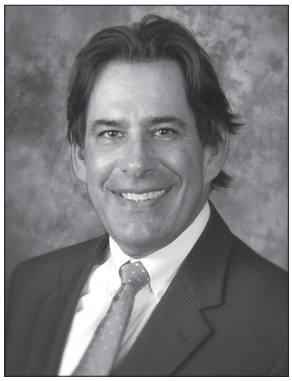
My Favorite Mistakes: An Owner's Guide to Avoiding Disaster on Construction Projects

By Steven B. Lesser and Ryan F. Carpenter



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I. Introduction

As Elvis Presley taught us "When things go wrong, don't go with them." Much can go wrong during this uncertain era of a national construction boom. One wrong move can spell financial disaster for owners, and in addition, plague end users with life-threatening, unsafe conditions. Owners can avoid these risks by implementing a strategic plan to identify what can go wrong and initiate measures to address them—before the first shovel goes into the ground. Traps exist for owners that fail to appreciate the limitations of the local labor force as well as the difficulties associated with building in congested and densely-populated areas. Similar challenges arise from the failure to recognize the existence of implied warranties that arise by operation of law to benefit end users and by signing onerous contracts that wipe away valuable rights and defenses. It is foolhardy to begin the design and construction process without first considering strategic ways to (1) avoid liability; (2) mitigate liability; (3) shift liability; and (4) insure against liability.

Proactive measures can be implemented to achieve these strategic objectives. While this article will focus on specific steps an owner can take to protect its interests, these same approaches can apply to other participants to avoid and mitigate risk such as (1) establishing "single-purpose" entities, (2) utilizing clauses to limit liability, (3) requiring compliance with notice and right to cure statutes, (4) conducting an early peer review to catch design errors, (5) using technology to monitor the pace of construction, and (6) initiating independent quality control inspections to mitigate the risk of faulty construction.

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II. Planning Phase

A. Consider Lessons Learned and Formulate Your Best Practices

Adopting proven general strategies that have been tested and utilized successfully in the construction industry should be considered.[1] Recognizing that each organization experiences its own unique issues, conducting a post-mortem project discussion to identify shortcomings and implement best practices to address these weaknesses is critical to avoiding future mistakes on other projects.

From a practical standpoint, the owner should designate a particular individual within an organization to gather, retain and communicate the lessons learned to the owner's staff. Once a project concludes, the owner's designee should meet with the project's key people to discuss the following general topics: (1) what went well and why, (2) what went wrong and why, (3) what could have been done better, and (4) what could have been done to avoid problems that occurred. While it is ideal to prepare written summaries of the discussions, counsel may need to participate to shield the documentation as attorney-client privileged or increase the likelihood it is deemed work product[2] so it does not become discoverable should litigation arise in the aftermath of the project.

At the outset of construction, a peer review informational session should take place with all trades to discuss how the project will be monitored from start to finish. Participants need to be placed on "high alert" that compliance with the contract documents will be expected and required. The owner needs to convey the message that the failure to follow this established process could result in financial repercussions to non-compliant participants as discussed in Section V.B. of this article.

B. Consider Establishing a Single-Purpose Entity

Owners have recently experienced the consequences of an economic downturn, such as rampant bankruptcies with litigious claimants ferociously chasing money from any available source. In the wake of these experiences, owners with multiple projects underway have migrated toward establishing a separate entity to be the "owner" of each new project. Single-purpose entities allow owners to reap the financial benefit from the project, if everything goes well, or if not, then a disposable entity exists to shield negative financial repercussions from impacting

other unrelated projects or affiliated companies. To some extent, the single-purpose entity option is uniquely beneficial to owners. This is because owners do not have the same licensing, bonding, and other requirements that traditionally preclude contractors and design professionals from taking advantage of this feature. Notwithstanding its merit and appeal, the single-purpose entity approach can backfire in certain jurisdictions, particularly if certain formalities are not followed.

1. Benefits of Using a Single-Purpose Entity

A single-purpose entity can shield the parent entity from liabilities that arise out of the development of a project. However, the parent can lose the protection by committing some act that directly causes damages[3] or by voluntarily assuming its subsidiary's liability, for example, by providing a guaranty to a subsidiary's creditor. Aside from such exceptions, the single-purpose entity approach generally protects the parent's assets from both its subsidiaries' business debts and the potential reach of judgment creditors.

Establishing a new entity for each project can provide a marketing advantage to the project. For example, an owner building a contemporary condominium in a fashionable part of town can select a name, logo, marketing program, and employees that will appeal to the millenial demographic. If that owner later constructs an office park or nursing home, the owner can (and probably should) select different names, logos, marketing programs, and employees for the "owners" of those projects.

2. Liability Theories Against a Single-Purpose Entity

Protecting a parent's assets from creditors is the primary reason to establish a single-purpose entity. When the parent and subsidiary become too intertwined, parties seeking to recover damages might try to "pierce the corporate veil" to recover from the parent's assets. Several other legal theories established in different jurisdictions provide plaintiffs with similar or equivalent remedies although referred to by different names such as "substantive consolidation," "fraudulent transfer" and a "denuding theory."[4] As discussed below, "holding out" and "direct participation" theories as developed in various jurisdictions have provided further support for those seeking to pierce the corporate veil.

a. Piercing the Corporate Veil

The doctrine of piercing the corporate veil allows plaintiffs to circumvent the protections of a business entity (its "veil") to recover from the personal assets of an individual owner. In many instances, these efforts are directed at individuals who have no ownership interest in the entity at issue,[5] as well as parent[6] and affiliated[7] entities. The particulars of the doctrine vary by jurisdiction based on specific statutes and common law. Generally, the doctrine has been used to disregard the corporate form when principles of justice and equity require it to prevent fraud or injustice.[8] A basic link between a parent and its subsidiary alone is not sufficient to justify holding the parent liable,[9] nor is the mere act of the parent providing funding to the subsidiary sufficient as long as it was not done to perpetrate fraud.[10] In fact, through its long history of use, jurisdictions have developed specific qualifying elements to limit the applicability of the doctrine as needed to prevent injustice.

The terminology and specific elements vary by jurisdiction, but courts will typically require those seeking to pierce a corporate veil to satisfy a test such as the following two-part "unity of interest" test: (1) there exists a unity of interest and ownership such that the separate personality of the company no longer exists (i.e., that the company being pierced is the "alter ego" of another entity or its owner); and (2) if the corporate form is upheld, an inequitable result would follow.[11] Jurisdictions require varying levels of proof in satisfying their respective tests, but many have enumerated similar factors to consider in deciding whether their established tests have been satisfied.[12]

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For example, in Massachusetts, plaintiffs must satisfy a "very high standard."[13] Against this backdrop, the First Circuit Court of Appeals identified several factors to consider, including, but not limited to (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity; (4) insufficient capitalization; (5) nonobservance of corporate formalities; (6) nonpayment of dividends; (7) insolvency of corporation at the time of transaction; (8) siphoning of corporate funds by the dominant shareholders; (9) nonfunctioning of officers and directors other than as the shareholders; (10) absence of corporate records; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.[14] Other states such as Illinois,[15] Kansas,[16] New York,[17] and Maine,[18] among others have established similar formulaic analyses.

A recent study by the *Wake Forest Law Review* analyzed plaintiffs' attempts to pierce the corporate veil in a variety of settings.[19] The authors found those seeking to pierce the corporate veil in Ohio achieved a consistently high success rate.[20] More generally, the study suggests that piercing corporate veil claims have the best overall chance of success in Arkansas, Idaho, Louisiana, and Utah and the worst chance of success in Georgia, Iowa, Maine, Nebraska, Pennsylvania, South Carolina, and West Virginia.[21]

b. Holding Out and Direct Participant Theories

Plaintiffs have also realized success using holding out and direct participation theories. While the bedrock of these theories have similar factors to those used to pierce a corporate veil, their less-defined requirements appear to have given courts greater flexibility and have arguably made it easier to succeed and recover assets from the parent entity. The holding out theory is based on the principles of agency and derives its name from the concept that the subsidiary is an agent "holding itself out" as an authorized representative of its parent, the principal.[22] Success turns on establishing that the parent is bound by the acts of its subsidiary with the apparent authority which the parent knowingly permits the subsidiary to assume, or which the parent holds the subsidiary out to the public as possessing.[23] The law of agency imposes liability, not as the result of a contractual relationship but because the actions of the parent somehow misled the public and third-parties into reasonably believing that the authority exists.[24]

Normally, the trier of fact decides whether an agency relationship existed.[25] Applied in a construction context, a parent risks assuming liability from the single-purpose entity's actions when, from the public's perspective, the actions giving rise to damages were committed as an agent of the parent. The Internet has proved valuable to plaintiffs in gathering proof of holding out by using marketing and advertising materials to blur the lines of distinction between the entities. Advertising the success of previous projects coupled with careless representations by sales personnel can destroy all diligent efforts designed to maintain a subsidiary's independence. Such records can also reflect instances of one entity performing routine business on behalf of the other, further supporting a plaintiff's argument that the parent should be liable for the acts of its subsidiary.

Along those same lines, the direct participant theory will hold a parent liable when it directs or authorizes the manner in which an activity is undertaken and foreseeable injury results.[26] A parent can be held liable if, *for its own benefit*, it directs or authorizes the manner in which its subsidiary's actions are implemented, disregarding the discretion and interests of the subsidiary, foreseeably resulting in harm to the claimant.[27] However, the parent's role must consist of more than simply being an officer of the parent making policy decisions for the subsidiary and supervising the subsidiary's activities; instead, plaintiffs must demonstrate that the conduct complained of occurred while the officer was acting in his or her capacity as an officer of the parent, rather than as an officer of the subsidiary.[28] Liability is imposed on a parent or principal when its/his actions involving an entity, when performed alone or jointly with the entity, would create liability.[29] For example, in one instance a corporate executive was held personally liable for executing a bad check, even when the check was signed in the executive's representative capacity and he did not know there were insufficient funds in his company's account to cover the check.[30] In that situation, the direct participant theory would serve to acknowledge that only a person can draft a check and that the drafter is personally obligated to assure that it is drawn on an account containing sufficient funds.

3. Drawbacks to Using a Single-Purpose Entity

To avoid liability under the foregoing theories, the parent must engage in a continual balancing act to keep its subsidiaries separate, in order to preserve the benefits of a single-purpose entity. An organized game plan must be formulated and rigorously enforced to keep the entities distinct. But such measures have a number of drawbacks. Keeping entities separate may limit the owner's ability to tout its reputation, in a marketing campaign, for historically producing quality construction along with strong financial resources to stand behind its product. Those drawbacks must be weighed against the benefits of a single-purpose entity to determine whether using a single-purpose entity is worthwhile. Choosing a subsidiary's name illustrates the tradeoffs that must be considered. Using a name that reflects its association with the parent might help capitalize on the parent's goodwill and reputation, but, at the same time, make the parent a more vulnerable target for creditors.

Licensing requirements for contractors and architects pose a more significant challenge to creating subsidiary entities. When a contractor subsidiary must employ an individual with a particular license to operate, or have a sufficient track record of successful projects to obtain a performance bond, a subsidiary's only option might be to adopt its parent's license or track record as its own. Similarly, when a design professional subsidiary tries to acquire professional liability coverage for that stand-alone entity, it might be impossible to obtain or cost-prohibitive to purchase.

