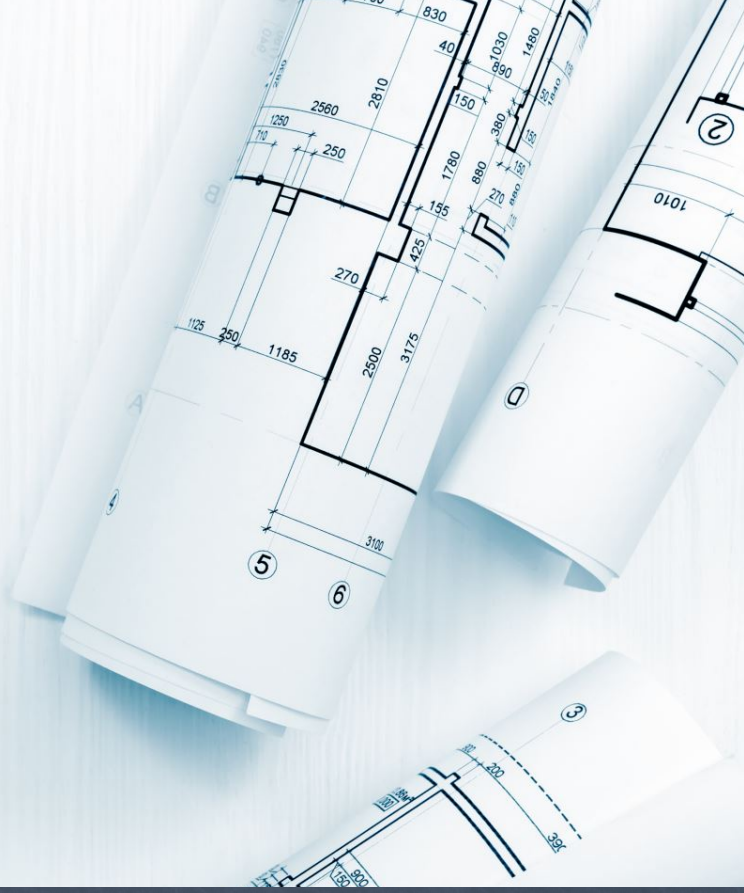


Basics of Construction Law

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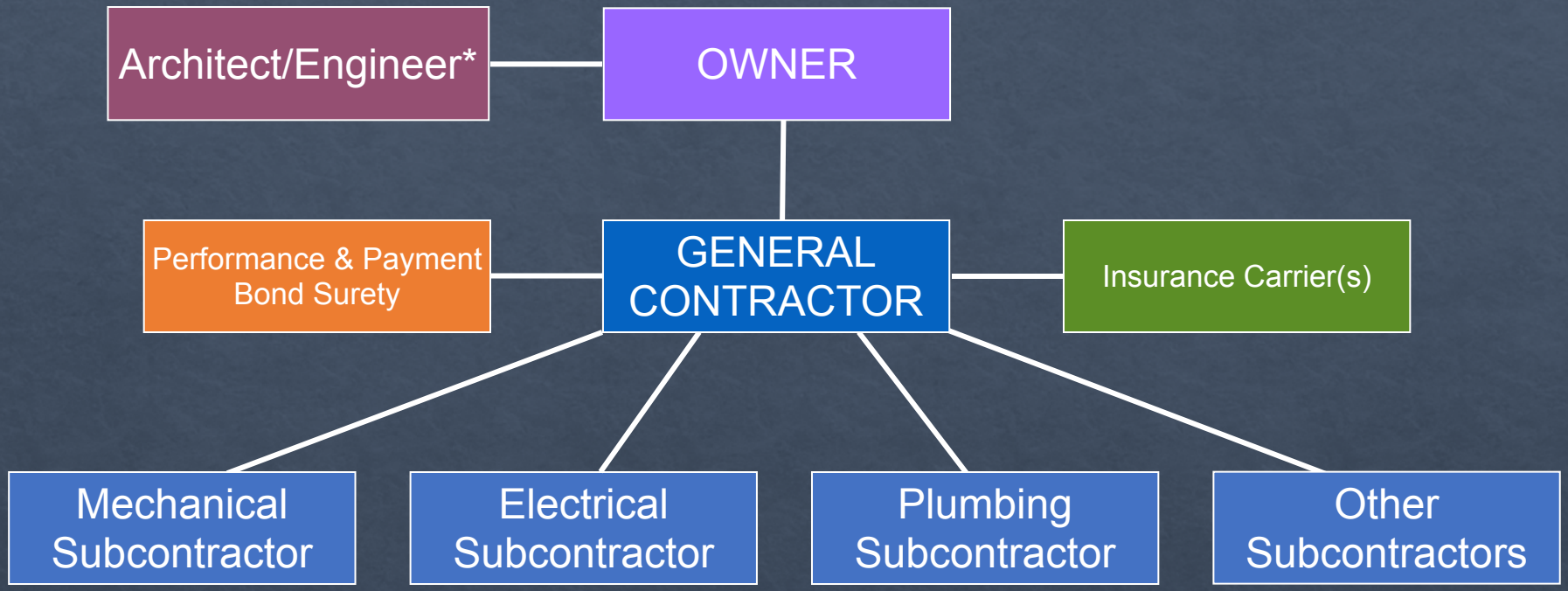


