THE BLAME GAME
CONSTRUCTION DEFECTS:
Prevention, Resolution, And Risk
March 27, 2002

Sponsored By: PINNELL BUSCH, INC. & AGC ASSOCIATES COUNCIL
THE PRESENTERS

JEFF BUSCH  
Pinnell�Busch, Inc.
Sr. Consultant & Principal - with 25 years experience he specializes in project & construction management, partnering facilitation, dispute management programs, mediation and management training.

DARIEN S. LOISELLE  
Schwabe, Williamson & Wyatt
Lawyer - experience includes commercial, insurance, and construction issues, including construction lien and defect litigation, insurance coverage and surety litigation, and BOLI and prevailing wage compliance.

DICK PORTERFIELD  
Maxson Young Assoc. Inc.
Executive General Adjuster / Vice President - began his adjusting career in 1959. He specializes in the handling of complex commercial losses, including construction defect and builder's risk.

BRUCE McDONALD  
Maxson Young Assoc. Inc.
General Adjuster/Branch Manager - began his adjusting career in 1977. He currently serves as Treasurer for the Oregon Chapter of CPCU and is an instructor for the Insurance Educational Association.

BRUCE FONG  
Kaiser Permanente
Senior Project Manager of Design & Construction, NW Region - over 20 years experience in strategic planning, campus planning, life cycle cost analysis, building standards development and project management.
AGENDA

The “Blame Game” has now taken root in the construction and capital projects industry. Many experts believe that what we have seen is the onset of what will become an avalanche of trouble for facilities owners and their construction service providers.

8:45 Introduction: Case Study Examples
- Jeff Busch, Pinnell\text{\textregistered}Busch, Inc.

9:15 How Contracts Determine Responsibility
- Darien Loiselle, Schwabe, Williamson & Wyatt

9:45 Break

10:00 Trends In Insurance Coverage & Claims
- Dick Porterfield & Bruce McDonald, Maxson Young Assoc.

10:45 How Owners Can Reduce or Eliminate Construction Defects
- Bruce Fong, Kaiser Permanente

11:15 The Ten Keys You Need to Know - to Know About Construction Defect’s Potential Impacts
- All Speaker Panel moderated by Jeff Busch

12:00 Close & Lunch
CASE STUDY EXAMPLES

Jeff Busch

P I N N E L L ♠ B U S C H , I N C.

www.pinnellbusch.com
But does Sick Building Syndrome really exist?

... the public is answering “yes’ to the question, a trend that’s heralding a wave of lawsuits targeting the building industry.
“This type of joint assembly, . . . was a typical design practice when the bridge was built 30 years ago.”
Bridges

**FATIGUE, BRITTLE FRACTURE LIKELY CAUSED MILWAUKEE SPAN FAILURE**

No damage to channeled approach span

No damage to pier

Post demolition—Piece 1 was backflipped over onto piece 2 to avoid hitting pier.

EXPLOSIVE BACKFLIPS Failed span removal scheme avoided damage to bridge pier.

Prompted by the failure of an approach span of Milwaukee's Dated Webster Hoan Bridge, the state's Dept of Transportation is reviewing more than 20 other 'fracture-critical' steel bridges with two and three girders.设计. No significant problems have been found to date, reports Fimb Hubbard, WisDOT's structural design supervisor in Madison.

On Dec. 15, using sequential explosions to avoid damage to a nearby bridge pier and utility building, crews brought down the lowest approach span. The demolition opened the door for internal experts, assembled by WisDOT, to determine why the main girder cracked and created a 44-foot dip in the roadway. Sections of the failed span are on their way to Lehigh University, Bethlehem, Pa., and the Federal Highway Administration's Turner-Fairbank Research Center, McLean, Va., for detailed analysis.

Investigators will scrutinize material and welding integrity, along with design differences such as lateral housing details, says Hubbard. The lateral bracing, which forms a series of flat, I-shaped members in plan view, is unique for bridges of this type, he adds, noting that 'shearing is more common.'

The span failure occurred Dec. 13 in a southbound approach of the bridge, which carries Interstate 94 traffic onto the Milwaukee Harbor area Lake Michigan (ENR 1/18 p. 15). After finding full-depth cracks in two of three (fifth) main girders, WisDOT abandoned repair plans.

