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Design Professionals Exposure to Natural Disaster Claims

Natural disasters are a major adverse event resulting from natural processes of the earth including, floods, volcanic eruptions, earthquakes, tsunamis, hurricanes and tornadoes. Natural disasters have intensified in recent years and have created an environment of lawsuits against all involved. The lawsuits are not only in regards to structures that were destroyed from the disaster, but also include claims pertaining to the responses to the disaster and also to post construction work. This article will discuss how to deal with those lawsuits which also include, large scale disasters like the Minnesota with bridge collapse or 9/11, how insurance carriers deal with such claims and how to defend them.

A. The Significant Of Disasters and Claims Against Designers

The destruction of structures in natural and large scale disasters is huge. For example, the Northridge earthquake of 1996 caused 45,000 homes to be damaged or destroyed. Katrina floods, which occurred in 2005, damaged or destroyed over 70,000 structures. Irene hurricane in 2011 destroyed over 5,000 homes, super storm Sandy in 2012 destroyed 15,000 homes and over 5,000 buildings (with over 250,000 units) and Oklahoma tornados in 2013 destroyed 4,000 homes and 1,500 buildings.

These disasters cause large scale litigation, which typically exposes the design professional to multiple claims occurring at the same time. Not only do these lawsuits have an emotional and professional toll, but they may also exhaust the designer's policy limits.

i. Claims Made For Construction Pre-Disaster

There are several stages of claims that typically arise from large scale disasters. One type of claim involves a claim stemming for the disaster itself. An example to such a claim is the Minnesota bridge collapse in 2007, wherein 13 people had died. The lawsuits resulted in settlements with the contractors for $10 million, and with the engineering firm for $52.4 million. Yet the lawsuits also brought new legislation such as, amendments to the statutes of repose.

ii. Claims Made For Disaster Response

Another type of claim relating to disasters involves the response of the design professional to the event. For example, after Sandy overworked city inspectors were left to try and determine which properties could be saved and which would go, decisions that had to be made before rebuilding could begin. Architects and engineers were solicited to the task but they feared that they could be sued under New York state tort law if a property owner disagreed with their assessment. There were 400 professionals who initially came to assist and later backed out. Architects, not like some other professionals such as doctors, are not protected by Good Samaritan laws nationwide.

After 9/11 for example, architects provided guidance on how to dig out debris without destabilizing structures and avoiding causing injury. Later, however, numerous lawsuits were filed, many of them multimillion-dollar class-action lawsuits, which held architects partly responsible for everything from failure to save those who were buried to worsening the release of toxic dust. After extensive litigation following ground zero response by design professionals, architects, engineers and contractors have been pushing for their own Good Samaritan protections in the State of New York.

At least 24 states including, California, Colorado, Florida and Louisiana, who may be better accustomed to natural disasters have more protections for design professionals responding to disasters.

iii. Claims Made For Construction Post-Disaster

A third point of contention between design professionals and large scale disasters relates to the re-building efforts. After a disaster occurs and red-tagging takes place, the design professionals must get involved in long-term, sustainable development, with the goal of attaining for the community a standard of living better than what existed before the disaster. For design professionals, this means developing a design process that can address the area's vulnerability and incorporate opportunities for modern development.

Examples to these efforts were design professionals' involvement in post earthquake construction in Los Angeles after the Northridge Earthquake, which lead to changes in the local building codes. Another example is the requirement that homes built post Katrina in New Orleans would be built on stilts. The design of those homes appears modern and it is very different from the pre-existing homes.

These new methods often involve risky designs and they test architectural limits. It is risky because the designers have to deal with transformation of methods, political and social concerns (often having conflicting agenda), budgetary constraints and introduction of new concepts. There is also a need for massive and speedy reconstruction of damaged structures while conserving heritage buildings. Those struggles lead to many lawsuits often by groups opposing the changes. This becomes even more contentious when the new design involves environmental concerns and LEED (Leadership in Energy and Environmental Design) issues. LEED certification certifies that where structures are energy efficient their owners can benefit from certain tax credits. However, there is a lot of fraud involving LEED and many competing contentions regarding whether the structures are really more energy efficient. Insistence on LEED design may result in delay of the reconstruction and lawsuits.