"I know nothing about the subject,
but I'm happy to give you my expert opinion."

The Basics of Construction

- PROJECT
  - Owner
  - Design Professionals
    - Architects
    - Engineers
  - General Contractor
    - MEP (Mechanical, Electrical, and Plumbing)
    - HVAC (Heating, Ventilation, and Air-Conditioning
    - Roofing
    - Landscape
    - Other subcontractors

Typical Single Prime Matrix



* Some Engineers contract directly with Owner (example: Civil) while others are under Architect umbrella.

Process

Design-Bid-Build

- Traditional model, supposed to keep costs down.
- However, makes contractor & designer more adversarial

Design/Build

- Includes both design and construction under one contract
- Usually more efficient; completion timely more likely.
- However, need trust between the parties
- Owner is delegating a lot of control to the construction team

Contracts

Single Prime

- Owner contracts with contractor who then retains everyone else for the team. Might still have a separate contract with Architect.
- Flat Fee or GMP (Guaranteed Maximum Price).

Multi-Prime

- Owner signs separate prime contracts with all contractors for flat fee.

CM at Risk (Construction Manager at Risk)

- A construction manager agrees to deliver the project on time
- Flat Fee or GMP (Guaranteed Maximum Price).

Surety Bonds

- Different than insurance
  - Three party contract
    - Surety – many times an insurance company
    - Principal – the Contractor
    - Obligee – the Owner

- Contractor promises to fulfill its contractual obligations and Owner promises to pay.
- If one of those does not occur, the Surety will pay.
- Needed on Public projects (cannot lien public projects.)

Other Bonds

Bid

- Just helps screen out unqualified bidders

Performance

- Protects the Owner from financial loss if the Contractor fails to perform

Payment

- Assures the Contractor that they will get paid



Liens

Mechanics Lien

- In a construction project it is filed against real property NCGS § 44
- Example: Sub-contractor may do work and not get paid by the GC. Even though Sub-contractor has an agreement with the GC, and not the property owner, they can file a Mechanic's Lien against the property. This will get the Owner involved and usually get the contractor paid.
- Strict time periods (120 days/last service for notice; 180 days/last service perfection)

Lien Waivers

- Partial/conditional lien waivers (with pay applications)
- Final at end of project

Terminology



Terms You Should Know

Drawings and Specifications

- Drawings are the graphic representation of the building.
- Specifications are the written descriptions of the materials to be used and how to construct the building.

Construction Administration / Contract Administration

- Very similar and simply mean making sure that what is in the contracts is what is done on the Project.

Certificate of Merit

- Many states require that an expert give an affidavit to be included with a complaint against an Architect or Engineer. No requirement in NC.

Terms You Should Know (cont.)

Requests for Information (RFIs)

- A form the Contractor can use when they do not understand something on the design. If they proceed without knowing how to build it that can create problems.