The 3,940-foot long bridge, designed by BSTC Corp., was completed in 1953. Says W. Scott Putnam, officer in charge of WisDOT's Milwaukee office, declining to speculate on failure causes, he notes: "The structure has been in service for decades."
. . . officials say that the structure meets design codes, but an unpredicted live loading type caught them unaware.

The British Standards Institution is expected to decide . . . if code changes are needed.
The tugboat is approaching the bridge with barges loaded with coal. The river is at flood stage and actually over the guard rail at points. He released the barges. The bridge didn't open and the boat can't stop. Uh Oh! The current has swung the boat around sideways. The boss is going to REAL mad!

Uh . . . Boss? Do we have flood insurance on this boat?

Uh . . . Boss. You ain't gonnabelieve what we just did!

She's low, but the flag is still flying. Water is pouring out of the open doors. Look there's our barge! Smoke is coming from the exhausts. The tug is running!
$100 million in cost overruns at two-year-old Safeco Field and will pursue legal claims against the construction team.

The Public Facilities District, the stadium owner, says redesigns and plan errors and omissions caused more than $81 million in unanticipated costs.

The 45,600-seat ballpark was rushed through 27 months of construction and opened on time in July 1999,
CONSTRUCTION DEFECTS:
THE NEW RULES OF THE GAME

The construction industry has finally come of age — it has its own malpractice attorneys and self-appointed “experts” who earn a living finding fault with the work of builders.

By Paul R. Gary

WHY DO YOU THINK YOU ARE SPECIAL?

Anecdotes on corporations, corporations companies, software companies, doctors, accountants, and lawyers have all seen a dramatic rise in lawsuits over the last 15 to 20 years. The Hung and verdicts of lawsuits apparently are now as nonthreatening as international events. If you have never heard of the woman who sued McDonald's because her coffee was too hot, I'll bet you don't know the story behind the woman who sued Boeing because her airplane was too fast.

Over the same time, residential sales, which had been in bloom as an American industry, have seen a sales decline. The sales price for individual homes has increased dramatically. Americans have been told for years that their homes are the largest investments they will ever make, and that their neighbors are all selling their houses for big profits.

So, to get demand, buyers now must become more motivated buyers and will demand new homes with the features that used to be standard. This increased use of sub-contractors and consultants has created a new, often skeptical, building industries that has trouble accepting new technologies or challenging designs. One trend is evident: builders are more inclined to use high-quality, high-cost materials in their homes.

The infrastructure of an entire construction defect litigation industry has been built.

Then came a series of catalysts that appeared and turned this potential into reality. Naming just a few: the national trend toward litigation, the increased use of sub-contractors and consultants, and the increased use of high-quality materials in new homes.

CONSTRUCTION DEFECT CLAIMS ARE HERE TO STAY

Even with all that, I suggest the most serious danger for individual builders is to think that the industry will work its way through the latest crisis and that the number of frequent construction claims will pass — a return to a “normal” time.

That won’t happen.

The volume of construction defect litigation has created a new generation of “experts” that have become dependent on the industry for their livelihood. They can tap into a pool of dollars that are not available to them. This means that builders are more inclined to use high-quality, high-cost materials in their homes.

DEFINING CONSTRUCTION DEFECTS AND "THE VINCE LOMBARDI EFFECT"

Part of the problem is the desire to avoid the risk of a "construction defect." What is a CD, anyway? In California, it is something that an expert identifies as a problem. In Oregon, it is something that the doctor identifies as a problem. In Oregon, it is something that is not a CD. Currently, in Oregon, most cases are focused on assigning responsibility for damages to those involved in the design and construction of the building. In California, this letter has been left behind and plaintiffs are bringing things
On the day of the bid, the software allegedly malfunctioned 19 times, displaying the message: “Abort: Cannot find alternate.”

“if you are an architect putting information on a project Website, are you establishing a duty of care to people with whom you have no contractual relationship?”

