Table of Contents

Volume 1

CHAPTER 1. INTRODUCTION TO CONSTRUCTION LAW

- § 1:1 Construction—Hallmark of civilization§ 1:2 Modern construction's complexity—Implications for
- legal process § 1:3 Construction law—What is it?
- § 1:4 Construction law and academia
- § 1:5 Construction law and the American Bar
- § 1:6 Construction law practice
- § 1:7 Purpose of this legal treatise

CHAPTER 2. CONTRACT FORMATION

I. CLASSICAL CONTRACT FORMATION

§ 2:1	Generally
§ 2:2	Express contracts—Generally
§ 2:3	Express contracts—Offer and acceptance
§ 2:4	Express contracts—Mutuality and consideration
§ 2:5	Express contracts—Definite contract or "agreement to agree"
§ 2:6	Express contracts—Definite contract or "agreement to agree"—Indefinite delivery/ indefinite quantity contracts
§ 2:7	Express contracts—Definite contract or "agreement to agree"—Contracts with unstated completion dates
§ 2:8	Express contracts—Definite contract or "agreement to agree"—Letters of intent
§ 2:9	Express contracts—Definite contract or "agreements to agree"—Teaming agreements
§ 2:10	Implied-in-fact contracts
§ 2:11	Implied-in-law contracts—Generally

§ 2:12 Implied-in-law contracts—Promissory estoppel

II. CONSTRUCTION CONTRACT FORMATION PROCESS

§ 2:13	Generally
§ 2:14	Project delivery methods—Generally
§ 2:15	Project delivery methods—Design-bid-build
§ 2:16	Project delivery methods—Construction
	management
§ 2:17	Project delivery methods—Design-build and turnkey
§ 2:18	Project delivery methods—Public-private partnerships and "privatization"
§ 2:19	Project delivery methods—Collaborative
	alliancing, lean project delivery and integrated project delivery
§ 2:20	Project delivery methods—Legal implications of "public" versus "private" projects
§ 2:21	"Best value" procurement
§ 2:22	Source selection methods
§ 2:23	Types of contracts—Generally
§ 2:24	Types of contracts—Firm-fixed price
§ 2:25	Types of contracts—Fixed-unit price contract
§ 2:26	Types of contracts—Cost reimbursement with fixed fee
§ 2:27	Types of contracts—Cost reimbursement with fixed fee up to guaranteed maximum price
§ 2:28	Types of Contracts—Cost sharing
§ 2:29	Types of Contracts—Time and materials, and force account
§ 2:30	Types of Contracts—Indefinite delivery/indefinite quantity ("ID/IQ")

III. CONTRACT FORMATION BY COMPETITIVE SEALED BIDDING

§ 2:31	Generally
§ 2:32	Mechanics of competitive sealed bidding
§ 2:33	Scope of competitive sealed bidding statutes and exemptions—Generally
§ 2:34	Scope of competitive sealed bidding statutes and exemptions—Statutory public agency exemptions
§ 2:35	Scope of competitive sealed bidding statutes and exemptions—Statutory public work exclusions

DEFAULT

§ 2:36	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Generally
§ 2:37	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—"Inadequate competition" exemption
§ 2:38	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Professional or personal services exemption
§ 2:39	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Emergency work exemption
§ 2:40	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Small dollar exemption
§ 2:41	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Contract default exemption
§ 2:42	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Special legislative exemption
§ 2:43	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Social program exemption
§ 2:44	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Source of funds exemption
§ 2:45	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Public forces exemption
§ 2:46	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Intergovernmental exemption
§ 2:47	Scope of competitive sealed bidding statutes and exemptions—Statutory "impracticability" and "probity" exemptions—Public interest "catch all" exemption
§ 2:48	Competitive sealed bidding integrity—

	Preventing illegal circumvention of statutory mandate
§ 2:49	Competitive sealed bidding integrity— Preventing circumvention by contract "splitting" under "small dollar" exemption
§ 2:50	Competitive sealed bidding integrity— Preventing circumvention by engaging in post- bid negotiation of changes
§ 2:51	Competitive sealed bidding integrity— Preventing circumvention by "cardinal" change
§ 2:52	Competitive sealed bidding integrity— Preventing circumvention by reclassification of work to fit an exemption
§ 2:53	Competitive sealed bidding integrity— Preventing circumvention by use of "restrictive' product specifications
§ 2:54	Competitive sealed bidding integrity— Preventing circumvention by use of "restrictive" product specifications—Restrictive "brand name" specifications
§ 2:55	Competitive sealed bidding integrity— Preventing circumvention by use of "restrictive' product specifications—Avoidance of "restrictive" specifications by open product competition with post-bid selection
§ 2:56	Competitive sealed bidding integrity— Preventing circumvention by use of restrictive bidder qualification requirements
§ 2:57	Competitive sealed bidding integrity— Preventing circumvention in "bid alternate" selection process
§ 2:58	Competitive sealed bidding integrity— Preventing circumvention by imposing unreasonably short time for bid preparation
§ 2:59	Competitive sealed bidding integrity— Preventing conflicts of interest
§ 2:60	Statutory bidder preferences—Generally
§ 2:61	Statutory bidder preferences—Residency preferences
§ 2:62	Statutory bidder preferences—Small business preferences
§ 2:63	Statutory bidder preferences—Minority and disadvantaged business preferences
§ 2:64	Statutory bidder preferences—Minority and disadvantaged business preferences—

DEFAULT

		Determining credit toward DBE goals
§ 2	2:65	Statutory bidder preferences—Minority and
		disadvantaged business preferences—Prime
		contractor/DBE commercially useful function
		(CUF) responsibility
§ 2	2:66	Statutory bidder preferences—Minority and
		disadvantaged business preferences—
		Commercially useful function reviews and
		outcomes
§ 2	2:67	Statutory bidder preferences—Minority and
		disadvantaged business preference—Good faith
0 (2.00	efforts required by prime contractors
8 2	2:68	Statutory bidder preferences—Minority and
		disadvantaged business preferences—
		Procedures for requesting DBE contract waivers and modifications
86	2:69	Statutory bidder preferences—Minority and
8 4	2.03	disadvantaged business preferences—
		Terminating DBEs for convenience
8 9	2:70	Statutory bidder preferences—Minority and
0 -		disadvantaged business preferences—Penalties
§ 2	2:71	Statutory bidder preferences—Labor
		preferences—Generally
§ 2	2:72	Statutory bidder preferences—Labor
		preferences—Labor hiring preferences
§ 2	2:73	Statutory bidder preferences—Labor
		preferences—Project labor agreements
§ 2	2:74	Statutory bidder preferences—Labor
		preferences—Prevailing wage requirements
§ 2	2:75	Statutory bidder preferences—Labor
		preferences—Job targeting wage subsidy
0.0	. 50	programs
§ 2	2:76	Owner preparation and publication of invitation
6 6	0.77	for bids
8 2	2:77	Contractor bid preparation and submission—
2 6	0.70	Generally Contractor hid proporation and submission
8 4	2:78	Contractor bid preparation and submission— Review of the plans and specifications
8 6	2:79	Contractor bid preparation and submission—
8 4	2.13	Site investigation
8 9	2:80	Contractor bid preparation and submission—
o 4		Pre-bid clarifications and communications
8 9	2:81	Contractor bid preparation and submission—
o -		Pre-bid substitutions
§ 2	2:82	Contractor bid preparation and submission—