B. Carrier Challenges

The natural and large scale disasters have created a challenge to insurance companies and defense attorneys in recent years. First, there is a difficulty in underwriting the design professionals. Are there going to be exclusions for certain disasters? For example, homeowners' insurance claims in certain areas exclude fire, earthquake or flood and those disasters must be separately insured or endorsed. This was not the case a decade ago.

When a carrier insures a design professional it anticipates a claim from a few owners regarding isolated issues. It does not necessarily anticipate class actions or multiple claims from the same locality. Similarly, a carrier may not anticipate consultation claims (often entangled in administrative hearings) where design professionals become involved in tagging buildings after a disaster.

Second, carriers become entangled in defending design professionals because there is more ease in triggering coverage, compared to contractors who are also typically sued in the same lawsuits. Moreover, the contractors and design professional have different policies so their coverage may vary. Often, the design professionals may find themselves the only insured party, or the party having the most coverage. Therefore, while the initial claim may have little to do with the design, once insurance coverage becomes an issue the focus of the lawsuit may turn against the design professional.

A third issue that is unique to design professionals' insurance is that, as opposed to contractors' GL policies, many professional liability E&O policies have depleting limits. The more the design professional spends on the defense of the claim the less funds it will have available for settlement. This creates a higher settlement incentive to the design professional since it does not want to run out of coverage. It also makes policy limit demands a little trickier to analyze.

Lastly, in E&O cases there are no additional insureds so the design professional needs to come up with other creative theories to make claims against the co-defendants. This may also prove problematic the other way around, where claims are sought against the design professional. Owners (or others) with strong bargaining power may seek indemnity from the design professional in the parties' contract, as an alternative to seeking additional insured coverage (since additional insured coverage is not available). Additional insured coverage, if it was available, would have been more favorable to the name insured (the design professional) since the alternative indemnity claims may not be covered by insurance and may become a burden on the name insured.

C. Defense of Disaster Claims Against Design Professionals

The defense of the design professionals in large scale disasters is not much different from the typical design professional defense, except that the litigation may involve many more defendants and the exposure may be higher. The defense attorney must distinguish its client from the other defendants and develop its own defense strategy, while working with the carrier and the insured to protect the rights of both when there are competing coverage issues.

i. Statute of Limitation

A basic and important issue to look at when defending a design professional is a statute of limitation defense. When there is a claim after a disaster for pre-disaster construction, even though the claims all arise out of the same disaster, each structure may have been designed at a different period of time. Statute of limitation defenses are more challenging however, when there are multiple theories of liability, each having a different statute of limitations.

For example, California Civil Code § 337 holds that breach of a written contract has a 4 year statute of limitation from the breach. When duties complained of arise out of a contract, the applicable statute of limitations for the breach of such duties is also 4 years. *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 786, fn. 2 (1979) "The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled." *Id*. This argument is particularly important because when the claim is for breach of contract but the allegation is that the professional acted below the standard of care, counsel can argue that the applicable statute of limitation is for actions based on negligence. California Civil Code § 339 holds that the statute of limitations is two years for an oral contract. This has been extended to professional negligence. *Smith v. SHN Consulting Engineers & Geologists, Inc.*, 89 Cal.App.4th 638 (2001).

Thus, despite the labeling of the cause of action the courts will look at the gist of the claim to determine which statute of limitation to apply. To be able to benefit from the longer 4 year statute of limitation for breach of contract the plaintiff will have to establish a breach by showing that the designer failed to perform a specific obligation under the contract. *Sackett v. Spindler* (1967) 248 CA2d 220, 227. Namely, plaintiff will have to prove that a particular conduct violated the specific obligations under the contract. *Wise v. Southern Pac. Co.* (1963) 223 CA2d 50. Yet, actions whose gravamen is professional malpractice are subject to the two-year statute of limitations (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 714); even when a plaintiff states other claims against the professional "for which a different statute of limitations might otherwise apply."

