

Best Practices for Documenting Construction Claims

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**BUT FIRST . . .
FACT OR FANTASY?**

But First: Fact or Fantasy:



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Fact

- Burj Khalifa
- Dubai
- 160 stories; 2,717 feet
- Opened in January 2010
- Taller than the Chrysler Building stacked on top of the Empire State Building
- Skidmore, Owings & Merrill



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Fact

- Aqua—Chicago, Illinois
- 82 stories, apartment tower
- Tallest building in the world designed by a woman—
Jeanne Gang
- Curved concrete balconies provide shade, and . . .
- Dissipate wind (no tuned mass damper required for this
building)



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Fiction

- From the Star Wars universe:





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FACT



- Shanghai Tower
- Topped out last month
- Designed by Gensler
- Notch interrupts wind
 - Saved \$58M
- Gold LEED
- Rainwater collection system
- And . . .

- 270 wind turbines
- Powers nighttime lighting
- 350K kWh / year



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Take away:

- 1. Provide proper NOTICE in a TIMELY MANNER.
- 2. RECORD as many facts as you can AT THE TIME.

Why Document?

- To support a liability claim;
- To support a claim for reasonable damages; and
- To support causation—that specific impacts have resulted in certain damages.
- To defend against a claim.

THE FIRST BEST PRACTICE RE: A CLAIM (AND AN INCREASINGLY IMPORTANT ONE)

Follow the Notice of Claims Provision in Your Contract.

- Most contracts have one.
- Must give written notice
 - Of any issue giving rise to a “claim”
 - Within a given time.

Follow the Notice of Claims Provision in Your Contract

- Example: AIA A201-2007:
- “Claim” = demand or assertion seeking as matter of right payment of money or other relief with respect to the terms of the Contract.
- “Claim” includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Contract.

Follow Your Contract Notice Clause:

- Claims must be made by providing WRITTEN NOTICE to the architect and the other party WITHIN 21 DAYS AFTER THE OCCURRENCE OR EVENT GIVING RISE TO SUCH CLAIM, or
- WITHIN 21 DAYS AFTER THE CLAIMANT FIRST RECOGNIZES THE CONDITION GIVING RISE TO THE CLAIM, WHICHEVER IS LATER.

Follow the Notice of Claims Provision in Your Contract

- NB: may have to provide back up documentation.
- Notice may need to go to a third party (design professional).
- Why do people often ignore this provision?
- Why is it bad to ignore this provision?

Ignore the Contract At Your Own Peril:

- **BECAUSE BY IGNORING THE NOTICE PROVISION YOU MAY BE WAIVING YOUR RIGHT TO MAKE A CLAIM.**
- **RECENT DECISIONS REFLECT WHY IT IS BAD TO IGNORE THE NOTICE PROVISION.**

Village of Greenport

v.

Manning Plumbing & Heating Corp.

- Village sued Manning for negligent design and construction at a marina in the Village;
- Contract was for fire suppression system;
- Piping and connections ruptured during use, and the system failed tests conducted by Manning after the failure.

Village of Greenport

- Manning sent the Village a letter informing the Village of the failure TWO DAYS after the failure occurred.
- The Court said this did not constitute “a Claim” under the contract because it was not a letter from the Village demanding relief against Manning.
- The Village lawsuit was dismissed based on the Village’s failure to comply with the contractual notice of claim provision.

Central States Mech., Inc.

v.

Agra Indus.

- \$1.1M claim for delays, extra work, and acceleration costs against the GC;
- CO to be submitted within 21 days of event causing the claim;
- Delay Notice, 7 days, Delay Claim, 14 days.

Central States

- Central claimed failure to follow CO procedure was merely a “technical breach,” that timing requirements were unenforceable, and that attempts to comply would have been futile.
- Court rejected this argument:
 - Parties are sophisticated;
 - Contract was for millions of dollars of work;
 - This was Central’s bargained for contract.

Cajun Constructors, Inc.

v.

Velasco Drainage Dist.

- Owner and Contractor have disputes over delays and claims for COs.
- Contractor sues Owner, but did not give required notice to Owner and Engineer of intent to file suit.
- Owner files MSJ seeking dismissal of the claims.
- Contractor says notice provision not condition precedent to suit for breach of contract, therefore no bar.

Cajun Constructors

- Trial court grants Owner's motion based on Contractor's failure to abide by the notice provision.
- Texas Court of Appeals AFFIRMS, finding that the Contractor failed to satisfy a condition precedent to filing suit; therefore, the lawsuit was barred.

Southwest Eng. Co. v. Reorg. Sch. Dist. R-9

- Missouri, 1968
- Plaintiff constructed a school; when finished, Owner withheld money as LD for a delay in completion;
- Plaintiff won at trial; on appeal Owner argued that Plaintiff did not make a timely request for an extension of time.

Southwest Eng. Co.

- Court found that contract allowed 48 hours after the delay period ended to provide notice of the claim.
- A letter to the architect was sufficient in this case.
- Contract allowed for notice of claim directly to the architect.
- NOTE: the court looked at the contract.

Other Cases

- ***A. Hedenberg & Co. v. St. Luke's Hospital*** (Mn. Ct. App. 1996):
 - Claim for LD was a “claim” under the contract, and the notice provisions applied.

- ***RCR Bldg. Corp. v. Pinnacle Hospitality Partners*** (Tenn. Ct. App. 2012):
 - Owner cannot recover LD because it failed to comply with the notice provisions of the contract. Claim for LD is a “claim” under the contract.