Change Order (CO)

- Form the Contractor can submit to make a change in the plans. All Parties sign it and it formally changes the contract amount and usually length to change time.

Construction Change Directive (CCD)

- When the Parties cannot agree on a Change Order, an Architect can issue a CCD requiring the Contractor to proceed with a new design and reserve the costs issue.

Critical Path Method (CPM)

- Not every construction activity is critical or effects other subcontractor's work. If it does then it is considered on the critical path.

Terms You Should Know (cont.)

Value Engineering

- Contractor can look over the plans and make recommendations for ways to do something in a less expensive manner.

Means and Methods

- Contractor decides how they are going to build it. Owner and/or Architect cannot tell him how to get it done.

Construction Contingencies

- Extra funds to take care of changes or cost overruns.

Troubles on a Project

Delays

- Excusable (time extension only)
- Compensable (money and time)
- Concurrent (no compensation)

Cost Overruns

Unforeseen Conditions

Non-performance



Non-performance

- Termination for Convenience
  - This is a choice the Owner can make to let the Contractor go. Requires the Owner to make all payments due and owing. Safest way to proceed.
- Termination for Cause
  - It is terminated for fault. Owner is not required to make any further payments. Probably going to bring a lawsuit.

Legal Theories

- Economic Loss Rule
- Limitation of Liability
- Privity of Contract
- Statute of Repose
- Indemnity

Economic Loss Rule

1. In North Carolina, a party cannot recover for purely economic losses through a tort action. Moore v. Coachmen Industries, Inc., 129 N.C. App. 389 (1998)

2. Only where a defective product causes damage to property other than the defective product is the loss attributable to the defective product and recoverable in tort. Id.

Limitation of Liability

- Parties are free to contract to a limitation of their potential exposure.
  - It is a contract based defense.
  - Not applicable for negligence claims.
  - Has to be reasonable.

Privity of Contract

- In NC you can bring direct causes of action.

  Davidson & Jones v. New Hanover Co., 41 N.C. App. 661, 255 S.E.2d 580 (1979)

  - Davidson abolished privity of contract, allowing contractors to sue design professionals directly.
  - Flows from negligence breach of common law duty of care to all foreseeable third parties.

Statute of Repose

- Six (6) year statute of repose.
- Still a three (3) year statute of limitation.
- Very important: you must specifically plead that the action has been brought within the Statute of Repose period! Bryant v. Don Galloway Homes, Inc., 147 NC 655, 556 SE2d 597 (2001)
- Spearin Doctrine
  - If the Contractor builds according to the plans, even if they are wrong, it is not the Contractor's responsibility
  - If Contractor believes it is not buildable that way and deviates from the plans then it is their responsibility