		Unbalanced bidding
§ 2	:83	Contractor bid preparation and submission—
		Subcontractor listing requirements
§ 2	:84	Contractor bid preparation and submission—Bid security—Generally
§ 2	:85	Contractor bid preparation and submission—Bid security—Bid security damage measures
§ 2	:86	Contractor bid preparation and submission—Bid security—Bid security beneficiaries
§ 2	:87	Time allowed for bidding
§ 2	:88	Bid submission and opening—Generally
§ 2	:89	Bid submission and opening—Generally Bid submission and opening—"Firm bid" rule
§ 2	:90	Evaluation of bid responsiveness—Generally
§ 2	:91	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Generally
§ 2	:92	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to properly complete bid form
§ 2	:93	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to comply with mandatory subcontractor listing
§ 2	:94	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to provide mandated documentation
§ 2	:95	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to acknowledge amendments to bid invitation
§ 2	:96	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to furnish proper bid security
§ 2	:97	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to submit bid on time
§ 2	:98	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to conduct mandatory site inspection
§ 2	:99	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as

	nonresponsive—Failure to initial bid alterations
§ 2:100	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to offer to do work in conformance with invitation requirements
§ 2:101	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to evidence intent to be bound
§ 2:102	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to submit balanced bid
§ 2:103	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to submit complete and unqualified bid form
§ 2:104	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to submit social program preference compliance information
§ 2:105	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to submit experience qualification information
§ 2:106	Evaluation of bid responsiveness—"Material" deviations requiring rejection of bid as nonresponsive—Failure to satisfy "selfperformed" work requirement
§ 2:107	Evaluation of bid responsiveness—"Minor informalities" waivable at owner's discretion
§ 2:108	Evaluation of bid responsiveness—Public agency discretion in judging bid "responsiveness"
§ 2:109	Evaluation of bid responsiveness—Recourse against third parties who cause bid to be nonresponsive
§ 2:110	Evaluation of bidder responsibility—Generally
§ 2:111	Evaluation of bidder responsibility—Bidder responsibility vs. bid responsiveness
§ 2:112	Evaluation of bidder responsibility—Public agency discretion in judging bidder "responsibility"
§ 2:113	Evaluation of bidder responsibility—Public agency discretion in judging bidder "responsibility"—Bidder integrity

§ 2:114	Evaluation of bidder responsibility—Public agency discretion in judging bidder "responsibility"—Bidder licensure
§ 2:115	Evaluation of bidder responsibility—Public
§ 2:115	agency discretion in judging bidder
	"responsibility"—Bidder past performance on prior contracts
§ 2:116	Evaluation of bidder responsibility—Public
8 2.110	agency discretion in judging bidder
	"responsibility"—Bidder information required
	for responsibility determination
§ 2:117	Evaluation of bidder responsibility—Public
8 2.111	agency discretion in judging bidder
	"responsibility"—Bidder experience
§ 2:118	Evaluation of bidder responsibility—Public
8 2.110	agency discretion in judging bidder
	"responsibility"—Bidder social responsibility
§ 2:119	Evaluation of bidder responsibility—Bidder
§ 2.113	prequalification
§ 2:120	Evaluation of bidder responsibility—Bidder
3 =11=0	request for pre-award nonresponsibility hearing
§ 2:121	Evaluation of bidder responsibility—Bidder
	suspension and debarment from future contract award
§ 2:122	"Firm bid" rule and enforcement of sub-bids—
	Generally
§ 2:123	"Firm bid" rule and enforcement of sub-bids—
	Sub-bid "promissory estoppel"
§ 2:124	"Firm bid" rule and enforcement of sub-bids—
	Equivocal or conditional intent to be bound
§ 2:125	"Firm bid" rule and enforcement of sub-bids—
	Bidder lack of reliance on sub-bid—Generally
§ 2:126	"Firm bid" rule and enforcement of sub-bids—
	Bidder lack of reliance on sub-bid—Bidder
	rejection of sub-bid by post-bid "bid shopping"
	or "bid chiseling"
§ 2:127	"Firm bid" rule and enforcement of sub-bids—
	Bidder lack of reliance on sub-bid—Bidder
	rejection of sub-bid by post-bid negotiation of
	materially different terms
§ 2:128	"Firm bid" rule and enforcement of sub-bids—
	Bidder lack of reliance on sub-bid—Sub-bid
	mistake
§ 2:129	"Firm bid" rule and enforcement of sub-bids—
	Bidder lack of reliance on sub-bid—Lack of

	timely acceptance of sub-bid
§ 2:130	"Firm bid" rule and enforcement of sub-bids— Bidder lack of reliance on sub-bid—Lack of timely acceptance of sub-bid—Contractor
e 0.101	change of identity
§ 2:131	"Firm bid" rule and enforcement of sub-bids— Owner rejection of subcontractor or supplier
§ 2:132	"Firm bid" rule and enforcement of sub-bids— Promissory estoppel—"One-way" or "two-way" street for subcontractors
§ 2:133	Mistake in bid—Generally
§ 2:134	Mistake in bid—Burden of proof for mistake remediation
§ 2:135	Mistake in bid—Mistake of fact
§ 2:136	Mistake in bid—Mistake of judgment
§ 2:137	Mistake in bid—Mistake of law
§ 2:138	Mistake in bid—Bid mistake by subcontractor as
	affecting prime bid
§ 2:139	Mistake in bid—Bidder's "unilateral" mistake— Generally
§ 2:140	Mistake in bid—Bidder's "unilateral" mistake— Unconscionability
§ 2:141	Mistake in bid—Bidder's "unilateral" mistake— Materiality
§ 2:142	Mistake in bid—Bidder's "unilateral" mistake—
e 0.149	Negligence or breach of duty
§ 2:143	Mistake in bid—Bidder's "unilateral" mistake— Lack of prejudice
§ 2:144	Mistake in bid—Bidder's "unilateral" mistake— Accepting party's knowledge or inducement of unilateral bid mistake
§ 2:145	Mistake in bid—Bidder's "unilateral" mistake— Constructive knowledge of mistake from disparity in bids and estimates and duty of inquiry
§ 2:146	Mistake in bid—Bidder's "unilateral" mistake— Inducement of mistake by misrepresentation
§ 2:147	Mistake in bid—Bidder's "unilateral" mistake—
§ 2.141	Waiver of right to relief for unilateral mistake
§ 2:148	Mistake in bid—Mutual mistake—Generally
§ 2:149	Mistake in bid—Mutual mistake—Assumption of risk of mistake
§ 2:150	Mistake in bid—Mutual mistake—Relief from mistake in bid