4. Measures to Preserve Benefits of a Single-Purpose Entity

No single measure by itself can safely preserve the benefits of a single purpose entity. The more proactive measures that are taken, the more likely that the single-purpose entity structure will be successfully maintained. One step to enhance the likelihood that the single-purpose entity is preserved is to include a provision in all contracts by which the other parties acknowledge that their relationships are solely with the subsidiary and that any rights or remedies they might have shall only be against the subsidiary, not the parent. Commonly used provisions confirming that there are no intended third-party beneficiaries can be modified to serve this purpose.[31]

Parent companies should also consider how future plaintiffs could use written records and employee statements to argue that the parent should be liable for the acts of its single-purpose entity. Plaintiffs will use any reference to the parent in written documents to argue that the parent should be liable, as well as its subsidiary. It might be easier said than done, but the parent can deprive potential plaintiffs of that ammunition by avoiding references

to the parent in (1) records from the feasibility/planning stages; (2) applications seeking government approvals and permits; (3) meeting minutes; (4) proposals and invoices; (5) correspondence with vendors; (6) marketing materials, press releases, news interviews, promotional videos; (7) issuing checks and other forms of payment; and (8) insurance policies.[32]

Separate books and records can be used to demonstrate the subsidiary's independence from the parent entity. At relatively little cost, a subsidiary can have its own signatories, registered agent, logos, and letterhead. Even though more costly, maintaining separate e-mail domains, websites, and physical offices might also be worthwhile endeavors. Conversely, using similar or overlapping services, books, records, and websites can produce disastrous results and serve up to plaintiffs countless examples of the relationship between parent and subsidiary.[33] Precautionary steps must be taken at the inception of a project, otherwise the anticipated benefit could be irretrievably lost.

If both entities initially use a single website, or even if there are merely links between two, these connections will continue to exist and enable plaintiffs to find and use this evidence to establish liability against the parent. Old versions of websites are readily accessible to potential plaintiffs on "The Wayback Machine" (an Internet archive website) at https://archive.org/web. Moreover, versions may also be discoverable from an IT or website hosting company's backups acquired by subpoena in the event that litigation is pursued. In either case, the plaintiff will be able to show the websites to a trier of fact even though they are no longer being used. Financial and operational facets also must be scrutinized to ensure the parent and subsidiary have been maintained as objectively distinct and independent. Using parent assets to obtain financing for the subsidiary should be minimized.

With regard to personnel, ideally the parent's officers and employees should not staff the subsidiary entity and should avoid directing the subsidiary's strategies or authorizing its actions. This approach may prove prohibitively expensive or disruptive for the parent. If it is necessary for a parent's officers or employees to participate in the subsidiary's operations, they should be fully and officially designated to serve as the subsidiary's officers and employees during the pendency of a project. For example, officers/employees involved in the subsidiary's operations should receive a W-2 from the subsidiary, not the parent. Likewise, separate insurance policies should be issued to the subsidiary as opposed to the parent and endorsements carefully worded to avoid the spillover effect to establish a connection between the parent and subsidiary.

All of the foregoing might be costly and/or inconvenient to implement. Nevertheless, if deemed worthwhile, all of these approaches are completely within the parent's control to adopt. Eliciting damaging testimony from people involved in a project referring to the parent instead of the subsidiary could be one of the most potent weapons in a plaintiff's arsenal. Proactive steps should be implemented to neutralize the effectiveness of this tactic. For example, from the earliest planning stages to even after project completion, owners should continually consider what future deponents will say, and how plaintiffs will use their testimony. If employees are conditioned to recognize and honor the distinctness of the subsidiary, that will likely go a long way to molding third-parties' perceptions (and ultimate testimony) to keep the parent out of the line of fire. As an illustration, if during normal operations employees refer to their employer as the subsidiary and accountants are consistent in referring to the subsidiary as the owner of assets, their use of the subsidiary's name will likely lead to vendors testifying that they were dealing with the subsidiary, not the parent. Conversely, if employees ultimately testify that they were employed by the parent, accountants testify that the subsidiary's assets were the parent's, or vendors testify that they provided goods and services to the parent, it will be difficult for the parent to preserve the sanctity of its single-purpose entity.[34]

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In the early planning stages of a project, clear policies must be established to properly educate the marketing team along with the sales department and other employees as to the distinct nature of the parent. It is insufficient simply to have a good policy and conduct a few (or no) training sessions. To be effective, a parent must enforce the policy throughout the course of a project. Inevitable turnover and generally transient workforces can seem like overwhelming obstacles, but they can be overcome through diligent efforts. Even when a project is winding down, a parent must not let its guard down, or the benefit of its prior efforts might be negated. For example, while it might be a standard practice to deploy a specialized team of non-project employees to deal with the punch-list phase, they must receive the same training as regular project employees.

C. Use Contract Provisions to Limit Liability

A prudent owner will contractually limit its liability at the outset of the development process and continue that practice through design, construction, sales, and operation. There are many ways to contractually limit liability. For example, a traditional limitation of liability clause can effectively cap damages at a certain dollar amount

or require the alleged damages to be in excess of a certain threshold to be actionable. Yet, enforcement of these provisions varies depending upon the jurisdiction of the project. From an enforcement standpoint, certain jurisdictions either restrict the extent to which liability can be limited or completely prohibit certain methods.[35] Therefore, it is imperative to confirm that the methods employed are enforceable in the relevant jurisdiction and to what extent.

Efforts to negotiate any adjustment to the applicable limitation period first requires consideration of those insurance provisions that an owner may rely upon to provide coverage for a defense and liability.

For example, one way to limit liability is to contractually limit the time period for initiating a claim, but the enforceability of such provisions will depend on the exact nature of the provision and the laws of the relevant jurisdiction. Some jurisdictions permit the length of a statute of limitations or statute of repose period to be modified, but only when the agreed-upon period is longer than the statutory period.[36] Other jurisdictions may permit an adjustment of the period by stipulating to a different starting point from which the period runs.[37] Whether an earlier or later starting point is better depends on whether you expect to be sued or anticipate wanting to sue someone else. Assuming an owner expects to be sued, efforts may be undertaken to negotiate a relatively early starting point, such as the date of substantial completion. An owner that expects to sue could negotiate a later point in the construction process, such as the date on which the design professional or contractor finishes its work, or the date on which it receives its final payment. If effective, the owner will be allowed to file its lawsuit later as opposed to an earlier start date.

Even with an enforceable clause limiting the time period for filing claims, a future plaintiff might be able to circumvent that limitation by virtue of the "discovery rule" or statutes tolling the applicable limitations periods, like those delaying their running pending a condominium's turnover[38] and during statutory pre-suit procedures.[39] Similarly, a statute of repose might expire later than it appears on the face of the statute, depending on the courts' interpretations over the starting point for the repose period. For example, a statute starting the repose period upon the "completion" of a contract could be interpreted to mean it starts when the contractor submits its final payment application (as an indication the work is complete) or when the final payment is issued.[40] In one recent decision, the court held that the statute runs once the parties have completed their respective obligations under the contract as opposed to the date a final payment application is submitted.[41] Under this interpretation, more claims would be preserved.[42]

The foregoing "extensions" do not correspondingly extend insurance coverage. Therefore, while an owner might be able to sue and recover from a responsible entity, if viable, the applicable coverage might have lapsed by that later point. Accordingly, if this approach is adopted, insurance coverage should be required for as long as suit may be brought. Efforts to negotiate any adjustment to the applicable limitation period first requires consideration of those insurance provisions that an owner may rely upon to provide coverage for a defense and liability.

Another way to contractually limit liability is to limit the classes of potential claimants. For example, third-party beneficiaries could be excluded.[43] Similarly, warranties can sometimes be limited, or completely disclaimed, against some or all potential claimants, depending on the jurisdiction.[43] However, special care must be taken when contracting away or limiting warranties. For example, if the provision goes too far, the entire provision might be deemed completely unenforceable, losing some lesser benefit that could have been gained if the jurisdiction allows a less aggressive disclaimer.[45] From an insurance standpoint, exclusions to coverage must be carefully reviewed. In some instances, condominium or multi-family structures may be excluded rendering insurance for this type of project worthless.

Contract provisions also may be used to establish prerequisites for liability to arise. For example, a contract provision could require a certain standard of conduct to occur before a claim arises (e.g., requiring gross negligence or willful misconduct).[45] Such a provision could also require certain support before a claim may be pursued, like a report signed and sealed by a design professional attesting to the validity of the claimant's allegations.

Other provisions can also pose hurdles to particular classes of claimants. For example, contracts involving homeowners associations can require that the association obtain the approval of a certain percentage of its members (e.g., 75% or more) before being authorized to file a lawsuit seeking more than $100,000.[47] A mandatory arbitration clause could also be an effective stumbling block. As no one can be forced to arbitrate,[48] requiring arbitration might prevent a plaintiff from joining all of the entities it would prefer to join in the same action.[48] Restrictions on where the arbitration is held could also assist in making pursuing a claim less attractive to a claimant. This approach can be especially effective, if allowed, but some jurisdictions prohibit forum-selection clauses requiring claims to be brought out-of-state.[50]

Thirty-five states have "right to cure" statutes requiring potential plaintiffs to follow pre-suit claim procedures which afford defendants an opportunity to resolve a dispute amicably before a lawsuit may be filed.[51] In some states, though, the contract at issue must specifically

trigger the statute's application.[52] Accordingly, if the jurisdiction has a right to cure statute available, but it must be triggered by specific language in the contract, such language should be included. Statutory right to cure procedures may deter some from pursuing claims or at least may provide opportunities to resolve their claims before filing a lawsuit. Consequently, some benefit can be realized from requiring compliance with these procedures. However, in some jurisdictions, claims pursued through statutory pre-suit processes do not trigger insurance coverage.[53] Without triggering coverage such as under an OCIP[54] commercial general liability insurance policy, an owner that receives a right to cure notice may be forced to self-fund payment of attorneys and consultants to defend against a pre-suit claim, and any settlement. If possible, an owner should try to have its policies modified to specifically cover statutory pre-suit claims processes, to avoid those potential drawbacks. Otherwise, an owner might consider the risks of ignoring the pre-suit notice and wait for a lawsuit to be filed to trigger coverage and a duty to defend by its insurance carrier.

D. Understand Project Requirements and Perform Pre-Bid Risk Assessment

Regulatory requirements and restrictions have become a potential minefield to expose owners to liability. Physical conditions encountered at project sites can vary significantly, even on adjacent properties, requiring a thorough risk assessment to avoid surprises. From a business perspective, an owner must investigate applicable regulations, ordinances and site conditions to best understand existing obstacles to developing the project and determine the project's cost. From a planning perspective, the owner also needs to know and understand those requirements in order to retain team members who have experience in addressing these issues during the project.

During the planning stage, owners should meet with building officials and other authorities having jurisdiction over the project to clarify code, land use, and zoning issues particular to the state, county, municipality, or city in which the project will be constructed.[55] This process will reveal special ordinances that may impact upon construction such as noise ordinances restricting hours when work will be permitted. With a multitude of potentially overlapping federal, state and local regulations, affirmative steps must be initiated to determine the specific applicable requirements that will be enforced by the governing authorities. Failing to do so may result in the authority having jurisdiction later requiring removal of finish work and remediation of noncompliant work at a significant cost. For example, while an owner might only focus on complying with the federal Americans with Disabilities Act, applicable state or local counterparts could be more stringent.

Owners need to be mindful of soil conditions (e.g., sinkholes) and weather conditions (e.g., hurricanes) or other natural disasters associated with the specific geographical location where construction will take place. These geographic-based challenges coupled with other safety-related conditions can impact progress and escalate the cost of insurance to address these risks. Local codes may likewise impact progress. For example, if a new building will eventually come close to an adjacent building or other object, workers might not have sufficient clearance to work safely, or there might be inadequate space left for cranes to function properly, or the proximity to other structures may violate the state or local fire code. For these reasons alone, undertaking a pre-bid risk assessment becomes a critical and worthwhile exercise.[56]

III. Assembling the Team

A. Bidding

During the bidding phase, an owner may focus more on saving money and obtaining the lowest possible bids to assure financial success. However, placing too much emphasis on price can prove shortsighted. For example, using an out-of-state design professional might seem attractive from a marketing standpoint due to his/her national reputation, but his/her lack of familiarity with applicable local codes, permitting requirements, and subcontractor community might ultimately increase the cost of the project. Although adding to the cost, proceeding without a design professional familiar with local requirements could spell disaster. Under those circumstances, there can be no substitute for retaining a local design professional familiar with local requirements to lead to a successful project.