Indemnity

Contract

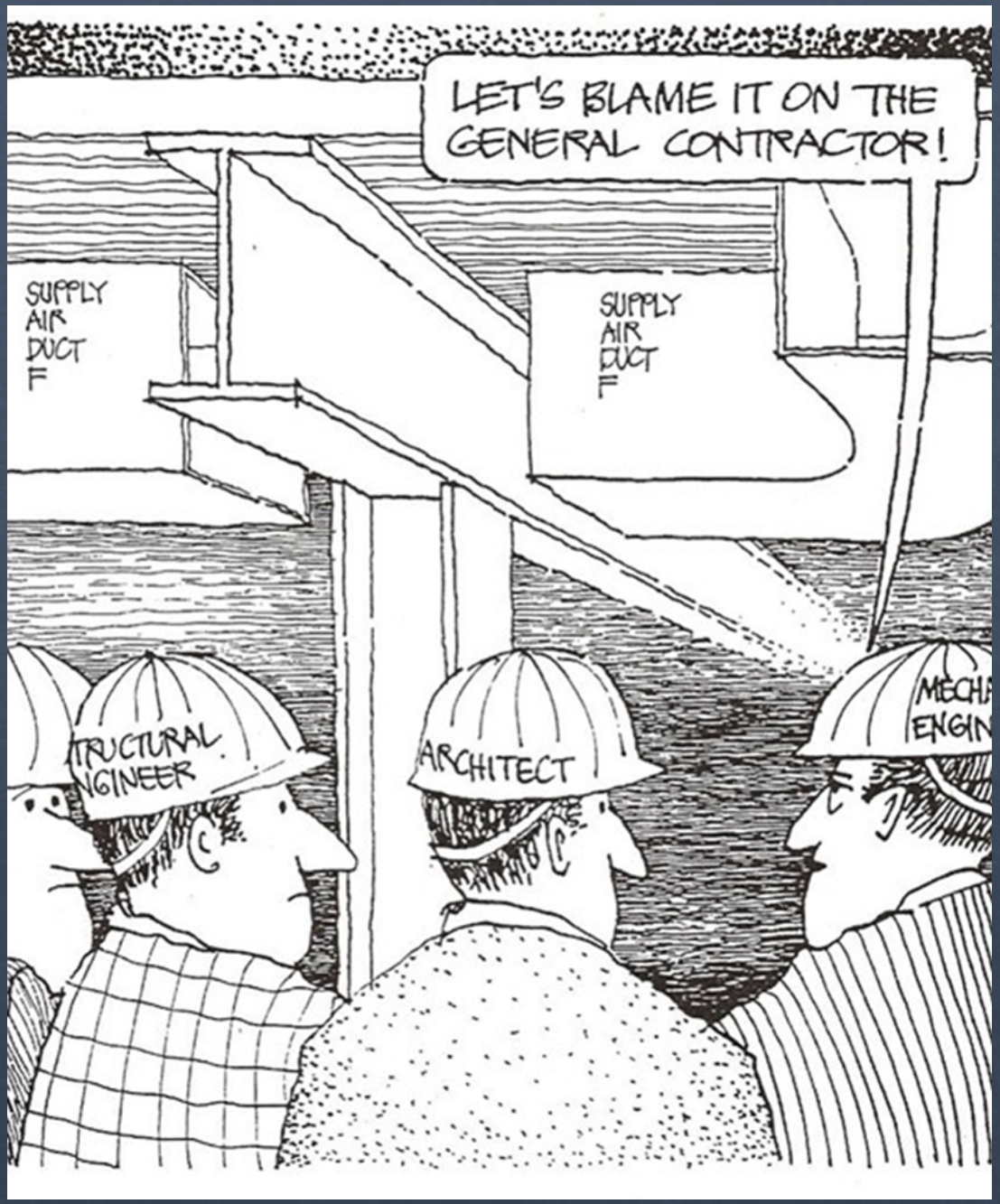
- Express written provision
  - Parties can contract to include indemnity
- Implied-in-Fact
  - Existing contract between the parties that implies the right