§ 2:151	Rejection of all bids—Generally
§ 2:152	Rejection of all bids—Failure to make findings on "compelling reasons" for cancellation
§ 2:153	Rejection of all bids—Cancellation simply to obtain lower prices
§ 2:154	Evaluation of low price bid
§ 2:155	Award—Generally
§ 2:156	Award—Award of public contracts
§ 2:157	Award—Bidder's voluntary extension of public contract "firm bid" acceptance time
§ 2:158	Award—Award of private contracts

IV. CONTRACT FORMATION BY COMPETITIVE NEGOTIATION

§ 2:159	Generally
§ 2:160	Statutory authority to form public construction contracts by negotiation—Generally
§ 2:161	Statutory authority to form public construction contracts by negotiation—Negotiation objective—"Best value"
§ 2:162	Statutory authority to form public construction contracts by negotiation—Selection of "evaluation factors"
§ 2:163	Request for proposals
§ 2:164	Cancellation of the request for proposals
§ 2:165	Offeror preparation and submission of proposals
§ 2:166	Evaluation of competitive proposals
§ 2:167	Pre-award negotiation
§ 2:168	Negotiation considerations—Generally
§ 2:169	Negotiation considerations—Negotiation techniques
§ 2:170	Negotiation considerations—Negotiated profit
§ 2:171	Negotiated contract award

V. CONTRACT FORMATION BY COMPETITIVE "TWO-STEP" PROCEDURES

§ 2:172	Generally
§ 2:173	Two-step competitive sealed bidding procedure
$\S 2:174$	Two-step design-build source selection procedure
§ 2:175	Practical state and local two-step "best value"
	source selection procedure

VI. REMEDIES FOR IMPROPER AWARD OF

PUBLIC CONTRACT

§ 2:176	Generally
§ 2:177	Standing to protest
§ 2:178	Mootness of protest
§ 2:179	Protest forum
§ 2:180	Delay in assertion of protest
§ 2:181	Damage remedy against owner—Bid preparation costs
§ 2:182	Damage remedy by or against successful bidder—Lost profits
§ 2:183	Injunctive relief to direct or stay of award
§ 2:184	Recovery under special statutes and common- law principles—Generally
§ 2:185	Recovery under special statutes and common- law principles—Civil rights laws
§ 2:186	Recovery under special statutes and common- law principles—Antitrust laws
§ 2:187	Recovery under special statutes and common- law principles—Anti-retaliation laws
§ 2:188	Recovery under special statutes and common- law principles—Defamation

Volume 1A

CHAPTER 3. CONTRACT CONSTRUCTION AND INTERPRETATION

I. IN GENERAL

§ 3:1 Contract construction and interpretation—Journey from "text" to "context"

II. THE MODERN CONTEXTUAL CONSTRUCTION CONTRACT

3:2	Generally
§ 3:3	Sources of contextual terms insinuated into the
	express contract
$\S 3:4$	Implied terms and conditions—Generally
3:5	Implied terms and conditions—The Spearin
	Doctrine—Implied warranty of design
§ 3:6	Implied terms and conditions—Implied duty of

	disclosure—Control over the source of material design information
§ 3:7	Implied terms and conditions—Implied duty to seek clarification of design discrepancies—
	Control of the "Last Clear Chance" to avoid a dispute
§ 3:8	Implied terms and conditions—Gray areas of
	design control—"Dual hands on the steering wheel"
§ 3:9	Implied terms and conditions—Gray areas of design control—Shop drawings and submittals
§ 3:10	Implied terms and conditions—Gray areas of design control—Jointly developed specifications
§ 3:11	Implied Terms and Conditions—Gray areas of
	design control—Designer reliance on manufacturers product literature
§ 3:12	Implied terms and conditions—Gray areas of
	design control—"Brand name" and "sole source" specifications and commercial availability
§ 3:13	Implied terms and conditions—Gray areas of
	design control—Mixed design and performance specifications
§ 3:14	Implied terms and conditions—Gray areas of
3 3.22	design control—Conflicts between design
	specifications and contract performance
	acceptance requirements
§ 3:15	Implied terms and conditions—Gray areas of design control—Diagrammatic drawings
§ 3:16	Implied terms and conditions—Gray areas of
	design control—Owner design warranty and the lower tiers
§ 3:17	Implied terms and conditions—Gray areas of
	design control—Approval of contractor plant, equipment or "work plan."
§ 3:18	Implied terms and conditions—Gray areas of
	design control—Approval of contractor concrete mix design, manufacture and placement
§ 3:19	Implied terms and conditions—Gray areas of design control—Control of construction methods
§ 3:20	Implied terms and conditions—Gray areas of
	design control—Owner implied warranty of
6 0 01	design versus contractor warranty of materials
§ 3:21	Implied terms and conditions—Gray areas of
	design control—"Government contractor" defense