Owner information such as knowledge of the soil conditions and other engineering studies must be furnished to bidding contractors to avoid liability under the *Spearin* doctrine.[56] If they are not provided all of the owner's information, bidders can claim that the owner misled them into contracting for an inadequate price.[58] Alternatively, bidders can claim that they relied on owner-furnished information that turned out to be inaccurate.[59] In either scenario, the bidder can claim damages from the owner, or be deemed immune from liability when they have performed construction in accordance with the information provided.[60] These potential claims often place the owner in a difficult predicament when disclosing information to potential bidders. All information provided during the bidding phase should be qualified to require bidders to perform their own due diligence.[61] Bidders should also be required to acknowledge that information provided by the owner is not to be relied upon. Efforts should be undertaken to confirm that they accept the risk of any inaccuracies or incompleteness of information provided, if the bidder chooses to rely on the information. Such disclaimers and acknowledgments could prove to be invaluable in defending against a misrepresentation claim. To help defeat a claim that certain information was withheld, an owner should make all known information available to bidders. Bid documents or preconstruction meetings between the owner and contractor are often the best vehicle to convey this information. Owners should prepare meeting minutes and distribute

them to all meeting attendees within forty-eight hours of conclusion, or videotape or otherwise record the discussions, and catalog documents forwarded to participants, to avoid disagreements over what was said or what information was actually distributed to the attendees. These precautionary steps will assist the owner in defeating contractor claims that the owner failed to disclose material facts in its possession.

B. Design Professionals

Given their pervasive involvement on most projects, design professionals can potentially cause more liability to an owner compared to all other participants, except perhaps the general contractor. This is particularly true because the owner warrants the constructability of the plans to the contractor.[62] To the extent that building code violations occur in the design, the owner becomes liable for the resulting damages. To minimize that liability, numerous ways exist contractually to shift liability from an owner to the design professional. For example, owners can require design professionals to guarantee the adequacy of the plans and specifications. Also, while design professionals as a general rule only approve a contractor's submittals and work for general conformance with the design's intent, an owner could obligate the design professional to issue more meaningful approvals, such as confirming actual compliance with the requirements of the design.

Risks associated with holding a design professional to a higher standard can be problematic. As the owner's agent, establishing a more onerous standard for its performance might make it easier for a claimant to establish liability in the first place (i.e., a plaintiff might claim that a defect should have been caught and corrected, had the owner's agent satisfied its obligation). Further, a contractor might argue that the design professional's approval under a heightened burden relieves the contractor of its responsibilities. To minimize that risk, an owner should make clear in its agreement with a contractor that nothing the owner and its agents do or do not do will relieve the contractor of its independent obligation to adhere to the contract and the design requirements.[63]

As a practical matter, an owner's right to hold a design professional responsible for damages arising from its errors and omissions may be limited by the resources available to satisfy the design professional's liability. Unlike general contractors and major trade subcontractors, which traditionally have sizable balance sheets and own equipment and other major assets, design firms are often thinly capitalized with few substantial assets and minimum capital beyond the monthly cash flow from work in progress. To increase the pool of available resources, owners have pursued recovery from individual design professionals in addition to their employers. Historically, the individuals could be held personally responsible if they failed to meet their standard of care[64] and might not even be protected by limitation of liability provisions in their employers' contracts.[65] Nevertheless, while the economic loss rule might not bar such a negligence claim by someone who was not in privity with the individual design professional, at least one state legislature has barred the claims upon certain conditions.[66]

To make sure the pool of available resources is as broad as possible, owners must make sure their contracts with design professionals do not trigger statutory protections. From the owner's standpoint, it is critical to analyze the applicable jurisdiction's statutes to formulate a plan based on the governing statutes' specific triggering mechanisms. Using Florida's statute as an example (quoted in endnote 66), an owner could require the individual design professionals who will work on a project to sign the contract as additional parties, along with their employer, which will likely foster resistance. On the other hand, having the design professionals as parties to the contract might not be the best option anyway for at least two reasons. First, having them as parties might trigger the protections of the economic loss rule limiting the owner to a breach of contract action. Being forced to pursue a breach of contract action would mean any limitations of liability provisions in the contract would likely apply to the claim and require the owner to demonstrate that the design professional breached a specific provision of the contract, as opposed to simply establishing that the design professional failed to meet his or her standard of care. Second, an owner's recovery would be limited to the specific individuals who signed the contract at the beginning of the project, leaving individuals who unexpectedly become involved later protected from the owner's claims. Instead of taking that approach, simply ensuring the statutorily-required warning language does not get incorporated into the contract will likely preserve the owner's potentially-unlimited and less-constrained negligence claims against all individuals who participate in the project. Moreover, requiring a design professional to obtain higher limits of professional liability insurance, or alternatively, project-specific coverage, can also provide more comfort to the owner that a fund exists to satisfy design claims.[67]

C. Inspectors

All projects must comply with applicable building codes to protect public safety and avoid catastrophic building failures. To help ensure compliance, local government agencies routinely dispatch publicly-employed inspectors to inspect the project during construction. Alternatively, building officials have, in certain instances, delegated that responsibility to private individuals, referred to as "threshold" or "special" inspectors, selected and paid for by owners.[68] This option has been utilized to satisfy private sector objectives to speed up the construction process and avoid bureaucratic delay in performing inspections and issuing approvals.

Neither option is a perfect solution. Especially during a construction boom, the government agency's limited resources might be insufficient to inspect and promptly

catch all non-conformities. When defects are missed, even if it is undeniably something that should have been caught, the owner will likely be without recourse against the inspector, because the inspector is protected by sovereign immunity.[69] Even when not directly employed by the government agency, threshold inspectors might nevertheless be protected by sovereign immunity, because they are working as an agent of the government.[70]

Competing interests and incentives make the threshold inspector option even more problematic. A threshold inspector's duty is to serve the building official's interests. The building official is principally concerned with the project complying with applicable codes. The owner, on the other hand, is likely more focused on the project being completed on time and ultimately being profitable. A threshold inspector will often be caught in the middle of those all-too-often competing interests.

The following situations demonstrate how the tension between the foregoing interests can quickly escalate from theoretically precarious to a real-world predicament. To decrease the risk that defects go unnoticed, a building official and the threshold inspector may want frequent and exhaustive inspections. The owner, responsible for the cost, will want a more "reasonable" approach. When faced with a minor deviation, a threshold inspector's obligation to the building official will dictate that the inspector halt construction until the work is corrected. Professional dictates aside, from a business perspective, it will be difficult for a threshold inspector to forget that it is the owner, not the building official, who (1) selected the threshold inspector to work on the project, (2) is paying the threshold inspector's bills, (3) can terminate the threshold inspector's contract, and (4) will have discretion in selecting threshold inspectors for future projects. Even without these inevitable ethical quandaries, publicly-employed and threshold inspectors do not satisfy all inspection needs on a project because their scopes are limited to code compliance issues.

Although inspections performed by the design professional and code inspector can be beneficial, the owner might not be adequately protected against defective and non-compliant work. An owner must simply acknowledge that hiring an additional independent inspector whose interests and scope are tailored to fill the quality control gaps is probably the only way to gain that added comfort. With no constraints to the relationship, the owner can require the independent inspector to inspect to identify problematic issues and at sufficiently frequent intervals to catch issues before they become more expensive to fix.

No matter how many inspectors observe the work, even continually, it is still possible for defects to slip through the cracks. Adding yet another "owner's agent" to the project, though, might make it easier for contractors to argue that the work being inspected without objection should be deemed an irrevocable acceptance. Accordingly, adding an independent inspector makes it even more important that all contracts with all other entities contain an acknowledgment from them that the inspections are for the sole benefit of the owner and that an inspection, or even an explicit acceptance, will not preclude the owner from pursuing a claim when nonconformant work and/or materials are later discovered.[71]

D. Contractor

When plans are frequently revised several times over the course of a project, contractors may inadvertently build from the wrong version. Even when the right version is used, no matter how perfect a design, a contractor can still fail to follow the plans' requirements. No matter how many meticulous inspections are performed, people make mistakes. When things do go wrong, an owner can incur substantial liability. The contractor's central role on projects often means that it somehow caused, contributed to, or at least was in the best position to prevent the damages.

Several proactive measures can be undertaken by an owner to help prevent delays, cost overruns, defective work, and claims during construction. The owner should also take appropriate measures to ensure that it has a source of recovery if it incurs future liability after selling the project, or individual units within the project, to another owner. Risk shifting to the contractor for construction defects is paramount and can be accomplished in several ways. As examples, the owner can obligate the contractor to bear the burden of all costs reasonably foreseeable from the design to remedy the construction deficiency and require the contractor to supply additional resources, *at the contractor's expense*, to offset delays and maintain the project schedule.

Owners could also require the contractor and its subcontractors to defend and indemnify the owner for the costs associated with liability arising from the contractor's defective work. Doing so might provide an alternate source of recovery, but it could just as easily be an empty option, especially if the contractor goes out of business before the owner's need for defense and indemnity arises. Therefore, the owner should consider requiring the contractor to provide a guaranty from the contractor's parent company especially if the contractor has limited assets or is a single-purpose entity[72] and/or provide payment and performance bonds to secure performance. Bonding can be an effective tool because surety companies often require the principal of the contracting entity to sign personal guaranties, indemnity agreements, and in some instances, pledge assets to protect against risk. The personal assets of the contracting principal then remain on the hook and serve as additional incentive to properly perform the work. Alternatively, the owner could require the contractor to obtain subcontractor default insurance to avoid a situation where the contractor is willing to cure its subcontractors' breaches but financially unable to do so.[73]

IV. Preparing for Construction

With the team assembled and plans prepared, an owner might be tempted to start work immediately. However, having fresh eyes to review the overall approach to the

project along with the plans and specifications before commencement of the work and during construction, could prove to be a worthwhile investment in terms of both time and cost.

A. Design Peer Review

It might be difficult for a design professional who has spent months preparing a design for a project to be objective in evaluating the design to detect potential life-safety flaws, conflicting details, and deviations from the building code, and other requirements. The failure to detect such flaws early on can be costly if first discovered during construction or after construction.[74] Recognizing that the owner likely lacks the technical expertise to critique the design professional's product, a careful peer review can be beneficial. A peer review is especially valuable given the owner's implied obligation to a contractor to furnish plans that are constructible in light of the *Spearin* doctrine.

Selection of the peer review inspector is critical. The candidate needs to be experienced in detecting construction defects in the field and understanding how improper plan and specification detailing can result in significant damage that can easily be avoided. Design professionals often specify products without reading the manufacturer's literature prohibiting certain uses—like incorporating a waterproof membrane "not to be applied above habitable space" into the design for a roof of a condominium. More egregiously, they can fail to perform tasks at the very heart of their role on projects, but not fess up until it is too late—like a structural engineer not performing any calculations to determine the necessary amount of reinforcing steel in a concrete structure until he is forced to admit his omission after multiple stories of the building have been completed.

Even without quasi-fraud, early insight from a peer review can avoid complicated re-work and afford the owner an opportunity to reconsider unwise cost saving measures, especially if value engineering has contributed to those changes. Deficiencies such as excessive travel distance between a residential unit in a high-rise building and the path of egress to safety, or shallow head room clearance in a parking garage or the lack of fire-resistive material in a wall cavity separating residential units from each other, could all be captured through peer review and corrected before any construction begins. More significant is the necessity to repeat a design peer review once the value engineering phase is completed. Value engineering of a moisture barrier which unwittingly compromises the integrity of the building envelope could be avoided if the faulty detailing is detected before construction. This measure could avoid the onset of catastrophic damage claims, remedial work, and protracted litigation over this design flaw. Owners must be mindful that just because plans look good that does not mean they *are* good.