Negligence

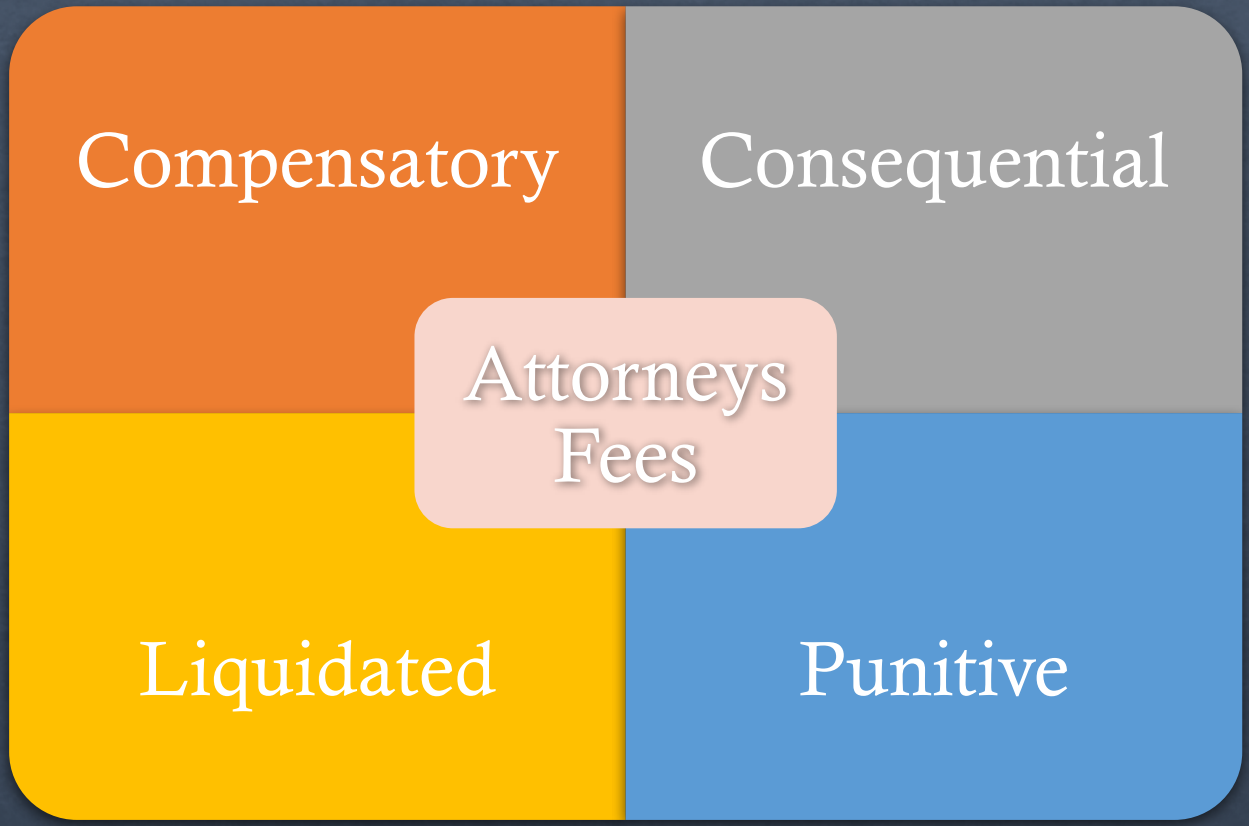
- Active/Passive

Claims

- Delay damages/Extended General Conditions
- CPM (Critical Path)
- Recoverable in certain situations; delay can be excusable or inexcusable.
  - Excusable delays are typically delays caused by acts outside of contractor's control and is no fault of either party (such as weather conditions). Excusable delays do not give rise to money damages but may entitle a contractor to an extension of time to complete the work.
  - Inexcusable delay is caused by one party that impacts the other party . This type of delay is considered a breach of contract (such as supplying defective materials.
  - If both parties contribute to a delay, generally neither can recover.


LET'S BLAME IT ON THE GENERAL CONTRACTOR!
SUPPLY AIR DUCT F
SUPPLY AIR DUCT F
TRUCTURAL NGINEER
ARCHITECT
MECH ENGIN

Damages


Compensatory
Consequential
Attorneys Fees
Liquidated
Punitive

Compensatory Damages

Arise as a proximate result of the breach of the contract.

Also available in a tort claim.

Consequential Damages

- Loss of use/rent/profit.
- Extended overhead or Loss of bonding capacity.
- Increased material costs.
- Special proof will have to be shown, specifically, that the parties contemplated lost profits when the contract was made.
- May not be applicable in a negligence setting.
- AIA, ConsensusDocs, and EJCDC form contracts contain mutual waiver of consequential damages.

Liquidated Damages

- Usually used when difficult to determine the amount of actual damages.
- They have to be reasonable.
- They have to be included in the contract.
- Not available for concurrent delay.

Punitive Damages

- Not available in a breach of contract claim.
- Can be awarded in a negligence claim.
  - Aggravating factors have to be present.
    - Fraud
    - Malice
    - Willful or wanton conduct

Attorney Fees

- There must be a statutory basis.
  - Lien (must recover more than 50% of liened amount; otherwise party opposing lien can recover)
  - Unfair and Deceptive Trade Practice
  - Punitive Damages
  - Contract allows it in a business to business contract with mutual attorney fee provisions (6-21.1)
  - Often found in arbitration provisions (either discretionary with arbitrator or mandatory award to prevailing party)

Insurance Considerations

- Professional Negligence Policies
  - Eroding Polices
    - Why different and why it matters to your case

Closing Remarks