DEFAULT

§	3:22	Implied warranties of construction— Workmanship
§	3:23	Implied warranties of construction—Product suitability
§	3:24	Implied warranties of construction—Duty to provide technical Product information
§	3:25	Implied warranties of construction—Duty to warn
§	3:26	Implied mutual duties in construction— Cooperation
§	3:27	Implied mutual duties in construction—Good faith and fair dealing
§	3:28	Implied waiver of express rights—Contract completion date
	3:29	Implied waiver of express rights—Contract specifications
§	3:30	Implied waiver of express rights—Other contract rights
	3:31	Implied authority to modify contract rights
§	3:32	Express disclaimers of implied warranties and duties
Ι		CONTRACT CONSTRUCTION AND NTERPRETATION CONSIDERATIONS
Ι		NTERPRETATION CONSIDERATIONS
	Ι	NTERPRETATION CONSIDERATIONS
	A.	NTERPRETATION CONSIDERATIONS IN GENERAL Ascertaining the meaning of human language
§	A. 3:33	NTERPRETATION CONSIDERATIONS IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION
8	A. 3:33 B.	NTERPRETATION CONSIDERATIONS IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory
\ \ \ \ \ \ \ \ \	A. 3:33 B. 3:34	NTERPRETATION CONSIDERATIONS IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally
8 8 8	A. 3:33 B. 3:34 3:35	IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally Impact of warring doctrines—Waning vitality of traditional "plain meaning" rule
8 8 8 8	A. 3:33 B. 3:34 3:35 3:36	NTERPRETATION CONSIDERATIONS IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally Impact of warring doctrines—Waning vitality of
8 8 8 8 8	A. 3:33 B. 3:34 3:35 3:36 3:37	IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally Impact of warring doctrines—Waning vitality of traditional "plain meaning" rule Impact of warring doctrines—Confusion over interpretation When is language ambiguous—Facial ambiguity
	A. 3:33 B. 3:34 3:35 3:36 3:37 3:38 3:39 3:40	IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally Impact of warring doctrines—Waning vitality of traditional "plain meaning" rule Impact of warring doctrines—Confusion over interpretation When is language ambiguous—Facial ambiguity When is language ambiguous—Contextual ambiguity
	A. 3:33 B. 3:34 3:35 3:36 3:37 3:38 3:39	IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally Impact of warring doctrines—Waning vitality of traditional "plain meaning" rule Impact of warring doctrines—Confusion over interpretation When is language ambiguous—Facial ambiguity When is language ambiguous—Contextual
	A. 3:33 B. 3:34 3:35 3:36 3:37 3:38 3:39 3:40	IN GENERAL Ascertaining the meaning of human language OJECTIVE VERSUS SUBJECTIVE THEORY OF CONTRACT INTERPRETATION The objective "plain meaning" rule Influence of contract formation theory Impact of warring doctrines—Generally Impact of warring doctrines—Waning vitality of traditional "plain meaning" rule Impact of warring doctrines—Confusion over interpretation When is language ambiguous—Facial ambiguity When is language ambiguous—Contextual ambiguity When is language ambiguous—Strict versus

C. PAROL EVIDENCE RULE

§ 3:43	Purpose of the rule
§ 3:44	Substantive law or procedural rule
§ 3:45	Relationship to statute of frauds
§ 3:46	Integration requirement
§ 3:47	Merger or integration clauses
§ 3:48	Effect of integration upon application of parol evidence rule
§ 3:49	Exceptions to application of parol evidence rule
§ 3:50	Missing and implied terms
§ 3:51	Pre-bid discussions
§ 3:52	Change orders, releases, and settlements

D. RISK ALLOCATION PRINCIPLES APPLIED IN CONTRACT INTERPRETATION

8 3:53	Consequences of knowing other party's meaning—
	"Acquiescence by silence"
§ 3:54	Patent ambiguity doctrine—Generally
§ 3:55	Patent ambiguity doctrine—Application of rule in language conflict situations
§ 3:56	Patent ambiguity doctrine—Satisfying inquiry duty
§ 3:57	Doctrines of "superior knowledge" and "duty to disclose"
§ 3:58	Contractor's lack of reliance upon its espoused interpretation
§ 3:59	Consequences of drafting ambiguous language— <i>Contra proferentem</i> rule

E. JUDICIAL INTERPRETATION PREFERENCE STANDARDS: RULES FOR DETERMINING THE MOST REASONABLE INTERPRETATION

§ 3:60	Generally
§ 3:61	Ordinary, technical or private meanings in
	context
§ 3:62	The "whole agreement" rule—Generally
§ 3:63	The "whole agreement" rule—The specification
	tree and incorporation by reference
§ 3:64	The "whole agreement" rule—Incorporation by
	reference of upper tier contract provisions int

	lower tier agreements—"Flow down" clause
§ 3:65	The "whole agreement" rule—Incorporation by law
§ 3:66	The "whole agreement" rule—Contractual order of precedence provisions
§ 3:67	The "whole agreement" rule—"Specific governs general"
§ 3:68	The "whole agreement" rule—"Typed over the printed" and "written over the typed"
§ 3:69	The "whole agreement" rule—"Terms over recitals"
§ 3:70	The "whole agreement" rule—Inclusion of one is exclusion of others—Doctrine of "expressio unius est exclusio alterius"
§ 3:71	The "whole agreement" rule—"Any provision herein to the contrary notwithstanding" language
§ 3:72	The principal purpose doctrine
§ 3:73	Role of trade custom and usage—Generally
§ 3:74	Role of trade custom and usage—Parties presumed to know well-established trade usage or custom
§ 3:75	Role of trade custom and usage—Contract interpretation—Two competing theories
§ 3:76	Role of trade custom and usage—Employing trade usage to define meaning of particular terms
§ 3:77	Role of trade custom and usage—Employing trade usage to give meaning where contract is silent
§ 3:78	Role of trade custom and usage—Employing trade usage to resolve conflicts in contract language
§ 3:79	Role of trade custom and usage—Establishing trade usage
§ 3:80	Role of "course of dealing" in contract interpretation
§ 3:81	Role of "course of performance" in contract interpretation—Generally
§ 3:82	Role of "course of performance"—"Practical construction"/"concurrent interpretation"
§ 3:83	Interpreting standard form agreements— Marriage of intention and convenience
§ 3:84	Interpreting standard form agreements— Objectionable terms
§ 3:85	Interpreting standard form agreements— Customizing or altering standard form

agreements

- § 3:86 Interpreting standard form agreements— Standard form agreements as adhesion contracts
- § 3:87 Interpreting standard form agreements—Quasiadhesion analysis—Applying contra proferentem rule and other interpretation guides to standard form agreements
- § 3:88 Reformation of contract is not interpretation

CHAPTER 4. CONTRACT "CHANGES" AND "EXTRAS"

I. GENERAL CONSIDERATIONS

- § 4:1 Construction's "constant"—Certainty of change
- § 4:2 The modern changes clause—Its purposes and objectives
- § 4:3 Origins and evolution of "changes" and "extras" clauses

II. MODERN CONSTRUCTION CONTRACT STANDARD FORM APPROACHES TO "CHANGES"

- § 4:4 Generally
- § 4:5 Federal "changes" clause
- § 4:6 Federal "value engineering" clause
- § 4:7 American Institute of Architects "changes" and "claims" clauses
- § 4:8 Federal and state highway construction "alterations," "extras" and "variation in quantities" clauses