. . . disclaimers coming with electronic documents [from design firms] that say that there is no guarantee that this is what was sent,”
But contractors who have handled projects using synthetic stucco are finding their liability insurance is being cancelled,

“Almost any contract we see carries an exclusion for synthetic stucco,”
The court agreed, holding that the architects’ law and the engineers’ law should be read in tandem,

...there is indeed an overlapping of the professions, and neither one establishes a clear, mutually exclusive, delineation between the two.”
Contractor that Met Specs May Have Duty to Warn

The fact that a highway contractor used specified materials would not protect it from liability for a motorist’s death if the contractor knew that the specified materials were dangerous before it signed the contract, a federal court has ruled.

On Dec. 21, 1998, Deborah Engelhardt was killed in a car accident while driving on U.S. Highway 65 in Faulkner County, Ark., when another vehicle hydroplaned and collided with her car. The stretch of highway where the accident occurred was part of a 6.3-mile section that had been resurfaced by Rogers Group Inc. under a contract with the Arkansas State Highway and Transportation Dept.

The administrators of Engelhardt’s estate sued Rogers, charging it with negligence in using the wrong type of asphalt mix to resurface the highway, and in failing to warn the driving public and the Highway Dept. of the dangerous road conditions it created. They also argued that Rogers was strictly liable for supplying an unreasonably dangerous product, the road.

Rogers asked the federal trial court to grant judgment for it before trial. Rogers asserted that it was protected by the “acquired immunity doctrine,” because it used the type of asphalt mix—Type III—that was specified by the highway department. The doctrine states that a contractor for a governmental body that performs its work according to the contract is not liable for injuries caused by the work unless the contractor is negligent or guilty of a wrongful act.

Type III asphalt sometimes causes hydroplaning in heavy rains and is designed for potholes, parking lots, low-volume roads and overlays, according to the U.S. District Court for the Eastern District of Arkansas. It ruled that Rogers had no duty to warn the public of the potential danger created by the resurfaced highway because Rogers’ contract did not require it to do anything after it completed the resurfacing. The court also ruled that the resurfaced highway was not a product, and so was not covered by product liability law.

However, the court allowed the Engelhardt estate to proceed with its negligence claim against Rogers. Even though Rogers used the asphalt that was specified, the court held that the “acquired immunity doctrine” would not protect Rogers if, as the estate claimed, Rogers knew before it signed the contract that Type III sometimes causes hydroplaning when used on heavily traveled highways. The court ruled that the estate had the right to try to prove its allegation against Rogers. *Engelhardt v. Rogers Group Inc.*, 132 F. Supp. 2d 757 (E.D. Ark. 2001).
The owner impliedly warrants to the contractor the accuracy and suitability of the documents.

An experienced contractor cannot, however, consciously overlook patent defects or rely on this implied warranty when it knows or should know that such documents could not produce the desired end result.
Modern Western society has not eliminated building failure . . . the bigger projects made possible by computer design also result in more expensive fixes.

Computer tools will not eliminate the chance of design of construction defects, but they may alter the distribution of such risks.

- Our society uses computers for critical tasks, despite defects that would be intolerable for other purchases.
- Computer tools may have latent bugs that can produce anomalies.
Those defending mold-related claims have a heavy burden in convincing a juror that the presence of mold does not justify the complete removal and replacement of the entire exterior siding and expensive interior repairs.
Bumpier Road to Finish Line

Constructing buildings has gotten more difficult in 20 years since the Hyatt walkway collapse

On July 17, 1981, two suspended sidewalks spanning the atrium lobby of the Hyatt Regency Hotel in Kansas City, Mo., collapsed during a 400-room hotel opening reception attended by 1,000 guests, killing 111 people and injuring 180. The failure resulted in the deaths of hundreds more and sent shock waves through the nation and especially the building community. The tragedy has become the 20th Century's low watermark against which all other building failures can be compared.

The 20th anniversary of the Hyatt mishap is an appropriate time to take stock of the current state of building construction in the U.S. What has changed, for better or worse, since the devastating failure? Is building quality in the ascendant or not, and why? What standards to be followed?

Engineer Emil J. Tropp, a steel design and construction consultant based in Easton, Mass., thinks the quality of “routine” buildings has eroded over the past 20 years. He blames the source developer as much as anyone.