Another issue that relates to statutes of limitation is, when it accrues. This is a big issue of contention because plaintiffs like to argue that they 'discovered' the claim shortly before they filed the action, even when the action was filed many years after the design professional completed its contact. "The general rule for defining the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises …" *Norgart v. Upjohn Co.*, the Court stated that: 21 Cal.4th 383, 397 (1999). The plaintiff's discovery of a particular theory of liability is not pertinent. It is the discovery of the facts constituting the wrongful act that is relevant. 3 Witkin, Cal. Procedure (2003 supp.) Actions, § 693, pp. 192–193.

ii. Statutes of Repose

Statutes of repose provide an outside final date in which to bring claims. All states have much longer statutes of repose for construction related claims compared to statutes of limitation, although the states differ greatly in their statutes. For example, Alabama has a 13 year statute of repose but a 2 year statute of limitation for negligence. Louisiana however, has a 5 year statute of repose and Florida has a 4 year statute of limitation for negligence. New York has no statute of repose and has a 3 year statute of limitation. Some states like Arkansas, California, and Utah, have different statutes depending on the injury (personal, property, latent or patent defect, tort or contract).

Most courts hold that statutes of repose are a broader category than statutes of limitation. Yet, statutes of repose differ from statutes of limitation in that the deadline imposed by statutes of repose is enforced much more strictly and they cannot be tolled (tolling occurs for example when a defect is latent and cannot be easily discovered). Simply put, the difference between the statutes is that a statute of limitations is triggered by an injury, while a statute of repose is triggered by the completion of an act. An example of a statute of repose trigger is when a construction project is "substantially completed," meaning that merely items on a "punch list" remain.

Unfortunately, disasters bring changes and Minnesota for example had changes to its statute of repose which allowed claims to be brought after the expiration of the statute of repose if it is a claim for indemnity by a joint tortfeasor whose statute of repose has not yet expired. Minn. Stat. § 541.051, Subd. 1. Other states may merely have exceptions to the statute of repose such in the case of fraud.

iii. Completed and Accepted Doctrine

Another theory of defense is the common law doctrine of ‘completed and accepted’ work. The defense is that the owner has accepted the work and its quality. This defense was explained in the California case of *Neiman v. Leo Daly Co.*, 210 Cal. App. 4th 962 (2012) the architect established that its work(design of the stairs) was completed and accepted by the owner (a college). The alleged defect (lack of light strips) was patent as a matter of law. The architect's plans and specifications called for contrast marking stripes to be placed on the stairs at the main stage. The absence of stripes on the stairs was obvious and apparent to any reasonably observant person and a reasonable inspection would have disclosed that defect. Therefore, plaintiff who tripped from walking down the stairs had no claim. The rationale for this doctrine is that an owner has a duty to inspect the work and ascertain its safety, and thus the owner's acceptance of the work shifts liability for its safety to the owner, provided that a reasonable inspection would disclose the defect. This doctrine however, applies to patent defects only, but not latent defects because those cannot be discovered and effectively represent to the world that the construction is sufficient. See e.g., *Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1467.

iv. Agency and Privity

A further issue in defending designers is to figure out who was the agent of whom. Was the designer hired by the contractor? By the owner? Did the owner have a construction manager? Understanding the relationships between these parties will assist in untangling the various duties among them including, whether there is privity between the parties to make certain claims,

whether there was notice for purpose of triggering the statute of limitation, and whether the parties are joint tortfeasors.

California Civil Code § 2332 states that: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." For example, when an architect hires a mechanical engineer and bills for his services, the mechanical engineer is deemed to be the agent of the architect. However, if the mechanical engineer is hired directly by the owner then the architect may not be responsible for his mistakes.