III. "CHANGES" AND "EXTRAS" CLAUSES AS EXCLUSIVE BASES FOR ADMINISTRATIVE RELIEF FOR CLAIMS "ARISING UNDER THE CONTRACT"

- § 4:9 Generally
- § 4:10 Meanings of contractual "scope" and "general scope"—Generally
- § 4:11 Meanings of contractual "scope" and "general scope"—Parameters of contract "scope"
- § 4:12 Meanings of contractual "scope" and "general

	scope"—Parameters of contract "general scope"
§ 4:13	Changes outside the "general scope"—"Cardinal"
	changes or abandonment of contract
§ 4:14	Changes outside the "general scope"—"Cardinal"
	changes or abandonment of contract—
	Cumulative impact of changes as "cardinal"
_	change
§ 4:15	Changes outside the "general scope"—"Cardinal"
	changes justifying "abandonment" of contract—
0	Practical proof of "cardinal" change
§ 4:16	Changes outside the "general scope"—"Cardinal"
	changes or "abandonment" of contract—Effect on
0 4 1 1	measure of recovery
§ 4:17	Changes outside the "general scope"—"Cardinal"
	changes or "abandonment" of contract—
\$ 4.10	Discharge of the performance bond surety
§ 4:18	Changes outside the "general scope"—"Cardinal"
	changes or abandonment of contract—Right to stop work and abandon or terminate contract
§ 4:19	Changes outside the "general scope"—"Cardinal"
8 4.13	changes or abandonment of contract—Deductive
	change or partial termination for convenience
§ 4:20	Changes outside the "general scope"—"Cardinal"
5 4.20	changes or abandonment of contract—Sovereign
	immunity defense
§ 4:21	Changes outside the "general scope"—"Cardinal"
, <u>-</u> -	changes or abandonment of contract—Violation
	of competitive sealed bidding statute

IV. TYPES OF CHANGES

§ 4:22	Generally
§ 4:23	"Formal" change
§ 4:24	"Value engineering" change
$\S 4:25$	"Constructive" change
§ 4:26	"Constructive" change—Type I constructive change involving contract misinterpretation
§ 4:27	"Constructive" change—Type I constructive change involving contract misinterpretation— Specification ambiguity
§ 4:28	"Constructive" change—Type I constructive change involving contract misinterpretation— Hypertechnical inspection
§ 4:29	"Constructive" change—Type I constructive

	Bruner & O'Connor on Construc
	Specification waiver
§ 4:30	"Constructive" change—Type I constructive
	change involving contract misinterpretation—
§ 4:31	Post-award changes in laws or regulations "Constructive" change—Type II constructive
\$ 1. 01	change involving owner interference or failure to cooperate
§ 4:32	"Constructive" change—Type III constructive change involving defective or impracticable specifications
§ 4:33	"Constructive" change—Type IV constructive change involving wrongful withholding of superior knowledge
§ 4:34	"Constructive" change—Type V constructive change involving acceleration
V. T]	IMELINESS REQUIREMENTS
§ 4:35	Claim notice timeliness requirements

§ 4:36 Claim submission timeliness requirements VI. "WRITTEN ORDER" REQUIREMENT

§ 4:37 Generally § 4:38 Implications of enforcement of "writing" requirement Implications of enforcement of "writing" § 4:39 requirement—Waiver of "writing" requirement Implications of enforcement of "writing" requirement—Implications of "anti-waiver" § 4:40 clauses Implications of "order" requirement § 4:41

VII. CHANGE ORDER AUTHORIZATION

- § 4:42 Generally
- § 4:43 Actual authority
- § 4:44 Implied authority
- § 4:45 Apparent authority
- § 4:46 Authority by ratification
- § 4:47 Authority by estoppel

CLAIM SETTLEMENT AND RELEASE VIII.

§ 4:48 Generally

CONTRACTOR'S DUTY TO PROCEED WITH IX.

xviii

THE CHANGED WORK

§ 4:49 Generally

X. FALSE CLAIMS

§ 4:50	Generally
§ 4:51	Federal sanctions
§ 4:52	State and local remedies
§ 4:53	Private remedies
§ 4:54	Managing contract formation, change order and litigation processes to avoid false claims—The lessons of <i>Daewoo</i>
§ 4:55	Managing contract formation, change order and litigation processes to avoid false claims— Documenting construction claims and costs

Volume 2

CHAPTER 5. STANDARD CONSTRUCTION CONTRACT FORMS: ANALYSIS OF THE AIA GENERAL CONDITIONS

I. INTRODUCTION

§ 5:1	Standardized construction contract forms: Search for generally accepted approach to allocation of risks and responsibilities
§ 5:2	American Institute of Architects (AIA) standard forms
§ 5:3	Federal Acquisition Regulation standard forms
§ 5:4	Federal Acquisition Regulation standard forms— American Association of State Highway Officials standard forms
§ 5:5	Federal Acquisition Regulation standard forms— Engineers Joint Contract Documents Committee (EJCDC) standard forms
§ 5:6	ConsensusDOCS contract documents
§ 5:7	Other organizations' contract forms
§ 5:8	Challenge of maintaining consistency in a web of contract documents
§ 5:9	Contract forms and allocation of cost uncertainty

II. ANATOMY OF AIA GENERAL CONDITIONS

§ 5:10	In general
§ 5:11	Definitional and housekeeping provisions ("definitional")
$\S 5:12$	Legal relationship provisions ("legal")
§ 5:13	Scope of work provisions ("scope")
$\S 5:14$	Architect scope provisions ("architect")
§ 5:15	Contract communication provisions ("communication")
§ 5:16	Quality assurance and quality control provisions ("quality")
§ 5:17	Claims administration provisions ("claims administration")
§ 5:18	Dispute resolution provisions ("dispute resolution")
§ 5:19	Risk transfer provisions ("risk transfer")
$\S 5:20$	Risk mitigation provisions ("risk mitigation")
$\S~5:21$	Risk allocation provisions ("risk allocation")
§ 5:22	Evolution of AIA General Conditions Document from 1987 to 2007
§ 5:23	2007 A201 document's Initial Decision Maker (IDM): An option to remove the architect from the dispute resolution process
§ 5:24	Issues raised by architect's traditional contract administration duties and the formal disputes process
§ 5:25	IDM's decision-making process
§ 5:26	Mediation as a prerequisite to further dispute resolution process
§ 5:27	Rejection of arbitration as the mandatory dispute resolution process

III. ANALYSIS OF AIA GENERAL CONDITIONS

 $\S 5:28$ In general

A. GENERAL PROVISIONS

§ 5:35	§ 1.1.7—Instruments of service (definitional)
§ 5:36	§ 1.1.8—Initial decision maker (definitional)
§ 5:37	§ 1.2.1—Correlation and intent of the contract documents (scope)
§ 5:38	§ 1.2.1.1—Invalid provisions are severable from the whole (definitional)
§ 5:39	§ 1.2.2—Organization of the specifications (legal)
§ 5:40	§ 1.2.3—Technical language (legal)
§ 5:41	§ 1.3—Capitalization (definitional)
§ 5:42	§ 1.4—Interpretation (legal)
§ 5:43	§ 1.5.1—Ownership of the instruments of service
	(legal)
§ 5:44	§ 1.5.2—Conditions and limitations on the use of
	the instruments of service (legal)
§ 5:45	§ 1.6.1—Notice (legal)
§ 5:46	§ 1.6.2—Notice of claims (legal)
§ 5:47	§ 1.7—Digital data use and transmission (legal)
§ 5:48	§ 1.8—Building information models use and