Some design issues undeniably need to be corrected, like clear code violations. Other issues might be more the subject of professional judgment or interpretation for which no corrective action might arguably be required. In those situations, a peer reviewer might provide insight to the owner about what might one day may become the basis for a lawsuit on the current project or a contemplated future project. Toward this end, careful owners should consider retaining construction counsel to provide guidance and assistance during the process to attempt to shield this information from disclosure in the future based upon the work product privilege. Nevertheless, such an assertion of privilege will likely be attacked because a plaintiff will argue that litigation was not anticipated at the time the peer reviewer performed his/her work. However, given the litigiousness in certain markets,[75] an owner may anticipate litigation from the start of construction as indicated by its inclusion of limitation of liability clauses in the design and construction contracts with participants, securing insurance to cover future construction defect claims by third-parties, post-completion warranty escrow clauses, and in some jurisdictions the recognition of statutory right-to-cure laws along with implied warranty obligations that cannot be waived.[76] To reflect that anticipation and help protect potential privileges, an owner should consider having its construction litigation attorney engage the peer reviewer.[77]

To achieve an even greater level of comfort as to the plans to be relied upon for construction, some case law suggests that the owner obtain the specific approval of critical plan details from the local authority having jurisdiction. Whatever the scope of the authority's review and approval, the authority's approval of a contentious component of the design might insulate the owner from liability, or at least provide a persuasive argument, if a claimant ever challenges the component's compliance with the code.[78]

B. Critical Design Issues

A peer review of any scope can be beneficial, but at a minimum, the following areas require careful consideration during this process: ADA compliance; life safety; code-required travel distance from a living unit to a means of egress; safe egress in the event of fire; separation wall assemblies; omission of vapor barriers to avoid mold and mildew; design calculations performed to determine size of HVAC and other mechanical equipment; shut-off valve replacement; material specifications and sole-source issues; stucco, exterior envelope, and EFIS assembly issues; foundation specifications; window specifications; product approval; and compliance of glazing, roofing, and hurricane-proof assemblies such as sliding glass doors.

Owners must recognize that any changes in the design, especially in the above categories, or generally through value engineering efforts, can negate code compliance or otherwise lead to serious problems. As a real-world example, the design for a 138-acre multi-use complex (residential, office, hospitality, entertainment, and retail) with a brick veneer wall system was modified via value engineering to delete a portion of the moisture barrier and eliminate a critical means of drainage. As a result, water infiltrated

into the wall cavity causing significant mold to grow. The claimed demolition and remediation costs totaled $100 million, not including the investigation and litigation expenses.

V. During Construction

A. Prepare to Defend Contractor Delay Claims

Once construction begins, the owner should monitor and document all activity at the site related to the progress of the work. Monitoring efforts should focus upon an assessment of the number of workers and the amount of equipment onsite and to confirm whether proper supervision has been provided in accordance with the contract documents. This documentation should be created especially when construction financing is provided as the owner may face financial repercussions if certain construction milestones have not been satisfied. As an illustration, consider the financial consequences of constructing a commercial project with national tenants that have imposed significant liquidated damages on the owner if the leased space is not timely delivered. Absent proper monitoring of a project, an owner may be ill-equipped to defend against such claims and transfer risk to the contractor for these delays.

With the suggested documentation, an owner will not only be able to raise examples of non-conforming work in response to a contractor's claim for additional compensation but also be able to rebut a time or cost-based claim more directly. For example, an owner should document any instances when a contractor fails to supply sufficient or adequate resources, such as too few workers or inefficient workers, or being unable to work because of equipment breakdowns. Additionally, an owner should document all instances when a contractor alters the sequence of its work to note the substitute work performed earlier than originally planned (thereby mitigating or entirely negating any impact of having to re-sequence).

Simply because a contractor performs its work in a different order than originally planned or certain activities take longer does not mean the contractor is automatically entitled to additional time or compensation. To properly monitor a contractor's progress and to assess whether a contractor is truly impacted when the unexpected happens, a critical path analysis becomes necessary. The critical path is the sequential train of activities that must be performed consecutively, which dictates the shortest total time necessary to complete the overall project.[79] An impact to an activity *not* on the critical path will, by definition, *not* delay the overall project. Even if an activity on the critical path is delayed, the potential impact could be negated through acceleration efforts, or other critical path activities taking less time than anticipated.[80]

Critical path logic must be used in a contractor's schedules to adequately support a delay claim. Even if a contractor disagrees factually with that scheduling tenet, a dispute can be avoided by having contractually required critical path methodology in both preparing update schedules and substantiating the contractor's claim for additional time and/or compensation.[81] Toward this end, the contractor should be contractually obligated to provide an updated critical path schedule with each application for payment as a condition precedent to payment becoming due.[82] Doing so will not only make the project's schedules more meaningful, but it will also shield an owner from frivolous claims.

If the critical path is impacted, the cause and source of the impact will determine which party will bear contractual responsibility for the costs associated with the delay. Where the owner or the owner's agent such as the architect has delayed the critical path, the contractor is often entitled to additional time and compensation. However, if the contractor even partially caused the impact, otherwise known as a concurrent delay, the contractor is not entitled to compensation because the contractor has not been truly damaged by the actions or inactions of the owner, given the damages would have occurred anyway as a result of the contractor's actions.[83] Again, to avoid delay claim disputes, and to help win ones that arise, owners should adopt established contract language from federal public project contracts[84] and case law[85] which favor owners.

B. Catch Quality Issues Early

As a pre-construction meeting is essential for every construction project, a quality control orientation session conducted with the design and construction teams prior to construction is critical to achieving success in eliminating and mitigating potential construction defects. The owner should require its quality control inspection team to meet with designers and all construction trades to review what will be expected during the construction process. Quality control inspectors should discuss the standards expected to be achieved for construction based upon the contract documents, special conditions associated with the building permit or other conditions imposed by the authority having jurisdiction. Emphasis should focus on quality. The inspectors should advise the participants as to the types of inspections to be performed and how inconsistencies in the field as compared with the plans will be addressed. It is not unusual for the quality control inspectors to issue written directives coupled with photographs to document the conditions that will require correction in the field. Deficiencies caught early on should be immediately addressed while the work force is onsite and working in that particular portion of the project. The failure to correct may result in a prompt back-charge as to the cost of the inspection when legitimate issues are demonstrated and require correction. Critical to achieving success is to establish the process and administer it firmly from commencement of the work to final payment. Through these diligent efforts, routine mistakes can be remediated to save years of litigation and associated expense.

In many instances, quality control inspectors have a background in inspecting similar facilities post-completion, to identify building code violations, deviations from plans and specifications, and bad construction practices.

If they can routinely find these deficiencies once construction is completed, discovering deficiencies during construction can be achieved. Screw spacing of drywall fire-resistive assemblies become critical to achieving a specified fire rating established by recognized testing laboratories. Hurricane-resistant sliding glass doors, windows, and railings must be installed consistently with those jurisdictions issuing notices of acceptance and product approvals of incorporated building materials. The installation of windows where openings are too large often requires modification in the field which could compromise the integrity of the window. As an example, a contractor might be tempted to use wood bucks as an easy and inexpensive way to fit windows installed in openings that are oversized. However, such measures might void the manufacturer's warranty, leaving the owner without recourse if defects are discovered post-construction. Even worse, when such a workaround allows air and water infiltration, the owner could be forced to not only address the original issue but also remediate resulting mold damage. Exterior Finish Insulated Systems (EFIS) as well as wood siding must be properly installed in accordance with strict manufacturer requirements; otherwise deviations will void warranties and cause the systems to fail resulting in massive damage awards against owners and others.

In addition to building envelope problems, other issues such as deficiencies associated with the installation of post-tension (PT) cables illustrate the potential for significant damages to plague owners. Deficiencies associated with PT cables can be easily detected during construction to avoid later massive damage claims. In many instances, contractors either entirely omit grease caps required to protect the ends of PT cables or fail to properly cap the cable ends. These deficiencies can be very expensive to fix, but can also pose serious life-safety concerns. Once the PT cables have been placed in tension and become compromised by corrosion, the cables might release causing the entire slab to fail. In that setting, the damages to relocate occupants can be significant but could be avoided at little cost during the construction quality control process. On the other hand, once construction is complete, the PT cables, and even their caps, are no longer visible for inspection. At that point, to definitively determine whether a problem exists at each PT cable location (hundreds in a high-rise building), swing stages must be dropped down the sides of the building to access the PT cable end locations. In addition, stucco and concrete must be chipped away to gain access to the PT cable end or cap, and after any problems found are resolved, the exterior surface must be reconstructed and repainted. Consider documenting the proper installation during construction. Then, if issues are raised post-construction, a documented history demonstrating proper installation can be provided to end the discussion as to the possibility of a PT claim. Likewise, taking stucco samples during construction to demonstrate proper thickness and application can be persuasive proof that post-construction testing is unnecessary and that these claims simply do not exist.

The quality control orientation session should be videotaped to preserve what was discussed among the participants. Once the project is completed and participants move away from the project, this videotaped session can be a critical piece of evidence to shift liability to others. Considering that the statutes of repose in most states are ten or more years,[85] this effort becomes even more valuable. More critical is the pressure on the owner to ensure that the program is properly administered to address these issues.

C. Use New Technology

New technology can be used to investigate hidden conditions without the need to intensively and physically monitor the work performed to detect defects that may be hidden behind building finishes. For example, new technological advances such as penetrating scans are being developed to investigate hidden conditions like PT cable deficiencies.

1. Mock-up Simulations

While design professionals have traditionally drawn on their experience in specifying certain materials, reading literature and performance data concerning the use of materials, etc., to prepare their plans so the resulting structures satisfy an owner's expectations, new mock-up and simulation technologies allow owners unprecedented insight into future performance. Mock-ups alone are very beneficial to discover problems with planned components and installation methods. Augmenting the benefit of mock-ups, equipment is now available to simulate conditions to which components might not be subjected for years, if ever. Both measures are worthwhile to avoid re-work and strategize regarding potential defect claims. For example, mock-up simulations of proposed railings can confirm that they will be aesthetically satisfactory, as well as comply with code requirements and withstand the pressures to which they will be subjected during their useful lives.

2. Cameras

Documenting a construction project through technological means took a giant leap forward with the advent of digital cameras. Video technology has the potential to be just as revolutionary. One application is to stream real-time video. The video can be captured by worker body cams and/or stationary webcams and reviewed not only by onsite supervisors but also by anyone who should review it, regardless their location.

Streaming the video facilitates more frequent inspections by special inspectors and enables executives to more fully assess situations when they need to make decisions as to how to resolve problems sitting at their desks thousands of miles away from the project site. Streaming video also affords owners tremendous flexibility when working with consultants. With video as an option, the geographic residency of consultant candidates is no longer such a pivotal factor. When selecting a consultant, the owner can choose the most qualified candidate knowing that he or she can

review specific conditions of concern at a moment's notice without the time delay and expense of traveling. Then, after the consultant has seen the conditions via video, the owner and consultant can decide whether traveling to the site is necessary. Not only will the subsequent onsite time be more efficient, having seen the conditions already, the video preview of the condition affords the consultant an opportunity to prepare more fully for his/her in-person investigation.

In addition to the general video benefits described above, worker body cams and stationary webcams have their own unique benefits. Body cams provide an up-close view of an employee's methods and finished product for quality control purposes, to catch problems early. Additional training can then be provided, as necessary, and the video can be used to confirm that constructive criticism is being implemented. The video also offers valuable insight for scheduling purposes, revealing how long particular tasks take and which employees are the quickest and/or best at which tasks to assign workers accordingly.