“You cannot get a quality construction project if you have one in ample time to do it right the first time,” says Tropp. “The routine building construction project today is quick and cheap. If we don’t change the owner’s mindset about building quality, the construction quality will continue to suffer.”

E-MAILS, ROUNDTABLE SHAPE REPORT

This special report on building quality is based on a compilation of e-mails responses to ENR’s request for industry comment on our.com, traditional reporting and information gathered at an in-person roundtable held April 26.
It’s not uncommon for a constructor to agree to an unreasonable schedule to secure a contract. In many instances, “nobody [on the team] thinks the schedule can be made,"

“But does anybody say it? No. Because you want the job.” So the blame game for botching buildings continues: It’s the owner’s fault. It’s the user’s fault. It’s the contractor’s fault. It’s the economy's fault. It’s society’s fault. It’s even the designer’s fault for producing incomplete and inaccurate drawings.
“Twenty-five years ago, we had more rectangles; we had consistency,”
The General Services Administration’s three-year-old Construction Excellence Program is a direct descendant of its widely applauded Design Excellence Program, which involves selecting outstanding A-Es to design . . .
MISSING REBAR - year old garage in Queens collapsed.
FLAW DETECTORS

Using the same sound reflection principles, ultrasonic flaw detectors look for echoes that result from cracks, voids or other discontinuities in a test piece.
To trial lawyers these days, the words are virtually interchangeable. “Mold is Gold!”

The same factors that led to the staggering numbers of construction defect suits for property damage are at work in the bodily injury mold claims.
... a great many contractors will encounter some overall surety tightening ...

- Frequency and severity of losses experienced by bonding companies in recent months (can you say “Enron?”)
- Some long-time surety reinsurers have simply left the business.
- Corporate decisions have led some insurance companies not to participate in bonding in the future.
Tightening Up Surety Bond Terms

The days of low-cost, easy-to-obtain bonds are over. Today's underwriters are tightening up, and bond issuers are being forced to pay more for surety bonds. The reason: rising losses and increased costs of doing business.

Surety underwriters have increased premiums by as much as 30% over the past 12 months, and loss ratios have risen to as high as 22.9% from a low of 8.4% in 1999. The result: premiums are now up 50% over 1999, and loss ratios are up 40%.

In the past, underwriters were willing to offer low-cost, low-risk bonds to contractors. Today, they are demanding higher premiums and stricter underwriting standards. Contractors who don't meet these new standards will have to pay more for bonds.

For example, a contractor who is rated A- by the Better Business Bureau will now have to pay a premium of 2.47% for a $10 million bond, up from 1.5% in 1999. The premium for a contractor with a rating of B- has also increased to 3.21%, up from 2.16%.

The increase in premiums is due to several factors, including higher loss ratios, rising interest rates, and increased costs of doing business. The result is that contractors are paying more for bonds, and the cost of doing business is increasing.

For contractors, this means that they will have to budget more for surety bonds, and they may have to reduce their profit margins to cover the increased costs. For surety underwriters, this means that they are now able to charge higher premiums and still make a profit.

Overall, the surety bond market is becoming more competitive, and contractors will have to shop around to find the best rates. The key to success is to be prepared to pay more for surety bonds, and to budget accordingly.

By Richard Kemper
HOW CONTRACTS DETERMINE RESPONSIBILITY

Darien S. Loiselle

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THE TEN KEYS YOU NEED TO KNOW - TO KNOW ABOUT CONSTRUCTION DEFECT’S POTENTIAL IMPACTS

Panel Discussion
THE TEN KEYS

B  Hire quality and experience - prime contractors and subcontractors, vendors, insurance, and legal.
B  Think ahead and identify exposures and plan how to handle them.
B  Policy holder needs to fully understand insurance coverage, and contract to identify insurance needs and additional named insured.
B  Clear and accurate, high quality specifications, by spending a bit more time up front.
B  Be extremely cautious with new building systems.
B  Document the execution of the project - including early identified defects/fixes and errors/omissions.
B  Follow contract protocol.
B  Keep open lines of communication between all parties to avoid and solve problems.
B  Consider not only the facility initial construction costs but also its lifecycle costs when making decisions.
B  Stay educated - be aware of new trends.