B. OWNER

reliance (legal)

- § 5:49 § 2.1.1—Owner's representative (legal)
- § 5:50 § 2.1.2—Owner's obligation to provide legal title and other property description information (risk mitigation)
- § 5:51 § 2.2.1—Owner's obligation to furnish financial information prior to commencement of the work (risk mitigation)
- § 5:52 § 2.2.2—Evidence of the owner's financial arrangements after commencement of the work (risk mitigation)
- § 5:53 § 2.2.3—Owner's obligation to refrain from materially varying financial arrangements (risk mitigation)
- § 5:54 § 2.2.4—Use and dissemination of owner's financial information (legal)
- $\$ 5:55 $\$ $\$ 2.3.1—Approvals, easements, assessments and charges (scope)
- § 5:56 § 2.3.2—Owner's obligation to retain licensed architect (risk mitigation)
- § 5:57 § 2.3.3—Owner's obligation to continue architect's employment or secure acceptable successor (risk mitigation)

§ 5:58 § 2.3.4—Owner's obligation to furnish accurate information (risk allocation) § 2.3.5—Timeliness of owner information § 5:59 (communication) § 2.3.6—Copies of contract documents § 5:60 (communication) § 5:61 § 2.4—Owner's right to stop the work (quality) § 5:62 § 2.5—Owner's right to carry out the work (quality) C. CONTRACTOR § 5:63 § 3.1.1—The "contractor" (definitional) § 5:64 § 3.1.2—Work in accordance with the contract documents (scope) § 5:65 § 3.1.3—Architect's activities no shield for contractor (architect) § 5:66 § 3.2.1 Site investigation representation (risk allocation) § 5:67 § 3.2.2—Contractor's review obligation (risk allocation) § 5:68 § 3.2.3—Contractor not responsible for ascertaining whether contract documents comply with applicable law (risk allocation) § 5:69 § 3.2.4—Consequences of failing to properly review the contract documents (risk allocation) § 5:70 § 3.3.1—Contractor's responsibility for construction means, methods and techniques (risk allocation) § 5:71 § 3.3.2—Contractor is responsible for the acts of its employees and subcontractors (risk allocation) § 5:72 § 3.3.3—Contractor's duty to inspect existing work to determine suitability for subsequent work (quality) § 3.4.1—Labor and materials (scope) § 5:73 § 5:74 § 3.4.2—Substitutions upon consent of the owner (quality) § 5:75 § 3.4.3—Contractor's enforcement of strict discipline and employment of fit personnel (quality) § 5:76 § 3.5.1—Contractor's warranty (quality) § 5:77 § 3.5.2—Special warranties required by the contract documents (quality)

§ 5:78

§ 3.6—Taxes (scope)

	5:79	§ 3.7.1—Permits, fees and notices (scope)
§	5:80	§ 3.7.2—Contractor's compliance with law (risk allocation)
§	5:81	§ 3.7.3—Contractor responsible where it knowingly performs work not in accordance with applicable laws (risk allocation)
§	5:82	§ 3.7.4—Claims for concealed or unknown conditions (risk allocation)
§	5:83	§ 3.7.5—Suspension of operations affecting burial markers, archaeological sites, or wetlands (risk allocation)
§	5:84	§ 3.8.1—Allowances included in the contract sum (risk allocation)
§	5:85	§ 3.8.2—Defining what is in and out of allowance items (scope)
§	5:86	§ 3.8.3—Owner to make prompt selections involving allowance items (risk mitigation)
§	5:87	§ 3.9.1—Superintendent (communication)
	5:88	§ 3.9.2—Contractor's disclosures regarding superintendent and owner's objections thereto (quality)
§	5:89	§ 3.9.3—Contractor may not employ a superintendent to which there is reasonable objection nor change the superintendent without consent (quality)
§	5:90	§ 3.10.1—Contractor's construction schedules (scope)
Ş	5:91	§ 3.10.2—Contactor's submittal schedule (scope)
	5:92	§ 3.10.3—Work in conformance with most recent schedules (quality)
§	5:93	§ 3.11—Documents and samples at the site (communication)
§	5:94	§ 3.12.1—Shop drawings (definitional)
§	5:95	§ 3.12.2—Product data (definitional)
§	5:96	§ 3.12.3—Samples (definitional)
_	5:97	§ 3.12.4—Purpose and review of shop drawings (communication)
§	5:98	§ 3.12.5—Contractor's review and approval of shop drawings (quality)
§	5:99	§ 3.12.6—Contractor's representations regarding shop drawings and other submittals (risk allocation)
§	5:100	§ 3.12.7—No work requiring submittals to be performed until approved (quality)

§ 5:101	§ 3.12.8—Architect's approval of shop drawings does not relieve contractor of responsibility to comply with the contract documents (risk allocation)
§ 5:102	§ 3.12.9—Resubmittals (quality)
§ 5:103	§ 3.12.10—Design delegation: Contractor to provide no design services unless specifically required by contract documents (risk allocation)
§ 5:104	§ 3.12.10.1—Design delegation process (risk allocation)
§ 5:105	§ 3.12.10.2—Contractor's design professional's certifications (quality)
§ 5:106	§ 3.13—Use of site (scope)
§ 5:107	§ 3.14.1—Contractor responsible for cutting and patching (scope)
§ 5:108	§ 3.14.2—Permission to cut or patch another's work (quality)
§ 5:109	§ 3.15.1—Cleaning up (scope)
§ 5:110	§ 3.15.1—Cleaning up (scope) § 3.15.2—Penalty for failing to keep premises clean (risk allocation)
§ 5:111	§ 3.16.1—Access to work (quality)
§ 5:112	§ 3.17—Royalties, patents and copyrights (risk allocation)
§ 5:113	§ 3.18.1—Indemnification (risk allocation) § 3.18.2—No limitation on indemnity because of
§ 5:114	§ 3.18.2—No limitation on indemnity because of workers' compensation laws (risk allocation)
D.	ARCHITECT
§ 5:115	§ 4.1.1—Identification of architect (definitional)
§ 5:116	§ 4.1.2—Architect's duties (architect)
§ 5:117	§ 4.2.1—Architect's duties as owner's
	representative during the construction process (architect)
§ 5:118	§ 4.2.2—Architect's site visitations (quality)
§ 5:119	§ 4.2.3—Architect to inform owner of progress and quality of work but is not responsible for contractor's failure to perform (risk allocation)
§ 5:120	§ 4.2.4—Communication facilitating contract administration (communication)
§ 5:121	§ 4.2.5—Architect's review of contractor's applications for payment (architect)
§ 5:122	§ 4.2.6—Architect's authority to reject work (legal)