With body cam video accessible from anywhere, supervisors do not need to be physically near employees to see their work, making their supervision of employees more efficient. Moreover, employees will likely be on their best behavior, knowing their actions are, or can be, monitored. Body cam video can also be used to track workers' movements, to know where they are, what they are doing, and to prevent workers from entering dangerous areas of the jobsite or causing a conflict with other work being performed. If an accident occurs, supervisors monitoring the video will know immediately and can provide assistance sooner.

A growing number of projects are also installing stationary webcams.[86] Generally they are positioned to transmit a broader view of the project to serve marketing and potentially security purposes. When broadcasted on the Internet, thieves and vandals might realize that the world could be watching them, deterring them from committing their acts on those projects.

With the cost of data storage decreasing dramatically in recent years, it has become even more economical to record and retain the video captured. Obviously, the recorded video can summarily resolve many common disputes between workers. There is some value in that, but the recorded video can be priceless in other ways. As examples, the video can help rebut allegations that things were done improperly, without performing destructive testing, and assist an owner in undermining a contractor's delay/acceleration claim by showing that its employees were either not working or being inefficient.

VI. Conclusion

In a McGraw Hill Construction survey, owners were asked to estimate the percentage of owners that have adopted formal risk mitigation procedures.[87] Half of them said they believed fewer than 25% of owners had such programs.[88] Owners can benefit from implementing measures to avoid, mitigate, and shift liability for faulty design and construction. This can best be accomplished through establishing single-purpose entities, using contract clauses to protect rights, remedies, and defenses, and using peer review and quality control inspections to prevent post-completion construction claims. All this comes at a price and many owners simply do not want to pay for it. However, more sophisticated owners recognize and have learned to appreciate the benefits derived from diligent efforts during design and construction. Procrastination must be resisted and avoided. Owners frequently comment that they will initiate these protective measures on their next project, someday in the future, but that may be too late. For owners to be successful, they must understand that "there are seven days in a week, but 'someday' isn't one of them."[89]

Endnotes

1. Best practices, forms, and checklists from the organizations below are available at the listed URLs:

- American Bar Association Forum on Construction Law
  http://www.imageserve.com/aba/const-checklists-ead.html
  http://www.americanbar.org/groups/construction_industry/publications.html
- Construction Owners Association of America
  https://www.coaa.org/Collaboration/COAA-eCatalog
- Construction Industry Institute
  https://www.construction-institute.org/Store/CII/Publication_Pages/bp.cfm?section=orders
- The American Institute of Architects
  http://aia.org/practicing/bestpractices/index.htm
- The Associated General Contractors of America
  https://www.agc.org/learn/resource-library
- The Construction Management Association of America
  http://cmaanet.org/pd-home

2. United States v. ISS Marine Services, Inc., 905 F. Supp. 2d 121, 138 (D.D.C. 2012) (refusing to protect internal investigation report as work product because the "supervision" by attorneys in preparing it was "so minimal and superficial that it bordered on being non-existent" and commenting generally that "[m]inimal attorney involvement in an internal investigation represents a distinct difficulty for corporations claiming work-product privilege because it is the rare case in which a company genuinely anticipating litigation will leave its attorneys on the outside looking in"). *But see* Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (acknowledging that "[w]hile the 'work product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer"); Garcia v. City of El Centro, 214 F.R.D. 587, 594 (S.D. Cal. 2003) (protecting insurance adjuster's interviews of witnesses as work product before lawsuit was filed against insured).

3. *See* Kilduff v. Adams, Inc., 593 A.2d 478 (Conn. 1991) (corporate veil did not have to be pierced to find that corporate officers were personally liable for their misrepresentations since officers would be personally liable for their torts regardless of whether corporation was itself liable).

4. Examples of theories that offer remedies analogous to piercing the corporate veil include the following:

- Substantive Consolidation. *See In re* Huntco Inc., 302 B.R. 35 (Bankr. E.D. Mo. 2003) (the pooling of debtors' estates when necessary due to their interrelationship, upon which creditors relied).
- Civil Conspiracy. *See* Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963).
- Fraudulent Transfer. *See* Mountview Plaza Associates, Inc. v. World Wide Pet Supply, Inc., 820 A.2d 1105 (Conn. App. 2003) (upholding default judgment against shareholder and limited liability company to which the shareholder transferred a corporation's assets to avoid a debt of the corporation).
- Trust Fund Doctrine. *See* Henry I. Siegel Co., Inc. v. Holliday, 663 S.W.2d 824 (Tex. 1984) (allowing creditor to recover from corporate assets preferentially transferred to stockholders).

- Denuding Theory. *See* World Broadcasting Sys., Inc. v. Bass, 328 S.W.2d 863 (Tex. 1959) (holding stockholders of corporation personally liable to creditors to the extent of the funds they received from corporation when it was effectively dissolved after the creditor's claim arose).

5. *See* Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc., 447 A.2d 406, 412 (Conn. 1982) (stock ownership is important but not essential), Lally v. Catskill Airways, Inc., 198 A.D.2d 643 (N.Y. App. Div. 1993) (deeming an individual an "equitable owner" even without being a shareholder, when individual exercised sufficient control); Equity Trust Co. Custodian ex rel. Eisenmenger IRA v. Cole, 766 N.W.2d 334, 339–40 (Minn. Ct. App. 2009) (imposing personal liability when the individual exerted complete control). *But see* Morris v. New York State Dep't. of Taxation and Fin., 623 N.E.2d 1157 (N.Y. 1993) (non-shareholder could not be held personally liable); Riddle v. Leuschner, 335 P.2d 107 (Cal. 1959) (without ownership interest and no right to profits, individual may not be held personally liable).

6. Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (3d Cir. 2001).

7. Troyk v. Farmers Grp., Inc., 171 Cal. App. 4th 1305 (2009).

8. *See* Green v. Ziegelman, 873 N.W.2d 794, 811–12 (Mich. Ct. App. 2015) (where judgment was entered against an architectural corporation, the sole owner, who transferred assets to unjustly prevent judgment creditor from collecting on judgment, was held personally liable).

9. UST Corp. v. Gen. Rd. Trucking Corp., 783 A.2d 931, 939 (R.I. 2001).

10. Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523 (Cal. Ct. App. 2000). As a particularly debtor-friendly state, case law from Florida exemplifies the necessity in some jurisdictions of showing that the corporation was organized or utilized for fraudulent or illegal purposes to justify piercing the corporate veil. *See, e.g.,* Hilton Oil Transp. v. Oil Transp. Co., S.A., 659 So. 2d 1141, 1152–53 (Fla. Dist. Ct. App. 1995) (upholding corporate form because there was no evidence that the corporation was organized or utilized for fraudulent or illegal purposes, despite lack of corporate formalities, inadequate capitalization, overlapping owners, use of same corporate office, informal loan transactions, corporation being in effect financed by individual and directors not acting independently in the best interests of the company).

11. *See* Trustees of the Graphic Commc'ns Intern. Union Upper Midwest Local 1M Health and Welfare Plan v. Bjorkedal, 516 F.3d 719 (8th Cir. 2008); Fontana v. TLD Builders, Inc., 840 N.E.2d 767 (Ill. App. Ct. 2005); Automotriz Del Golfo De California S. A. De C. V. v. Resnick, 47 Cal. 2d 792 (1957) (two requirements for disregard of the corporate entity are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that, if the acts are treated as those of the corporation alone, an inequitable result will follow).

12. *See,* e.g., Lomas v. Kravitz, 130 A.3d 107, 126 (Pa. Super. Ct. 2015), granting appeal on different grounds, 2016 WL 4467284 (Pa. 2016) (listing the following factors to consider in determining whether to pierce the corporate veil: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs, and (4) use of the corporate form to perpetrate a fraud); Burchinal v. PJ Trailers-Seminole Mgmt. Co., LLC, 372 S.W.3d 200 (Tex. App. 2012) (listing the following as proof of an alter ego:

(1) the payment of alleged corporate debts with personal checks or other commingling of funds, (2) representations that the individual will financially back the corporation, (3) the diversion of company profits to the individual for the individual's personal use, (4) inadequate capitalization, and (5) other failure to keep corporate and personal assets separate)).

13. Hiller Cranberry Prods., Inc. v. Koplovsky Foods, Inc., 2 F. Supp. 2d 157, 161 (D. Mass. 1998), *rev'd in part on other grounds by* 165 F.3d 1 (1st Cir. 1999). The seminal veil piercing case in Massachusetts is My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748 (Mass. 1968).

14. Pepsi-Cola Metro. Bottling Co., Inc. v. Checkers, Inc., 754 F.2d 10, 14–16 (1st Cir. 1985).

15. *See* Real Colors, Inc. v. Patel, 39 F. Supp. 2d 978, 993 (N.D. Ill. 1999).

16. *See* BioCore, Inc. v. Khosrowshahi, 41 F. Supp. 2d 1214, 1228–29 (D. Kan. 1999).

17. *See* Liberty Mut. Ins. Co. v. Leroy Holding Co., Inc., B.R. 746, 752 (N.D.N.Y. 1998).

18. *See* Johnson v. Exclusive Props. Unlimited, 720 A.2d 568, 571 (Me. 1998).

19. Rolf Garcia-Gallont & Andrew J. Kilpinen, *If the Veil Doesn't Fit . . . An Empirical Study of 30 Years of Piercing the Corporate Veil in the Age of the LLC*, 50 Wake Forest L. Rev. 1229 (2015).

20. *Id.* at 1242.

21. *Id.* at 1252, Appendix I.

22. Irving v. Doctors Hosp. of Lake Worth, Inc., 415 So. 2d 55 (Fla. Dist. Ct. App. 1982).

23. *Id.* at 58–59.

24. *See* Morgan v Jackson Ready-Mix Concrete, 157 So. 2d 772, 778 (Miss. 1963) (upholding jury's finding that corporation with which plaintiff had a contract was an agent of general partnership, resulting in partners being held personally liable).

25. Stone v. Palms West Hosp., 941 So. 2d 514 (Fla. Dist. Ct. App. 2006); *see also,* Cuker v. Hillsborough Cnty. Hospital Auth., 605 So. 2d 998, 1000 (Fla. Dist. Ct. App. 1992) (trial court erred in refusing to allow issue of "apparent agency" to go to the jury); Acevedo v. Lifemark Hosp. of Fla., Inc., No. 04-19615 CA 15, 2005 WL 1125306 (Fla. Cir. Ct. May 5, 2005) (like actual agency, using apparent agency principles to find liability is left for the jury's consideration).

26. Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007).

27. *Id.* at 237.

28. *Id.* at 239.

29. First Realvest, Inc. v Avery Builders Inc., 600 A.2d 601, 603 (Pa. Super. Ct. 1991); Garcia v. Coffman, 946 P.2d 216 (N.M. Ct. App. 1997).

30. Kolodkin v. Cohen, 496 S.E.2d 515, 517 (Ga. Ct. App. 1998), *superseded by statutory amendment as stated in* Helmer v. Rumarson Technologies, Inc., 538 S.E. 2d 504 (Ga. Ct. App. 2000).

31. The following provision might help undermine a plaintiff's attempts to reach beyond the single-purpose entity:

> [Contracting party] understands, acknowledges and agrees that [subsidiary] is an independent entity, separate and distinct from [parent entity] and [subsidiary's] affiliated entities. [Contracting party] acknowledges that by virtue of this Agreement it has a contractual relationship with [subsidiary] but confirms that it has no relationship with [parent entity] or [subsidiary's] affiliated entities with regard to [project name], contractual or otherwise. [Contracting party] agrees that no provision in this Agreement shall create or give to [contracting party] any claim or right of action against [parent entity] or [subsidiary's] affiliated entities. [Contracting party] further acknowledges that any claim or right of action it might have based on statements, representations, marketing materials, or any other writing issued directly or indirectly by [parent entity], [subsidiary's] affiliated entities, or any of their officers or employees, with regard to the project may be pursued solely against [subsidiary].