Iowa recently dealt with the long established common law doctrine that without privity, a subcontractor cannot be sued for breach of warranty. See, *Village at White Birch Town Homeowners Assn. v. Goodman Assocs., Inc*., (2012) 824 N.W.2d 561. This is notwithstanding that Iowa Supreme Court previously extended the implied warranty of workmanlike construction to subsequent purchasers (*Speight v. Walters Dev. Co.*, (2008) 744 N.W.2d 108, 115) and it extended an implied warranty of habitability to include a subcontractor's performance when the builder was judgment-proof. *Minton v. Richards Group of Chicago* (1983) 116 Ill. App. 3d 852, 452 N.E.2d 835. However, a "builder-vendor" has been defined as a person who is in the business of building or seller hence, the warranty did not extend to the sub-contractor who had no privity of contract.

Louisiana also confirmed that common law principal that without privity of contract no contractual duty lies against an engineer. However the court noted that general tort theories may apply. *Greater Lafourche Port Comm'n v. James Constr. Group, L.L.C.* (2012) 104 So. 3d 84.

Therein the court held that a design professional is the agent of an owner when the architect/engineer acts as the owner's supervisor on a project; however, a design professional, as far as the preparation of plans is concerned, acts as an independent contractor and is not in privity of contract with the contractor. Therefore, he cannot be sued for breach of contract by the contractor. Yet, due to his agency relationship with the owner, a design professional may be subject to an action in tort, even in the absence of any privity of contract. Such an action arises only when there is a breach of a duty owed independently of the contract between the owner and designer. He knows for example, that other third party relies on his plans.

In Massachusetts, the Supreme Court recently affirmed a long standing common law theory that a claim in tort may result from a contractual duty and therefore, an architect can be liable for construction defects and injuries at the job site. See, *LeBlanc v. Logan Hilton Joint Venture* (2012) 974 N.E.2d 34 wherein the architect was alleged to have failed to satisfy a contractual obligation to report construction deficiencies to owner and therefore, could be held liable for contribution to owner and the contractors with liability for death of a worker. The duty arises out of the contract but failure to perform it, causes a tort.

v. Arbitration

Another challenge in defending design claims is whether the underlying contract has an arbitration provision. Often it does, and further analysis has to be made as to how to proceed. In arbitration, claims against the designer may not be litigated in the same venue as the other defendants. This can be harmful to the designer since arbitration often proceeds before litigation and the designer may be exposed to the entire damages under joint and several liability theories, if they apply, and is then left with chasing the other parties for contribution. Arbitrations also

often are more expensive than lawsuits and they lack the opportunities of settlement. Moreover, arbitrations may have different statute of limitation and different tolling triggers. When there is an arbitration provision, the defense attorney should consult with the carrier whether to demand arbitration.

vi. Joint and Several Liability

More often than not the design professional is a joint tortfeasor with the contractor and others; but not always. One way to determine this is to look at whether there was a common injury. However, not always there is a common act of negligence and this need to be analyzed. For example, a structure may have had many phases of construction spanning over many years. The wrongful acts of the defendants may have been unrelated and the injuries may be multiple.

Joint tortfeasors are two or more individuals who either: (1) act in concert to commit a tort, (2) act independently but cause a single indivisible tortious injury, or (3) share responsibility for a tort because of vicarious liability. Under traditional common law, each joint tortfeasor is "jointly and severally" liable to the plaintiff's total damages. This means that each individual is fully liable to the plaintiff for the entire damage award. If the plaintiff is unable to collect a co-tortfeasor's portion of the liability, the tortfeasor from whom the plaintiff can collect are responsible for the other tortfeasor's share. See Restatement § 876.