§ 5:142

§ 5:123	§ 4.2.7—Architect's review of shop drawings and other submittals (risk allocation)
§ 5:124	§ 4.2.8—Architect's preparation of change orders (communication)
§ 5:125	§ 4.2.9—Architect's inspections and delivery of written warranties and related documents (architect)
§ 5:126	§ 4.2.10—Architect's project representative (architect)
§ 5:127	§ 4.2.11—Architect's interpretation of the parties' performance (architect)
§ 5:128	§ 4.2.12—rchitect's decision making to be impartial (dispute resolution)
§ 5:129	§ 4.2.13—Architect's decisions on aesthetic matters final (dispute resolution)
§ 5:130	§ 4.2.14—Architect to review and respond to requests for information (communication)
E.	SUBCONTRACTORS
§ 5:131	§ 5.1.1—Definition of subcontractor (definitional)
§ 5:132	§ 5.1.2—Definition of sub-subcontractor (definitional)
§ 5:133	§ 5.2.1—Subcontractor selection (quality)
§ 5:134	§ 5.2.2—Objections to proposed subcontractors (quality)
§ 5:135	§ 5.2.3—Owner's or architect's objection to proposed subcontractors (quality)
§ 5:136	§ 5.2.4—Limitation on subcontractor substitution (risk allocation)
§ 5:137	§ 5.3—Subcontractual relations—Obligation to "flow down" responsibilities to subcontractors (legal)
§ 5:138	§ 5.4.1—Contingent assignment of subcontracts (risk mitigation)
§ 5:139	§ 5.4.2—Suspension costs (risk allocation)
§ 5:140	§ 5.4.3—Owner's right to assign subcontracts to a successor contractor (legal)
F.	SEPARATE CONTRACTORS
§ 5:141	§ 6.1.1—Owner's right to perform construction (risk allocation)

§ 6.1.2—Definition of "contractor" in separate contract arrangements (definitional)

§ 5:143 § 6.1.3—Owner's coordination in the event of use of separate contractors (scope) § 5:144 § 6.1.4—Construction by the owner's forces (legal) § 6.2.1—Storage for owner's materials and § 5:145 equipment (scope) § 5:146 § 6.2.2—Contractor's notice obligation where its work relies upon work performed by owner or separate contractors (risk allocation) § 5:147 § 6.2.3—Responsibility for delays to and by separate contractors (risk allocation) § 5:148 § 6.2.4—Contractor's obligation to remedy damage to separate contractors' work (risk allocation) § 5:149 § 6.2.5—Owner's cutting and patching (scope) § 6.3—Owner's right to cleanup (dispute § 5:150 resolution) **CHANGES** G. § 5:151 § 7.1.1—Owner's right to make changes (risk allocation) § 5:152 § 7.1.2—Parties in agreement with respect to changes (legal) § 7.1.3—Contractor to proceed promptly to § 5:153 execute changed work (risk allocation) § 5:154 § 7.2.1—Change orders (definitional) § 5:155 § 7.3.1—Construction change directives (scope) § 5:156 § 7.3.2—Construction change directives used in absence of total agreement (definitional) § 5:157 § 7.3.3—Construction change directive adjustment methods (risk allocation) § 5:158 § 7.3.4—Architect's decision regarding adjustments to the contract sum for construction change directives (dispute resolution) § 5:159 § 7.3.5—Contractor may make a claim if it disagrees with adjustment to contract time (claims administration) § 5:160 § 7.3.6—Contractor's duty to perform changed work in face of disagreement over equitable adjustment (risk allocation) § 5:161 § 7.3.7—Construction change directive as change order (communication)

§ 7.3.8—Deductive changes (risk allocation)

§ 5:162

DE	FA	TI	T.T

22111021	
§ 5:163	§ 7.3.9—Payment certification process for construction change directives (claims administration)
§ 5:164	§ 7.3.10—Agreement with architect's determination on construction change directives (communication)
§ 5:165	§ 7.4—Minor changes (risk allocation)
H.	TIME
§ 5:166	§ 8.1.1—Definition of "contract time" (definitional)
§ 5:167	§ 8.1.2—Date of commencement of the work (definitional)
§ 5:168	§ 8.1.3—Date of substantial completion (architect)
§ 5:169	§ 8.1.4—Definition of "day" (definitional)
§ 5:170	§ 8.2.1—Time is of the essence (risk allocation)
§ 5:171	§ 8.2.2—No work until insurance in place (risk mitigation)
§ 5:172	§ 8.2.3—Contractor's responsibility to complete on time (scope)
§ 5:173	§ 8.3.1—Delays and extensions of time (risk allocation)
§ 5:174	§ 8.3.2—Procedures for delay claims (claims administration)
§ 5:175	§ 8.3.3—Reservation of delay damages (risk allocation)
I.	PAYMENTS AND COMPLETION
§ 5:176	§ 9.1.1—Contract sum (definitional)
§ 5:177	§ 9.1.2—Unit prices (risk allocation)
§ 5:178	§ 9.2—Schedule of values (communication)
§ 5:179	§ 9.3.1—Application for payment process (communication)
§ 5:180	§ 9.3.1.1—Payment applications for changes in the work (communication)
§ 5:181	§ 9.3.1.2—Payment applications for subcontractor work (risk mitigation)
§ 5:182	§ 9.3.2—Payment for stored materials (risk allocation)
§ 5:183	§ 9.3.3—Contractor's warranty of clear title (risk allocation)