Other similar protective provisions as set forth below should be incorporated in the construction agreement to shield individuals associated with the entity from liability.

> In no event shall [contracting party] have any recourse against the individual partners, officers, directors, employees, agents, and direct or indirect owners of [subsidiary] personally in connection with the obligations and liabilities of [subsidiary] hereunder. [Subsidiary], its partners and its representatives shall have no personal liability with respect to any of the provisions of the Agreement.

32. A plaintiff could argue that if the parent deems itself to have the insurable interest to warrant paying insurance premiums to recoup its financial damages in the event of a loss, it should have liability in other respects.

33. To prevail, a plaintiff might have to show more than indicators of the relationship between the parent and its subsidiary. See Muminov v. Muniraj Enterprises, Inc., No. 6:11-cv-969-Orl-31GJK, 2012 WL 760638 (M.D. Fla. Mar. 8, 2012) (granting summary judgment because plaintiff

failed to present indicia of control required to establish vicarious liability). Nevertheless, depriving a plaintiff of evidence of the relationship might preclude the argument to begin with.

34. *See* A.G. Cullen Constr., Inc. v. Burnham Partners, LLC, 29 N.E.3d 579 (Ill. App. Ct. 2015) (unpaid contractor using developer's bookkeeper's LinkedIn profile listing her as the operations manager of the parent entity and testimony of contractor's employee that he believed parent and subsidiary "were one and the same" and principal of parent was the ultimate decision-maker on the project because "everything had to go through [him]" was successful in getting appellate court to reverse the lower court, finding that the lower court should have pierced the subsidiary's corporate veil because of principal's fraudulent transfers).

35. *See, e.g., In re* CCT Commc'ns, Inc., 464 B.R. 97 (S.D.N.Y. 2011) (under New York law limitation on liability clauses are enforceable, except as to damages resulting from willful misconduct and gross negligence); Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc., 663 S.E.2d 240 (Ga. 2008) (holding that contractual clause under which owner agreed to limit engineering firm's liability on any third-party negligence claims to firm's total fee for services rendered on project violated public policy as set forth in applicable statute); E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex., 551 F.2d 1026, 1029 (5th Cir. 1977) (Alabama courts strictly construe provisions precluding delay-related damages but generally enforce them absent delay (1) not contemplated by the parties under the provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference). *But see* Fla. Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316, 1319–20 (11th Cir. 1985) (enforcing exculpatory and indemnity provision to shield designer from liability stemming from its own negligence when the provision was clear and unequivocal, the parties were sophisticated and owner was afforded option to obtain insurance coverage for liability but owner elected not to do so); Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195, 208–09 (3d Cir. 1995) (enforcing contractual limitation of liability, as to the owner's negligence and breach of contract claims, and stating that under Pennsylvania law the stringent standards developed for exculpatory, hold harmless, and indemnity clauses did not apply to the limitation of liability provision).

36. *See* Nelson Roofing & Contracting, Inc. v. C. W. Moore Co., 245 N.W.2d 866 (Minn. 1976) (upholding period to sue in surety bond that is longer than length of time in statute, because the parties' agreement does not frustrate the purpose of the statute). *But see* Transamerica Ins. Co. v. Housing Auth. of City of Victoria, 669 S.W.2d 818 (Tex. App. 1984) (even though longer, court held that one-year statute of limitations governed over conflicting two-year period in bond).

37. Fed. Ins. Co. v. Konstant Architecture Planning, Inc., 902 N.E.2d 1213 (Ill. App. Ct. 2009) (upholding dismissal of claim as time-barred because statute of limitations expired when calculated from starting point specified in parties' contract, despite the jurisdiction having a statute of repose with a discovery rule providing a delayed start for latent defects); Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., 892 A.2d 830 (Pa. Super. Ct. 2006) (enforcing a contract provision specifying when the applicable statute of limitations would run); Schultz v. Cooper, 134 S.W.3d 610 (Ky. Ct. App. 2003) (holding that statute of repose discovery rule was inapplicable and instead enforced statute of limitations trigger specified in contract).

38. Fla. Stat. § 718.124; *see* Charley Toppino & Sons, Inc. v. Seawatch Marathon Condo. Ass'n, Inc., 658 So. 2d 922, 925 (Fla. 1994); *see also* Magnolia No. Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 371–72 (S.C. Ct. App. 2012) (upholding lower court's equitable tolling of association's statute of limitations to allow the claim to proceed because owner had retained control). *But see* Berish v. Bornstein, No. BACV198800372A, 2006 WL 2221924 (Mass. Sup. Ct. May 22, 2006) (without explicit tolling statute, court refused to toll the association's statute of limitations despite available "adverse domination doctrine").

39. Fla. Stat. § 558.004(10); Ariz. Rev. Stat. Ann. § 12-1363(F); Del. Code Ann. tit. 25, § 81-321(a)(7); Idaho Code Ann. § 6-2503(1); Ky. Rev. Stat. Ann. § 411.264; Mont. Code Ann. § 70-19-427(1); Tenn. Code Ann. § 66-36-103(l); Va. Code Ann. § 55-70.1(E); Wash. Rev. Code. § 64.50.020(8).

40. *See* Cypress Fairway Condo. v. Bergeron Constr. Co., Inc., 164 So. 3d 706, 708 (Fla. Dist. Ct. App. 2015) (holding that the statute of repose did not begin to run on the date the contractor submitted its final payment application, as an indicator its work was completed, but rather on the date both sides had completed their obligations under the contract, the date of final payment); Fed. Ins. Co. v. Southwest Fla. Ret. Ctr., Inc., 707 So. 2d 1119, 1122 (Fla. 1998) (starting the statute of limitations for a claim against a general contractor's performance bond upon the owner's acceptance of the entire project as having been completed in accordance with the terms and conditions set out in the construction contract, but without any deferral of the accrual of a cause of action for latent undiscovered defects, because the latent defect exception appearing in the general construction claim statute of limitations did not appear in the statute applicable to performance bond claims); BDI Constr. Co. v. Hartford Fire Ins. Co., 995 So. 2d 576, 578 (Fla. Dist. Ct. App. 2008) (holding that for a claim against a subcontractor's performance bond the statute of limitations does not begin to run until the contractor accepts the subcontractor's scope of work as having been completed per the contract, without reservations, and pays for it in full).

41. Cypress Fairway Condo., 164 So. 3d at 708.

42. *See id.* (reversing the lower court's dismissal of the claim as untimely based on the final payment application date; even though final payment was issued only three days later, the appellate court's use of the final payment date as the date the contract was "completed" to start the statute of repose period meant the claim was timely).

43. RPC Liquidation v. Iowa Dep't of Transp., 717 N.W.2d 317, 320–21 (Iowa 2006) (enforcing contract provision excluding third-party beneficiaries); Pierce Associates, Inc. v. Nemours Found., 865 F.2d 530, 544 (3d Cir. 1988) (same, applying Delaware law).

44. Frickel v. Sunnyside Enterprises, Inc., 725 P.2d 422, 426 (Wash. 1986) (reversing judgment against apartment complex owner based on enforceability of warranty disclaimer); Nastri v. Wood Bros. Homes, Inc., 690 P.2d 158, 161–62 (Ariz. Ct. App. 1984) (holding that warranty disclaimer is enforceable as to original purchasers but void as to subsequent purchasers), *rejected on other grounds by* Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc., 223 P.3d 664, 669 (Ariz. 2010). *But see* Fla. Stat. § 718.303 (preventing the waiver of statutory condominium warranties).

45. *See* Mattingly v. Palmer Ridge Homes LLC, 238 P.3d 505 (Wash. Ct. App. 2010) (holding a provision unenforceable that limited owner's liability to only express warranties when purchaser was not provided terms before purchase and limiting provision was not conspicuous enough); Moorer v. Hartz Seed Co., 120 F. Supp. 2d 1283, 1291 (M.D. Ala. 2000) (holding that warranty disclaimer is enforceable as long as requirements are met to protect buyers from surprise and seller must still comply with certain standards).

46. *See In re* ATP Oil & Gas Corp., 517 B.R. 756, 761 (S.D. Tex. 2014) (upholding contract provision requiring gross negligence, willful misconduct, or intentional acts to recover consequential, special or indirect damages); Travelers Cas. and Sur. Co. v. Dormitory Auth.-State of N.Y., 735 F. Supp. 2d 42, 58 (S.D.N.Y. 2010) (finding that no viable claim existed in light of no-damages-for-delay clause because actions causing alleged delays did not rise to the level of willful, malicious or grossly negligent); Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329 (Fla. Dist. Ct. App. 2015) (upholding employer's workers' compensation immunity against claims based on acts that did not rise to the level of gross negligence).

47. *See* Fla. Stat. § 720.303(1) (statute requiring associations to obtain their members' approval before filing a claim with an amount in controversy over $100,000).

48. *See, e.g.*, Maddy v. Gen. Elec. Co., 80 F. Supp. 3d 544, 548 (D.N.J. 2015) (denying motion to compel arbitration because plaintiffs had not consented to arbitrate in a valid contract); *In re* Green Tree Servicing LLC, 275 S.W.3d 592, 604 (Tex. App. 2008) (directing lower court to reverse its ruling and enter an order compelling arbitration because of contract between the parties which contained a binding agreement to arbitrate); O'Hare v. Municipal Res. Consultants, 107 Cal. App. 4th 267, 283 (2003) (affirming denial of motion to compel arbitration because no enforceable

agreement to arbitrate existed); Laborers' Int'l Union of N. Am., Local Union No. 309, AFL-CIO v. W. W. Bennett Constr. Co., Inc., 686 F.2d 1267, 1274 (7th. Cir. 1982) (finding lower court did not have power to compel party to participate in arbitration of dispute when the party did not contractually agree to do so).

49. An owner expecting to pursue claims more often than defend against them would take the opposite approach and try to make the dispute resolution procedures and venues in its contracts consistent to make pursuing its claims more efficient. Such streamlining could be accomplished even if arbitration is preferred, by modifying certain provisions controlling consolidation and joinder in The American Institute of Architect's A201-2007, standard form general conditions:

> 15.4.4. Consolidation or Joinder
>
> 15.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).
>
> 15.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

AIA Document A201-2007, General Conditions for the Contract for Construction, §§ 15.4.4, 15.4.4.1, and 15.4.4.1.

50. *See, e.g.*, 62 Pa. Cons. Stat. § 3937; Fla. Stat. § 47.025; S.C. Code Ann. § 15-7-120 (1976); Consolidated Insured Benefits, Inc. v. Conseco Med. Ins. Co., 370 F. Supp. 2d 397 (D.S.C. 2004) (refusing to enforce forum selection clause requiring out-of-state litigation).