Implied indemnity (a claim against a more liable tortfeasor) is often used "to apportion losses among joint tortfeasors in proportion to their relative culpability." *Expressions at Rancho Niguel Assoc. v. Ahmanson Developments, Inc*. (2001) 86 Cal.App.4th 1135, 1142. However, it is not always advisable to bring cross-complaints for implied indemnity. While there may be more funds available to allow for a settlement when new parties are sued, pointing the fingers among the defendants often makes the plaintiffs case much easier. Further, not having a defendant in a trial (the empty seat) may help rebut the liability against the design professional.

vii. Economic Loss Rule

Economic loss is the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. Economic losses exclude personal injury and damage to other property.

The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations (namely, breach of a warranty that is in the contract), unless he can demonstrate harm above and beyond a broken contractual promise. "Quite simply, the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other." *Robinson Helicopter, Inc. v. Dana Corp*. (2004) 34 Cal.4th 979.

Aas v. Superior Court (2000) 24 Cal.4th 627 was a seminal California Supreme Court case which held that there can be no claim for negligence solely for economic losses (for example, loss of value due to violation of building codes) where there is no personal injury or physical damage to the property itself. Many states are in accord. The Supreme Court in Iowa also held that the economic loss doctrine bars recovery for negligence claims when the claimant has a contractual relationship and it suffered only economic loss. *Determan v. Johnson* (2000) 613 N.W.2d 259, 264.

This distinction is important because the damages for breach of contract and tort can be different and also the liability under breach of contract can be strictly limited to the scope of the contract whereas liability for tort can be broader. Therefore, limiting the applicability of tort leaves the plaintiff only with a breach of contract claim, if any.

viii. Damages

Damages vary depending on the cause of action. Some causes of action may only allow for restitution or injunction (like Unfair Competition laws) other allow for economic damages only (e.g., in the sale of a property for example, *Cagne v. Burton* (1954) 43 Cl.2d 481 which held that a soil tester who tested the soil prior to a developer's purchase and stated that there was no fill by mistake, cannot be liable for the cost of having to dig deeper due to the fill because the property was worth what the developer paid for it). Most states do not allow for emotional distress damages since the transaction was purely economic, and attorney's fees will depend on whether they are available in the contract (otherwise the American Rules applies that each party bears its own fees).

If a contract is at issue, the damages are 'benefit of the bargain' to put the injured plaintiff in the position it would have been but for the breach. California Civil Code, § 3300. However, the non-breaching party is entitled to recover only those damages "proximately caused" by the specific breach. *Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709. It must be proven that a breach of contract had the requisite causal connection to the damage suffered. *Silver v. Bank of America Nat'l Trust & Sav. Asso*. (1941) 47 Cal. App. 2d 639, 645. This may require repair of the property however, unreasonable.

If tort damages are at issue then the damages intended to compensate plaintiff for its consequential damages. A cause of action for professional negligence must also show proof of "a proximate causal connection between the negligent conduct and the resulting injury." *Budd v. Nixen* (1971) 6 Cal.3d 195, 200.

Lastly, the plaintiff is only entitled to damages that it was unable to mitigate, as it has a duty to mitigate.

ix. Limitation of Contracts

Contracts can protect a design professional from liability. They can impose a shorter statute of limitation, a requirement to mediate (namely, as a pre-requisite before filing a lawsuit with the detriment that failing to do so will prevent the prevailing party for recovering attorney's fees). It can provide limitation on the designer's scope of work (designer will not provide inspection or supervision of others), and so forth.

Often, plaintiffs will attempt to impose duties that are not specifically enumerated. In *Bonadiman-McCain Inc. v. Snow* (1960) 183 Cal.App.3d 58, the owner argued that his architect did not give proper advice for the selection of the general contractor and engineer. The court held that this "did not fall within the duties ordinarily assumed upon an architect."

However, if contracts are vague or broad, they may expand the design professional's duty to anything related to the matter in the contract. The same can happen when there is no contract, except that when there is no contract the professional may be better able to dispute its scope of work, then when there is a contract that a court decides to read more into it.

