

# ProNetwork News

## Risk Management Tools for the Design Professional

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Mr. Singer, who was awarded his J.D. by the University of Chicago Law School, is a former Professional Affiliate Director of the American Institute of Architects of Chicago and is a member of multiple bar associations and design professional groups. Recently ranked as AV® Preeminent™ by Martindale-Hubbell and listed in The Best Lawyers of America®, Construction Law, by those peer-review organizations, Eric is an active speaker and prolific author on the subject of construction litigation and the liability of the design professional.

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### **Veni, Vidi, Vici, Lis Pendens: I came, I saw, I got sued - Part 2 of 2**

By Eric L. Singer, Ice Miller, LLP

Last month's issue of *ProNetwork News* featured the first of a two-part article on the liability that can arise from undiscovered construction defects.

*In the section "Veni – I went to the site," Mr. Singer warned against the pitfalls that can arise from both contract language and the A/E's actions. He contrasted liability that arises from contracts, with torts, which arise from non-contractual duties and actions. He then favored us with the claim against the architect and consulting M/E/P engineer who couldn't see through walls: they were sued following the discovery of mold growth, and investigation revealed that pipes were only being insulated on the regularly scheduled days of their site visits.*

*One practical suggestion was to offer more frequent site visits as may be requested by the owner for an increased fee: then, if declined, to add language to the contract showing that it was discussed but not made a part of the deal.*

*In "Vidi- I observed for general conformance with design intent," the author warns against the use of the terms "inspect" and "assure compliance," and directs our attention to the AIA B201, § 2.6.2.1 clause, which speaks in terms of general conformity with Contract Documents, instead. "Bad contract language makes it difficult to defend construction defect claims," wrote Eric, and then went on to cite a memorable claim where construction defects were hidden in plain sight.*



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*One in 100 loft-style units in an extended stay hotel had one stair tread that was one-half of an inch short of code compliance. A resident fell down the stairs and suffered serious injury; and sued the owner who sued the Architect. The defense focused both on the overall compliance of the hotel's stairs and on standard of care. In addition, this particular jurisdiction required a signed architect's certification of code compliance prior to issuance of a certificate of occupancy. The case settled for a nominal sum but the settlement was literally on the eve of trial and followed exhaustion of the architect's deductible and expenditure of a great deal of legal, expert witness and the architect's time over the course of several years.*

### ***Lis Pendens – I got sued anyway***

Sometimes observable deficiencies get missed, or the timing, relative solvency or insured status of the parties and plain old bad luck conspire to force you to defend your compliance with the standard of care. In tort claims (injuries, property damage or other calamities), most states have procedural mechanisms to apportion fault among the parties or to add parties potentially at fault. Contract lawsuits are different and an owner could choose to pursue the A/E and leave the contractor alone or to settle and join forces with the contractor. In contract cases, many jurisdictions make it difficult for an architect to pursue claims against a contractor without a direct contract. You can defend by blaming the contractor's "empty chair" or try a more aggressive approach. The general conditions may provide you with some ammunition.

General Conditions frequently contain a warranty in favor of both the owner and the architect. The AIA A201 (2007), for example, provides "The Contractor warrants *to the Owner and Architect* that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit." (A201 – 2007, §3.5). Interpretation of this provision and rights of the architect in these circumstances varies greatly state to state. If viable in your state, a warranty claim against the contractor may prevent the owner and contractor from settling cheap or joining forces against the design team.

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### **Vici – I conquered?**

In claims, we look first to how and why the detail was missed and what was documented. If the person who missed the detail was young/junior/green, we recommend that the A/E consider assignment of such tasks to junior people with the guidance and experience of more seasoned/cynical/suspicious personnel, even if it means doubling up for site visits. We also look carefully at what was documented at the time. Field reports become the primary evidence both for or against you in claims. Do the field reports indicate whether any defects were identified or discussed? If so, why were those identified and this one missed? If none are identified at all, there will be an argument that there was insufficient scrutiny of the work. Whoever drafted the field report will likely be years away from the project by the time of their deposition so memory will not be a reliable aid. If there is a defect, get it down on paper and notify the owner.

Some defects, like the one-in-a-hundred stair tread, would never be caught by an architect using the standard of care. Those cases have to be vigorously defended. Their dynamics and process can depend greatly on who else is still around, solvent and insured. Even if successfully defended, a lawsuit win is rarely a victory. Defense costs within your deductible, the impact on your time, your practice and your future insurance underwriting all factor into an inefficient and exhausting process that is better avoided if possible.

You cannot control the future solvency and insurance coverage of contractors but you can manage construction administration risks. Visit the site but do so based on contract language appropriately allocating responsibility and write up your observations in sufficient detail that they can be useful later. Caesar may have been a great leader, but his field reports were incomplete.

*NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances and jurisdiction.*



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