51. The following states have right to cure statutes, albeit, some statutes listed are limited to particular types of claims and/or contexts. Alaska: Alaska Stat. § 09.45.881(a); Arizona: Ariz. Rev. Stat. §§ 12-1361 to -1366; Arkansas: Ark. Stat. Ann. § 4-2-607; California: Cal. Civil Code §§ 895 to 945.5; Colorado: Colo. Rev. Stat. §§ 13-20-803.5; Delaware: 25 Del. Code § 81-321; Florida: Fla. Stat. §§ 558.001 to -.005; Georgia: Ga. Code Ann. §§ 8-2-36-43; Hawaii: Haw. Rev. Stat. § 672E-11; Idaho: Idaho Code Ann. §§ 6-2501 to -2504; Indiana: Ind. Code §§ 32-27-3 - 32-27-3-14; Kansas: Kan. Stat. Ann. §§ 60-4701 to -4709; Kentucky: Ky. Rev. Stat. §§ 411.250 to .266; Louisiana: La. Rev. Stat. Ann. § 9:3141 to 3150; Minnesota: Minn. Stat. §§ 327A.01; Mississippi: Miss. Code Ann. § 83-58-17; Missouri: Mo. Rev. Stat. §§ 436.350, .353, .356, .362; Montana: Mont. Code Ann. §§ 70-19-426 to -428; Nevada: Nev. Rev. Stat. §§ 40.645 to .675; New Hampshire: N.H. Rev. Stat. § 359-G:1; New Jersey: N.J. Rev. Stat. § 46:3B-7; New York: N.Y. Gen. Bus. Law § 777-a; North Dakota: N.D. Cent. Code §43-07-26; Ohio: Ohio Rev. Code §§ 1312.01to.08; Oklahoma: Okla. Stat. Ann. § 765.6; Oregon: Or. Rev. Stat. §§ 701.565, .570, .580; South Carolina: S.C. Code Ann. §§ 40-59-830, -840, -850; South Dakota: S.D. Codified Laws §§ 21-1-15, -16; Tennessee: Tenn. Code Ann. § 66-36-101 to -103; Texas: Tex. Prop. Code § 27.001; Vermont: Vt. Stat. Ann. tit. 27A, § 3-124; Virginia: Va. Code § 55-70.1; Washington: Wash. Rev. Code §§ 64.50.005–.020; West Virginia: W. Va. Code §§ 21-11A-1 to -16; Wisconsin: Wis. Stat. §§ 101.148 & 895.07. * *But see* for Maryland, U.K. Constr. & Mgmt., LLC v. Gore, 20 A.3d 163, 171 (Md. App. 2011) (recognizing that "a plaintiff may not assert a claim for breach of warranty against a defendant whom he has denied the opportunity to correct the defect").

52. *See, e.g.*, Alaska Stat. § 09.45.893; Kan. Stat. Ann. § 60-4706(a); Ky. Rev. Stat. §§ 411.260(1), (2); Ohio Rev. Code § 1312.03; Tex. Prop. Code § 27.007.

53. Hawaii's statute states, in relevant part: "The notice of claim shall not constitute a claim under any applicable insurance policy and shall not give rise to a duty of any insurer to provide a defense under any applicable insurance policy unless and until the process … is completed." Haw. Rev. Stat. § 672 E-3(a). Less clear are statutes like Florida's which simply state that giving notice under the statute does not supplant the notice requirements under any applicable insurance policy. Fla. Stat. § 558.004(13). Recently, one Florida court confirmed this interpretation determining that an insurer's duty to defend is triggered by a formal "suit" defined as litigation, arbitration or other formal dispute resolution proceeding. Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 124 F. Supp. 3d 1272 (S.D. Fla. 2015) (holding that under the specific language of the standard commercial general liability insurance policy form CG 00 01 at issue, the notice and right to cure mechanism for resolving a dispute is not the same thing as a formal proceeding which would trigger the insurer's duty to defend).

54. OCIP stands for owner controlled insurance program.

55. *See, e.g.*, Edward J. Seibert, A.I.A., Architect and Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, 573 So. 2d 889, 892 (Fla. Dist. Ct. App. 1990) (reversing judgment against designer when building official interpreted code to determine that questionable issue in design complied and issued permit, holding "[w]hen an agency with the authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible"). For additional suggestions as to how owners can avoid litigation, see Steven B. Lesser & Michele C. Ammendola, *Checklist 26: How Owners Can Avoid Litigation on Construction Projects,* Construction Checklists: A Guide to Frequently Encountered Construction Issues 181 (Fred D. Wilshusen et al. eds., 2008), http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=215661 (last visited July 11, 2016).

56. For a more detailed discussion of performing a pre-bid risk assessment, please see the written materials from the 2015 Annual Meeting of the American Bar Association Forum on Construction Law entitled "Helping Your Client Set Up a Pre-Bid Risk Assessment System" by Michael Chase, Todd Mohr, and Tamara Lindsay.

57. United States v. Spearin, 248 U.S. 132 (1918) (an owner impliedly warrants that if a contractor complies with the design it is provided, the resulting construction will be adequate, and the contractor will not be liable to the owner for loss or damage which results from insufficiencies or defects in the plans provided).

58. Jacksonville Port Auth. v. Parkhill-Goodloe Co., 362 So. 2d 1009 (Fla. Dist. Ct. App. 1978) (owner provided boring reports but failed to disclose presence of known rock to dredging contractor); Sergent Mech. Sys., Inc. v. United States, 34 Fed. Cl. 505, 519 (1995); Am. Ship Bldg. Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981); Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 487–87 (1972); Helene Curtis Indus., Inc. v. United States, 160 Ct. Cl. 437, 444 (1963) (owner knew contractor erroneously assumed it could complete project without grinding process, but failed to inform contractor); City of Indianapolis v. Twin Lakes Enterprises, Inc., 568 N.E.2d 1073, 1080 (Ind. Ct. App. 1991) (owner failed to disclose the presence of obstructions it dumped in a reservoir that it instructed a contractor to dredge); Warner Constr. Corp. v. City of Los Angeles, 466 P.2d 996 (Cal. 1970) (owner liable for providing soil boring reports without disclosing cave-ins that occurred taking them, despite disclaimer clause); Hendry Corp. v. Metro. Dade Cnty., 648 So. 2d 140, 142 (Fla. Dist. Ct. App. 1994).

59. *See* Sherman R. Smoot Co. v. Ohio Dep't of Adm. Serv., 736 N.E.2d 69 (Ohio Ct. App. 2000) (allowing contractor to recover because it was entitled to rely on the information provided to it by the owner and, even though contractor did not conduct a reasonable pre-bid investigation, a reasonable investigation would not have revealed the inaccuracy of the information; stating the general rule that where information provided by an owner was obviously intended to be used by bidders in formulating their bids, the owner's implied warranty will prevail over express contract clauses that disclaim any responsibility for the accuracy of information and that require contractors to examine the site and check the plans, but recovery will be denied where (1) a reasonable investigation would have revealed the inaccuracy, or (2) the information provided was accurate, but the contractor reached conclusions based on it that were inaccurate). *But see* Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed Cir. 1987) (affirming dismissal of contractor's claim when contractor was not justified in relying on information that turned out

to be inaccurate in light of provision warning the contractor that the values provided were not to be interpreted as indicating range of material characteristic and further expressly indicated that bidders were obligated to perform the necessary investigation to decide for themselves character of material).

60. Cnty. Mut. Ins. v. Gyllenberg Constr., Inc., No. CV-03-856-ST, 2004 WL 1490326, at *9 (D. Or. July 2, 2004) ("The *Spearin* doctrine provides certain protection from liability to contractors who build a structure in accordance with the owner's plans.").

61. PCL Constr. Servs., Inc. v. United States, 47 Fed. Cl. 745, 785 (2000); *see also* Athan E. Tramountanas, *Affirmative Defenses to the* Spearin *Doctrine: Government Attempts to Avoid the Implied Warranty of Specifications*, Construction Briefings No. 2003-5 (May 2003); *cf.* E.H. Morrill Co. v. California, 65 Cal. 2d 787 (Cal. 1967) (court refused to uphold "verification" clause because it was too broad).

62. *See supra* notes 55–58.

63. Example language:

> Any and all approvals or consents of Owner which may be required hereunder must be in writing. It is understood and agreed, however, that no approval, consent or payment (whether partial or final) shall constitute final acceptance of the Work or a wavier by Owner of any rights or remedies, and that no such approval, consent or payment of Owner shall release or discharge Contractor of any of its obligations in connection with the Project.

64. Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999).

65. Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033 (Fla. Dist. Ct. App. 2010).

66. In Florida, design firms can now partially shield their employees from personal liability if:

> (a) The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;
>
> (b) The contract does not name as a party to the contract the individual employee or agent who will perform the professional services;
>
> (c) The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence; and
>
> (d) The business entity maintains any professional liability insurance required under the contract;

Fla. Stat. § 558.0035(1)(a)–(d).

If a firm satisfies the foregoing conditions, its employees will be protected from all economic damages. Under Florida's statute, the individuals could still be held liable for damages flowing from personal injuries or property not subject to the contract, but those limited and inapplicable exceptions will be of little comfort to an owner whose project is riddled with design errors.

67. The owner can also obtain Owners' Protective Professional Indemnity (OPPI) coverage to bridge the gap between the designer's limits and the owner's desired coverage level.

68. From Florida's Building Code at Fla. Stat. § 553.79(5)(b): "The fee owner of a threshold building shall select and pay all costs of employing a special inspector, *but the special inspector shall be responsible to the enforcing agency*." (Emphasis added.)

69. *See* Trianon Park Condo. Ass'n v. Hialeah, 468 So. 2d 912, 922 (Fla. 1985) (shielding governmental bodies and their inspectors from liability for failing to use due care in enforcing the construction requirements of the building code); Kennedy v. Haywood Cnty., 581 S.E.2d 119, 121 (N.C. Ct. App. 2003) (upholding inspector's sovereign immunity). *But see* Wood v. Milin, 397 N.W.2d 479 (Wis. 1986) (holding negligent inspectors and municipality liable up to statutory cap).

70. Dorse v. Armstrong World Indus., Inc., 513 So. 2d 1265, 1268 n.4 (Fla. 1987) (holding that a sovereign's agent also enjoys sovereign immunity if he is a "true" agent, a relationship in which the principal controls not only the outcome of the relationship, but also the means used to achieve the outcome).

71. An example provision clarifying that an independent inspector's inspections are for the benefit of the owner only:

> The Contractor has sole responsibility for the proper construction of the Project and is solely responsible for the safety and adequacy of any equipment, scaffolding, sheeting, bracing, forms, or other Work aids, and for supervising the Work. Construction review or inspection(s) by or on behalf of the Owner are for Owner's sole benefit and shall not relieve or diminish the Contractor of its responsibilities as described in the Agreement.

72. Omitting standard boilerplate provisions, the following is example language for such a guaranty:

> Guarantor unconditionally and irrevocably guarantees to Owner that in the event of Contractor failing in any respect in accordance with the provisions of the Contract (after the relevant notices have been issued and the failure has not been cured as required by the Contract), Guarantor shall promptly upon demand in writing by Owner perform or take such steps as are necessary to achieve performance or observance of such terms and provisions to the extent of Contractor's liability under the Contract.
>
> The liability of Guarantor hereunder shall not be reduced or discharged by any alteration in the relationship between Owner and Contractor which has been consented to by Contractor (with or without the knowledge or consent of Guarantor), or by any forbearance or indulgence by Owner towards Contractor or Guarantor whether as to payment, time, performance, or otherwise.
>
> Guarantor agrees to perform and make any payment due hereunder timely after receiving written demand and waives all privileges or rights which it may have as a guarantor to require Owner to first exhaust remedies against Contractor.
>
> The obligations of Guarantor hereunder shall continue in full force and effect (even after the expiration or termination of the Contract) until all of Contractor's performance and payment obligations and liabilities set forth in the Contract have been fully discharged.

Especially when the parent is a foreign entity, it is important to include choice of law and forum-selection provisions such as the following:

> This Guaranty shall be governed by the laws of the state of _____, without reference to its choice of law rules. The Parties agree that the sole and exclusive forum and venue for the resolution of any and all claims and disputes related to this Guaranty shall be in [recommendation: jurisdiction of the project's locale]. Process in any action or proceeding referred to in this Paragraph may be served on any party anywhere in the world. The terms of this Paragraph regarding governing law and venue for dispute resolution are exclusive and mandatory, notwithstanding anything to the contrary in the Guaranty or any of the documents referenced or incorporated herein.

73. Information regarding Zurich North American Insurance Company's Subguard coverage is available on its website at https://www.zurichna.com/en/industries/construction/contractors (last visited July 11, 2016).

74. See the classic story of how value engineering potentially threatened the demise of the Citycorp Center building in Manhattan where the joints were discovered to have been bolted as opposed to welded in accordance with the contract documents. The substitution was later discovered, post-completion, resulting in significant remediation after the building was fully-occupied. Joe Morgenstern, *The Fifty-Nine-Story Crisis*, The New Yorker, May 29, 1995, at 45.

