



The Global Legal Network  
*Celebrating 40 Years*

# NAVIGATING PROJECT DEFAULT

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## AGENDA

**CONSTRUCTION DEFECTS AND DELAY – Owner, Construction Manager/General Contractor & Subcontractor Perspectives And Best Practices**

**BANKRUPTCY AND INSOLVENCY – Impacts On Owner, Construction Manager/General Contractor & Subcontractor And Best Practices**



# CONSTRUCTION DEFECTS AND DELAYS

OWNER, CM/GC, AND SUBCONTRACTOR PERSPECTIVES

# CONSTRUCTION DEFECTS AND DELAYS

## OWNER VIEW

- Consequential damages
- Impacts: Tenant claims, loss of use, loans and cross-default, loss of historic and other tax credits
- Contract Best Practices:
  - Waivers
  - Liquidated damages
  - Notice and opportunity to cure

# CONSTRUCTION DEFECTS AND DELAYS

## OWNER VIEW

- When We Cause A Delay
- Why We Want Notice
- Contract Best Practices:
  - No Damage for Delay clauses
  - Limitations – Escalating costs only, no home office overhead
  - Notice and Claim Provisions

# CONSTRUCTION DEFECTS AND DELAYS

## OWNER VIEW

- Performance bond / working with the surety
  - Notice and our obligations
- Property Insurance / Builder's risk
  - Differences and Issues

# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

- Immediately Investigate
  - Workmanship (Subcontractor, Owner's Separate Contractor, Other Prime Contractor), Design and/or Product Defect
  - Keep customer's project on track / Where to get money NOW
  - Insurance, Funding Agreements and Reserving Rights



# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

- Taking Sides
- Contract Best Practices:
  - Incorporation by reference and flow down
  - Timing and documents / analysis required
  - Project impacts on budget and schedule

# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

**Notice is a good thing!**

Why? Allows owner to mitigate and control

### NOTICE + POTENTIAL RISK SHIFTING

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➔ Property Insurance / Builder's Risk and Commercial General Liability Carriers

➔ Lower-tiers and their carriers

# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

## SUBCONTRACTOR VIEW

- Documentation, documentation, documentation ....
  - What is required and when?
  - Incorporation by reference / flow down provisions / conflicts
  - What are best practices?

# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

### SUBCONTRACTOR VIEW

- Duty to proceed / “buck stops here”
- Best Practices:
  - Reserve Rights
  - Front Costs
  - Cost Coding
  - Initiate Dispute Resolution



# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

### SUBCONTRACTOR VIEW

- Defenses and Prevention Of Performance
  - Incomplete, conflicting, or defective design
  - Failure to receive RFI responses
  - Defective predecessor work
  - Cardinal Change
- CM not getting paid for allegedly defective work of another subcontractor
- Pay-if-Paid & Pay-When-Paid provisions

# CONSTRUCTION DEFECTS AND DELAYS

## CONSTRUCTION MANAGER / GENERAL CONTRACTOR VIEW

## SUBCONTRACTOR VIEW

- Securing payment:
  - Mechanic's Liens
  - Attested Accounts
  - Payment Bond Claims

**TAKEAWAY:** FOLLOWING STATUTES AND NOTICE REQUIREMENTS CAN MEAN THE DIFFERENCE BETWEEN GETTING PAID OR NOT.

# POP UP QUESTION

- WHAT IS A FORCE MAJEURE?
  - A. A French military officer
  - B. An unforeseeable circumstance that prevents someone from fulfilling a contract
  - C. A major defect in a building foundation
  - D. An indie rock band



# 2020 INDUSTRY TRENDS



# 2020 INDUSTRY TRENDS

## COVID-19: EFFECTS OF PANDEMIC

### FORCE MAJEURE CLAUSES

- Risk allocation
- Time and money

### HEALTH AND SAFETY PROVISIONS

- Additional costs
- Impossibility of performance

BANKRUPT

# BANKRUPTCY AND INSOLVENCY

3 PERSPECTIVES

# BANKRUPTCY OR INSOLVENCY

## Owner View

- **CM Bankruptcy**
  - Automatic Stay / Proof of Claim
  - Dealing with lower-tiers and claims
  - Replacement contractor issues
  - Performance bond claims

# BANKRUPTCY OR INSOLVENCY

## Owner View

- AIA 312 Obligee Claim Requirements (1984 vs. 2010)

**DRAFT AIA Document A312™ - 1984**

Payment Bond

CONTRACTOR (Name, Legal Status and Address):  
« »  
« »

SURETY (Name, Legal Status and Principal Place of Business):  
« »  
« »

OWNER (Name, Legal Status and Address):  
« »  
« »

CONSTRUCTION CONTRACT  
Date: « »  
Amount: \$ « »  
Description (Name and Location):  
«Blank Forms  
« »

BOND  
Date (Not earlier than Construction Contract Date): « »  
Amount: \$ « »  
Modifications to this Bond:  None  See Section 16

CONTRACTOR AS PRINCIPAL Company: (Corporate Seal)

SURETY Company: (Corporate Seal)

Signature: \_\_\_\_\_  
Name and Title: « »  
(Any additional signatures appear on the last page)

(FOR INFORMATION ONLY - Name, Address and Telephone)  
AGENT or BROKER: « »  
« »  
« »

OWNER'S REPRESENTATIVE (Architect, Engineer or other party):  
« »  
« »  
« »  
« »

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**DRAFT AIA Document A312™ - 2010**

Payment Bond

CONTRACTOR: (Name, legal status and address)  
« »  
« »

SURETY: (Name, legal status and principal place of business)  
« »  
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OWNER: (Name, legal status and address)  
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Date: « »  
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# BANKRUPTCY OR INSOLVENCY

## Construction Manager / General Contractor View

### (1) Owner Bankruptcy

- Chapter 11 vs. Chapter 7
- Pay-if-Paid
- Communications and Acting as a Conduit

# BANKRUPTCY OR INSOLVENCY

## Construction Manager / General Contractor View

### (2) Subcontractor Bankruptcy

- Process / Notices
- Supplementation vs. Termination
- Purchase materials / equipment and tools
- Claims of Owner, CM and other Subcontractors
- Delays and impacts on other trades
- Walk the line

# BANKRUPTCY OR INSOLVENCY

## Subcontractor View

### (1) Owner Bankruptcy

- Payment bond / lien rights / attested accounts
- Status and condition of the work
- Timing / payment terms
- Warranties

# BANKRUPTCY OR INSOLVENCY

## Subcontractor View

(2) Lower-tier insolvency or failure to perform

(3) Supplementation Issues:

- Management and control
- Payment terms
- OSHA and safety
- Additional time and cost to assess baseline
- Warranties for existing work and purchased equipment



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