TAKE AWAY #1:

- KNOW THE TERMS OF YOUR NOTICE PROVISION
- ABIDE BY THE TERMS OF THE NOTICE PROVISION
- OR YOU COULD BE OUT A SUBSTANTIAL SUM OF MONEY.

The Rest?

- The proof in is the paper.
 - Or the e-mail . . .
 - Or the metadata . . .

Keep in Mind

- It could be years before your claim is resolved.
- Think about how to prove claims . . .
 - What would you like to see if someone is making the claim to you?
 - “Show me.”

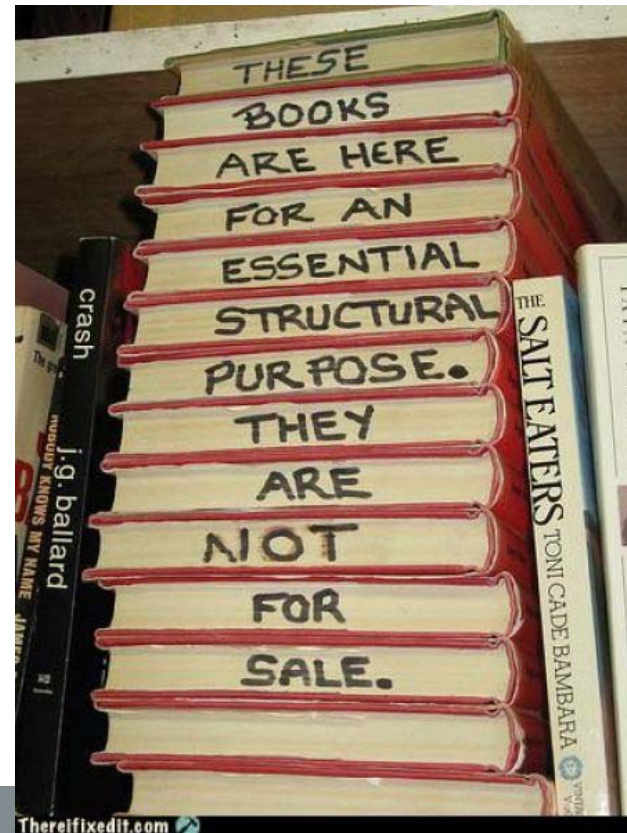
**Documenting Every Detail
vs.
Efficiencies Needed
to Be Cost Effective**

The tension:

Doing too much:



Doing too little:



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But First: A Bit of Science

- Claimants may benefit from:
- Zeigarnik Effect: uncompleted or interrupted tasks are remembered better than completed items.
- Van Restorff Effect: items that sticks out are more likely to be remembered than ones that do not.

Be Aware of Memory Bias (on both sides)

- Memory bias is an enhancement or an impairment to the recall of memories, OR an alteration of the content we report remembering.
- “Consistency bias” = incorrectly remembering one’s past attitudes and behavior as resembling present attitudes and behavior.
- “Context effect” = cannot remember work events as well when you are at home.
- “Generation effect” = remember what you generate, but not what others generate. Cf: “Source confusion.”

Memory

- In Missouri, a court will take judicial notice that memory fades over time (*Klopstein v. Schroll House Moving Co.* (Mo. App. 1968)).
- But this is based on common knowledge.
- “It is a matter of common knowledge that memory of most individuals for facts and details fades with the passage of time.”

So what documents do you need?

- The documents needed to support or defend a claim are a function of the claim itself.
- Baseline is typically the Planned Scope of Work and Estimates of Cost, Productivity, and Schedule.
- Think:
 - What was originally planned?
 - What really happened?

Actual Scope of Work

- Beware of Undocumented “Scope Creep.”
- Unilateral and bilateral COs.
- Contract modifications.
- Revised construction drawings and specs.
- RFIs, ASIs, letters, e-mails, meeting minutes, daily logs, inspection reports, material requisition orders, and the like.



Actual Scope of Work

- Encourage your onsite personnel to take photographs or video with their phones.
 - “Picture superiority effect”
- Do not discount your own contemporaneous memos to the file—this may be useful to us years later.
 - (And we like these—particularly if they are in electronic format).
 - Word, e-mails.

Actual Costs

- Job Cost Report;
- All invoices;
- Daily Reports (may show presence of specific construction equipment onsite);
- Equipment Usage Reports (show use and standby hours);
- Insurance and backcharge claims.

Actual Costs

- Delivery tickets and receiving reports;
- Payroll documents;
- Labor agreements;
- Your financial statements.
- Your contemporary memos to the file regarding these issues!

Actual Schedule

- Periodic schedule updates;
- Daily reports, logs, meeting minutes, monthly reports.
- Photographs and videos.
- Submittals, etc.
- Many of the same documents that support an adjustment to cost, but now we are focusing on the “when.”

Actual Productivity

- Many of the same documents as previously discussed;
- Weather bureau documents;
- Photos (showing congesting work spaces and trade stacking)
- Scheduling documents.

Take Away #2

- RECORD AS MANY FACTS AS YOU CAN
- AT OR NEAR THE TIME THOSE FACTS OCCUR

Conclusions

- Economic environment and competition → lower margins.
- Smaller room for mistakes.
- ^ need to adequately document directed and constructive changes.
- Quality of contemporaneous documents will be critical.

Conclusions

- Not all projects utilize all types of documents mentioned.
- Maintaining all possible records for all possibilities is daunting and may be costly; however
- Doing so can lead to earlier and less costly dispute resolution in the future.

THANK YOU FOR ATTENDING

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