75. In the 1970s and 1980s roughly one of three bid construction projects ended up in litigation. Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 Willamette L. Rev. 649, 665 (1997). The success of alternate dispute resolution methods has decreased litigation rates, but they are still high, especially considering they do not reflect a growing number of asserted but not litigated claims. Richard Fullerton, *Searching for Balance in Conflict Management: The Contractor's Perspective*, 60 ADR Disp. Resol. J. 48, 53 (2005) (citing national studies reporting mediation success rates between 80% and 85%). For example, approximately one in eight major construction projects in Portland, Oregon, had been reported to end up in litigation. Phillips, *supra*, at 668.

76. Even without an imminent lawsuit looming, similar analyses and records are commonly protected from disclosure in the analogous medical peer review context. Understanding the value of peer review to promoting quality healthcare, Congress required hospitals receiving Medicare funds to operate internal peer review programs and afforded the peer reviewers immunity from suit. *See* 42 U.S.C.A.

§ 1320c-3(a) (requiring peer review); 42 U.S.C.A. §§ 11101, 11111 (providing immunity). States have buttressed those protections by making peer review information privileged from discovery and admission in court. Brendan A. Sorg, *Is Meaningful Peer Review Headed Back to Florida*, 46 Akron L. Rev. 799, 808 (2013) ("all fifty states and the District of Columbia have created an evidentiary privilege for peer review information") (citing KD v. United States, 715 F. Supp. 2d 587, 594 (D. Del. 2010)); *see also, e.g.*, Iowa Code Ann. § 147.135 (1995); Ky. Rev. Stat. Ann. § 311.377(2) (1998); 63 Pa. Cons. Stat. Ann. § 425.4 (1995). The same public policy and claim management considerations underlying the protections afforded to medical peer review also justify protecting construction design peer reviews. Architects and engineers, like doctors, are professionals. *See* Fla. Stat. § 471.013(1)(a)1 (requiring a four-year college education, four years of engineering experience and satisfactory completion of an exam to become an engineer), and Fla. Stat. § 481.209 (imposing similar education, experience and examination requirements to become an architect). Like doctors, people's lives hinge on the quality of designers' work, which is improved with unimpeded peer review.

77. *See supra* note 2. From the perspective of making it as likely as possible the peer reviewer's work is protected as privileged, it is ideal for the owner's attorney to contract with the peer reviewer instead of the owner. If the owner's attorney is reluctant to do so because he/she does not want to assume the financial liability for the peer reviewer's fees, provisions could be incorporated into the peer reviewer's contract (or attached as an addendum) clarifying that the owner is solely responsible for the peer reviewer's fees. An example provision is below.

> Peer Reviewer acknowledges and agrees that Owner shall be solely responsible to pay all fees and costs that arise out of this Agreement. Peer Reviewer shall pursue collection of all amounts due and owing under this Agreement solely from Owner and further acknowledges and agrees that Counsel shall have no liability whatsoever for any fees and costs for any services or charges that arise from this Agreement. This Agreement is being executed by Counsel to protect all documents, reports and information generated by Peer Reviewer as work product prepared at the direction of Counsel as legal counsel for Owner. All invoices are to be directed to Counsel on behalf of Owner for the purpose of processing payment by Owner.

This approach could also be used in retaining consultants after a claim has been asserted, even when the owner's insurance company is paying for the owner's defense (but will not retain the consultants directly). The carrier's responsibility for the consultants' fees could be clarified using language like in provisions below.

1. Consultant acknowledges and agrees that Counsel and Owner shall *not* be responsible to pay any fees or costs that arise out of the above-referenced Consulting Agreement ("Agreement"), except that Owner might become responsible as set forth in Paragraph No. 2 below. (In no event shall Counsel be or become responsible.) Consultant shall pursue collection of all amounts due and owing under the Agreement solely from the insurance company(ies) paying for Owner's defense at the time the fees and costs are incurred ("Carriers"). The Agreement is executed by Counsel solely to protect all documents, reports and information generated by Consultant as work product prepared at the direction of Counsel as legal counsel for Owner.
2. In the event all of the Carriers provide a 72-hour notice that they will cease funding payments to Consultant, Owner will assume responsibility for the reasonable fees and costs incurred by Consultant after the conclusion of the last notice period. However, at the conclusion of the above-referenced notice period, either party may terminate their obligations under the Agreement at will.

78. *See* Seibert, 573 So. 2d at 892.

79. AACE International defines the "critical path" as:

> The critical path is defined as the longest logical path through the CPM network and consists of those activities that determine the shortest time for project completion. Activities within this or list form a series (or sequence) of logically connected activities that is called the critical path. A delay to the start or completion of any activity in this critical path results in a delay to project completion, assuming that this path consists of a continuous sequence of activities without an overriding date constraint or multiple calendars.

Christopher W. Carson et al., *Identifying the Critical Path*, AACE International Recommended Practice No. 49R-06, Rev. Mar. 5, 2010.

80. The same rationale underlies cases holding that in order for a contractor to be entitled to home office overhead damages from a government entity due to a delay on a project, the contractor must have been forced to sit completely idle for the period of "suspension." *See* Martin Cnty. v. Polivka Paving, 44 So. 3d 126, 132–33 (Fla. Dist. Ct. App. 2010); Broward Cnty. v. Brooks Builders, Inc., 908 So. 2d 536, 541 (Fla. Dist. Ct. App. 2005); Triple R Paving, Inc. v. Broward Cnty., 774 So. 2d 50 (Fla. Dist. Ct. App. 2000). *But see* Jackson Constr. Co., Inc. v. United States, 62 Fed. Cl. 84 (2004) (allowing a contractor that finished early or on-time to recover only if it proves (1) that it intended to finish early, (2) that it was capable of finishing early, and (3) that it would have actually finished early but for the owner's actions).

81. An example provision requiring critical path methodology in project schedules:

> Within fifteen (15) days from the date of the execution of this Agreement, Contractor will provide Owner with a revised Construction Schedule which shall: (1) be in a detailed critical path method schedule setting forth the dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents, (2) provide a graphic representation in CPM chart form of all activities and events that will occur during the performance of the Work, (3) contain the same completion dates set forth in the Owner-Contractor Agreement, (4) shall not exceed the time limits for completion of the Work, or any portion thereof, under the Contract Documents, (5) shall set forth all activities, by level, floor and area for the entire Project and shall provide for the expeditious and practicable execution of the Work, and (6) be satisfactory to Owner. At Owner's request, Contractor shall provide Owner with electronic versions of the original Construction Schedule and all subsequent updates, including, but not limited to, milestone status updates (*i.e.*, by disk or CD). The Construction Schedule shall be updated every month in both electronic and hard copy format as the Work is completed and be delivered to Owner with each Application for Payment. Review of Project Schedule(s) and/or Schedule Update(s) by Owner shall not be interpreted or construed to constitute approval by the Owner as to the accuracy or reasonableness of the Schedule(s). The Construction Schedule will be based on a five-day work week, with Saturday being allowed as a make-up day as required to keep pace with the Schedule.

An example provision requiring critical path methodology as a prerequisite to viable claims for additional time and costs:

> Notwithstanding any other provision in the Contract Documents to the contrary, Owner will evaluate each request for an authorized Contract Price Adjustment and/or Extension of the Contract Time ("Request") based upon the Progress Schedule in effect as of the date of the occurrence giving rise to the Request ("Occurrence"). Owner shall make all determinations concerning the approval or denial of such Requests. In no event will a Contract Price Adjustment or Extension of Contract Time be due unless the Occurrence affected the critical path of the Project, as substantiated by the Progress Schedules.

82. To impose the requirement, an owner should include the following language in its contract: "Delivery of an updated Progress Schedule with each Application for Payment shall serve as a condition precedent to any obligation of Owner to pay all or any portion of the Application for Payment submitted to Owner by Contractor."

83. *See* Blinderman Constr. Co., Inc. v. United States, 39 Fed. Cl. 529, 544 (Fed. Cl. 1997) (holding that where both parties contribute to the delay "neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party"); George

Sollitt Constr. Co. v. United States, 64 Fed. Cl. 229, 273–74 (Fed. Cl. 2005) (denying delay claim where both contractor and government were responsible for critical path delays and such delays could not be apportioned with any certainty).

84. The U.S. Court of Claims in Mega Constr. Co., Inc. v. United States, 29 Fed. Cl. 396 (1993), held that the following provision required a contractor to show that (1) the alleged delay was of an unreasonable length of time, (2) the owner was the sole proximate cause of the delay, and (3) the delay resulted in some injury to the contractor (i.e., impacted the critical path):

> If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the [Owner] . . . an adjustment shall be made for any increase in the cost of performance of this contract . . . necessarily caused by such unreasonable suspension, delay or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

29 Fed. Cl. at 396.

85. R. P. Wallace, Inc. v. United States, 63 Fed. Cl. 402, 409 (Fed. Cl. 2004) (holding that a claimant "must prove that the [events at issue] proximately caused a delay to the overall completion of the contract, *i.e.,* that the delay affected activities on the critical path"); Mega Constr. Co., 29 Fed. Cl. at 424–25 (to be recoverable, "delays must have affected activities on the critical path"); PCL Constr. Servs., Inc. v. United States, 96 Fed. Appx. 672, 676 (Fed. Cir. 2004) (affirming dismissal because claimant failed to conduct a critical path analysis or otherwise establish that defendant was "responsible for any quantified amount of delay attributable to specific conduct"); Net Constr., Inc. v. C & C Rehab. & Constr., Inc., 256 F. Supp. 2d 350, 354 (E.D. Pa. 2003) (claimant seeking additional costs resulting from delay "bears the burden of demonstrating a reasonable allocation of its increased costs as a result of delays of the construction project caused by [the party allegedly at fault]"); Wunderlich Contracting Co. v. United States, 351 F.2d 956, 968–69 (Fed. Cl. 1965) ("Broad generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took . . . longer to complete than anticipated are not sufficient. . . . It is incumbent upon plaintiffs to show the nature and extent of the various delays for which damages are claimed and to connect them to some act of commission or omission on defendant's part.").

86. *See, e.g.*, Iowa Code Ann. § 614.1 (15 years); Minn. Stat. Ann. § 541.051 (10 years, 14 years for contribution or indemnity claims arising from defect); N.J. Stat. Ann. § 2A:14-1.1 (10 years); Cal. Civ. Proc. Code § 337.15 (10 years); Mich. Comp. Laws Ann. § 600.5839(1)(b) (10 years).

87. Owners should include provisions in their contracts that permit them to install electronic devices to monitor construction, using construction equipment for mounting, where applicable. Example clauses are as follows:

> Example No. 1:
>
> Owner reserves the exclusive right to install and maintain a web camera on the top of the Project Crane for so long as the Project Crane shall be in service. The Owner's separate technician shall install and maintain the web camera and the power and signal leads to the web camera, and shall be responsible for removing them upon completion of the Project Crane's service on the Project. The Contractor shall arrange for the Owner's right to install and service the web camera at the time of negotiating the lease of the Project Crane. All power necessary for the operation of the web camera shall be provided from the power source to the Project Crane.
>
> Example No. 2:
>
> Owner reserves the right to install and maintain unmanned but recorded video surveillance cameras at the Project access and egress points. The recorded information on the surveillance tapes shall be solely the property of the Owner.

88. McGraw Hill Construction, Mitigation of Risk in Construction: Strategies for Reducing Risk and Maximizing Profitability, 24 (Harvey M. Berstein et al. eds., 2011), http://www.navigant.com/~/media/WWW/Site/Insights/Construction/Mitigation_of_Risk_in_Construction_Report.pdf (last visited July 11, 2016).

89. *Id.*

90. Anonymous.