An example where a duty can be expanded is when design professionals provide bids that include limited work only, to have the contractors seek clarification through RFIs, which are later used to blame the design professionals for responses to the RFIs. Other examples are projects that are design built and the contractor gets into trouble and asks the designer to come and rescue the situation. Or, where designers consult in post disaster situations and later get blamed for their advice. Surely none of these design professionals anticipate getting sued.

This shows that where there is a contract there is a risk that a court will insert expanded provisions, but when there is no contract there is absolutely no control over the extent of the professional's duty (which is defined by contract or law; see, *Carlton v. Terteza* (1993) 14 Cal.App.4th 745).

x. Indemnity Concerns

"Indemnity is a contract by which one engages to save another from the legal consequences of the conduct of one of the parties, or some other person." California Civil Code §2772.

Indemnity can be implied (more liable tortfeasor is responsible) and it can be expressed in a contract. Express indemnity has three types: Type 1 indemnity agreements are generally the most broad and can even include cases where the indemnitee is at fault and the indemnitor is not (although California has limited this by statute: California Civil Code §§2782-2784; see also New York case discussing broad indemnity: *Reyes v. Post & Broadway, Inc*., (2012) 97 A.D.3d 805). Type 2 indemnity is slightly less restrictive. Therein the indemnitor would not be required to cover the indemnitee's active negligence; only passive negligence. Type 3 indemnity is the most limited. It typically indemnifies the indemnitee only for the indemnitor's active negligence. There are many statutes that govern indemnity and they need to be strictly followed.

The California case of *Crawford v. Weather Shield Mfg., Inc*. 44 Cal.4th 541 (2008) completely changed how carriers analyze coverage with respect to indemnity and many policies following *Crowford* now exclude *Crowford* indemnity. *Crawford* held that: "[T]he duty to defend upon the indemnitee's request. . .is distinct from, and broader than, the duty. . .to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed." This law was extended by *Universal Development, L.P. v. CH2M Hill* 181 Cal.App.4th (2010) to design professionals. *Universal* held that "indemnity and defense clauses pertained to separate obligations." Even if the indemnitor is ultimately found not liable to the plaintiff and not required to pay for a judgment against the indemnitee, it does not follow that the indemnitee was not entitled to a defense. Massachusetts for example, has similar laws. See, *Siebe Inc. v. Louis M. Gerson, Co.* (2009) 74 Mass.App.Ct. 544.

Lastly, in multi party lawsuits with implied indemnity claims and joint tortfeasors, a settled party should obtain a good faith settlement order e.g., California Code of Civil Procedure §877.6; *Tech-Built, Inc v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488. If the settlement

is within the ballpark as of the time of settlement, the court order will bar/dismiss cross complaints for indemnity.

xi. Mediation

Large scale disaster lawsuits will go through many rounds of mediation. There will typically be many parties, many carriers, and side issues such as indemnities, additional insureds, contractors having multiple policies and coverage disputes.

Strategy at mediation has to be discussed with the carrier. On the one hand, as discussed above, the design professional can become the main target due to insurance. On the other hand, its policy may be depleting so it may want to settle quickly. Usually, those who settle first get the best deal, although sometimes sticking to the end and fighting makes a difference.

Another issue to consider is statutory offers. They work differently in different states but the gist is that they may shift the prevailing party (a prevailing plaintiff recovering less than the offer may not be considered prevailing). This may shift the entitlement to costs and fees (if there is an attorney's fees agreement). Making an offer before mediation sometimes raises the floor at negotiations since the expectation is that defendant will start where his offer was made.

Moreover, plaintiffs often make policy limits demands which should be closely evaluated by the carrier, as they may expose the carrier to excess damages under some circumstances.

Lastly, stipulated judgments can become a big issue. Arizona for example, is notorious and has three types of stipulated judgments from insureds who had their coverage denied: Darmon agreement is when an insurer outright denies coverage, the insured may enter into a stipulated judgment with a plaintiff in exchange for a covenant not to execute. The insurer has limitations in attacking a Damron Agreement absent fraud or collusion. There is no right to a reasonableness hearing to determine whether the judgment amount is reasonable. The insurer has no right to re-litigate the merits of the case or judgment. Morris agreement is when an insurer commits to defend a claim, but reserves its rights to contest its duty to indemnify based upon a coverage issue, the insured can likewise enter into a stipulated judgment in exchange for a covenant not to execute. A reasonableness hearing will be held to determine whether the judgment amount is reasonable, but the hearing is limited to issues related to whether the judgment amount is reasonable, not the underlying merits of the case. Helme agreement is when an insurer refuses to settle within policy limits and the insured enters into a stipulated judgment in exchange for a covenant not to execute. A reasonableness hearing will be held in this scenario as well, with the same limitations as the Morris context. Things to look for in these scenarios are, whether the insured gave notice, whether a declaratory relief claim can be brought, and whether the carrier wishes to reevaluate its position.

xii. Fiduciary Duty

States vary whether architects are fiduciaries of the owners. California for example, does not hold that a design professional is a fiduciary to an owner, except under very rare circumstances. Those circumstances can be when the architect acts more like an agent for the owner, for example, in mediating disputes or in supervising construction. In those cases, the liability may be similar to liability of an agent to a principal.

Fiduciary duty, if exists, results in a higher standard. Architects however, are generally held to the standard of care in the industry. An architect "undertaking does not apply or warrant a

satisfactory result." It "does not warrant or guarantee a perfect plan." *Paxton v. Alameda County* (1953) 119 Cal,App.2d 393. That said, where there is a Code violation issue the architect could be found to be negligent per se. *Chaplis v. City of Montery* (1979) 97 Cal.App.3d 249.

xiii. Liquidated Damages

Liquidated damages are an effective mechanism to limit damages in the contract. Connecticut recently reaffirmed this doctrine, even where the amount may have been later miscalculated. *Worth Construction Company, Inc. v. Dept. of Public Works*, (2012) 139 Conn. App. 54.

xiv. Litigation Against the State

Where the owner of the structure is the State there are many sovereign issues, notice, and different statutes of limitation that come into play. Further, there are more rigid rules regarding changes during construction (e.g., that the architectural plans may have to be stamped as approved by the office of the state architect). A Connecticut case recently found that the State was immune from all statutes of limitation, based on an old English common law doctrine of the doctrine of nullum tempus occurrit regi (no time runs against the king) or nullum tempus occurrit reipublicae (time does not run against the state), a common-law rule that exempts the State from the operation of statutes of limitation and statutes of repose and from the consequences of its laches in a manner similar to the related doctrine of sovereign immunity. See, *State v. Lombardo Brothers Mason Contractors, Inc*., (2012) 307 Conn. 412. That case holding was even more troubling since the contract had a statute of limitation within it, but the Supreme Court also held that the provision in the contract was not enforceable because the chief deputy commissioner of public works did not have the authority, pursuant to the applicable statute, that allowed him into enter into a contract waiving nullum tempus.

xv. Certificate of Merit

California Code of Civil Procedure, section 411.35 states that a certificate of merit must be filed when suing an engineer "that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state. . .in the same discipline as the defendant. . ." The purpose of the statute is to "discourag[e] frivolous professional negligence suits against registered civil engineers by imposing a sanction on the non-complying plaintiff . . ." *Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 270.

If a Certificate is wrongfully filed the trial court may seek to verify who the party consulted with, and order to pay attorney's fees. In Texas the court of *Garza v. Carmona*, (2012) 390 S.W.3d 391 recently dismissed a case against an engineer finding that the claims were not specifically plead as required by the statute.

To conclude, there are many issues from coverage, to the relationship between the parties, to timing, that are impacted by large scale disasters. Attorneys should work closely with their clients and carriers to strategize these issues, and come up with the most efficient plan of action. Some of the challenges facing the legal defenses will be that the jury where the damage occurred will be more receptive and forgiving to the injured since they have suffered or seen the suffering first hand. Therefore, legal issues should be worked on with the judges before the cases go to the jury.