 $\S~5:184~~\S~9.4.1$ —Process for architect's certificates for

	1 (1 ()
\$ F.10F	payment (architect)
§ 5:185	§ 9.4.2—Limitation upon architect's certificate for payment (architect)
§ 5:186	§ 9.5.1—Architect withholding payment
\$ 0.100	certification (risk mitigation)
§ 5:187	§ 9.5.2—Disputing the architect's decision
Ü	regarding payment certification (claims
S 5.100	administration) § 9.5.3—Certification after reasons for
§ 5:188	withholding are removed (communication)
§ 5:189	§ 9.5.4—Owner's right to issue joint checks (risk
\$ 0.100	mitigation)
§ 5:190	§ 9.6.1—Manner of making progress payments
0	(communication)
§ 5:191	§ 9.6.2—Payments to subcontractors (risk
	mitigation)
§ 5:192	§ 9.6.3—Architect to furnish information to
	subcontractor (risk mitigation)
§ 5:193	§ 9.6.4—Owner's right to contact and pay
0 = 101	subcontractors (risk mitigation)
§ 5:194	§ 9.6.5—Suppliers' payment rights (risk
e 5.105	mitigation)
§ 5:195	§ 9.6.6—Payment does not constitute acceptance (risk allocation)
§ 5:196	§ 9.6.7—Weak trust (risk allocation)
§ 5:197	§ 9.6.8—Contractor's indemnity owed for liens
	(risk allocation)
§ 5:198	§ 9.7—Failure of payment (risk mitigation)
§ 5:199	§ 9.8.1—Definition of "substantial completion" (legal)
§ 5:200	§ 9.8.2—Contractor's punch list (communication)
§ 5:201	§ 9.8.3—Architect's inspection to determine
\$ 0.201	substantial completion (quality)
§ 5:202	§ 9.8.4—Architect's certificate of substantial
5 - 1	completion (risk allocation)
§ 5:203	§ 9.8.5—Submission of certificate of substantial
	completion and payment of retainage (risk allocation)
§ 5:204	§ 9.9.1—Procedures for owner's partial
Ü	occupancy of project (risk mitigation)
§ 5:205	§ 9.9.2—Joint inspection prior to partial
	occupancy (risk mitigation)
§ 5:206	§ 9.9.3—Partial occupancy does not constitute
	acceptance (risk allocation)

DI	ALTE	TIT	m
IJĦ	IFA	чUI	Hill:

§ 5:207	§ 9.10.1—Architect's final inspection (quality)
§ 5:208	§ 9.10.2—Contractor's submittals for final payment (risk mitigation)
§ 5:209	§ 9.10.3—Delay in final completion after
, 0.200	substantial completion achieved (risk
	allocation)
§ 5:210	§ 9.10.4—Owner's waiver upon making final
	payment (risk allocation)
§ 5:211	§ 9.10.5—Contractor's waiver by acceptance of
	final payment (risk allocation)
J.	PROTECTION OF PERSONS AND
	PROPERTY
§ 5:212	§ 10.1—Safety precautions and programs (scope)
5:213	§ 10.2.1—Contractor's safety precautions (risk
	mitigation)
§ 5:214	§ 10.2.2—Contractor responsible for giving
	notices and complying with safety regulations
	(risk mitigation)
§ 5:215	§ 10.2.3—Erection of safeguards and to posting
2 5 010	of warnings (risk mitigation)
§ 5:216	§ 10.2.4—Use and storage of explosives or
§ 5:217	hazardous materials (risk mitigation) § 10.2.5—Contractor's responsibility for damage
3 0.211	to stored materials and other people's property
	(risk allocation)
\$ 5:218	§ 10.2.6—Contractor's safety representative (risk
,	mitigation)
§ 5:219	§ 10.2.7—Loading precautions (risk mitigation)
§ 5:220	§ 10.2.8—Injury or damage to person or property
	(claims administration)
§ 5:221	§ 10.3.1—Stop work when encountering
	hazardous materials (risk mitigation)
§ 5:222	§ 10.3.2—Owner's obligation to verify the
	presence of hazardous material (risk
8 5.000	mitigation)
§ 5:223	§ 10.3.3—Owner's "hazardous materials" indemnity (risk allocation)
§ 5:224	§ 10.3.4—Hazardous materials introduced by
3 0.444	contractor (risk allocation)
\$ 5:225	§ 10.3.5 Contractor's reimbursement obligation
,	(risk allocation)
\$ 5:226	§ 10.3.6—Owner's reimbursement of contractor's
	remediation costs (risk allocation)

§ 5:227 § 10.4—Emergencies (risk mitigation)

K. INSURANCE AND BONDS

- § 5:228 § 11.1.1—Contractor's insurance (risk transfer)
- § 5:229 § 11.1.2—Contractor's bonds (risk mitigation)
- § 5:230 § 11.1.3—Furnishing copy of bonds (risk mitigation)
- § 5:231 § 11.1.4—Cancellation or expiration of contractor's insurance (risk mitigation)
- § 5:232 § 11.2.1—Owner's insurance (risk transfer)
- § 5:233 § 11.2.2—Failure to purchase required property insurance (risk allocation)
- § 5:234 § 11.2.3—Cancellation or expiration of owner's property insurance (risk mitigation)
- § 5:235 § 11.3.1—Waivers of subrogation regarding property insurance applicable to the project (risk allocation)
- § 5:236 § 11.3.2—Waiver of subrogation on adjacent properties and completed projects (risk allocation)
- § 5:237 § 11.4—Loss of use, business interruption, and delay in completion insurance (risk transfer)
- § 5:238 § 11.5.1—Owner's disbursement of property proceeds as fiduciary for other insureds (risk mitigation)
- § 5:239 § 11.5.2—Owner's settlement and allocation of insured loss (claims administration)

L. UNCOVERING AND CORRECTION OF WORK

- § 5:240 § 12.1.1—Uncovering work improperly covered (quality)
- § 5:241 § 12.1.2—Uncovering work not specifically requested to be examined (quality)
- § 5:242 § 12.2.1—Correction of work before substantial completion (risk allocation)
- § 5:243 § 12.2.2.1—Correction of work after substantial completion (risk allocation)
- § 5:244 § 12.2.2.2 and § 12.2.2.3—One-year correction of work period (risk allocation)
- § 5:245 § 12.2.3—Removal of nonconforming work from the site (quality)
- § 5:246 § 12.2.4—Repair of other construction damaged

	by contractor's correction efforts (risk allocation)
§ 5:247	§ 12.2.5—One-year correction period governs only the correction of work remedy (legal)
§ 5:248	§ 12.3—Acceptance of nonconforming work (risk allocation)
M.	MISCELLANEOUS PROVISIONS
§ 5:249	§ 13.1—Governing law (legal)
§ 5:250	§ 13.2.1—Successors and assigns (legal)
§ 5:251	§ 13.2.2—Assignment to lenders (legal)
§ 5:252	§ 13.3.1—Rights and remedies (legal)
§ 5:253	§ 13.3.2—No waiver presumed by action or failure to act (legal)
§ 5:254	§ 13.4.1—Required tests and inspections (quality)
§ 5:255	§ 13.4.2.—Additional testing, inspection or approval (quality)
§ 5:256	§ 13.4.3—Responsibility for testing costs (risk allocation)
§ 5:257	§ 13.4.4 through § 13.4.6—Testing and inspection procedures (quality)
§ 5:258	§ 13.5—Interest (risk allocation)
N.	TERMINATION OR SUSPENSION OF THE CONTRACT
§ 5:259	§ 14.1.1—Contractor's right of termination (risk mitigation)
§ 5:260	§ 14.1.2—Contractor's right to terminate due to delay (risk mitigation)
§ 5:261	§ 14.1.3—Contractor's termination notice and recovery rights (risk mitigation)
§ 5:262	§ 14.1.4—Work stoppage due to owner's default (risk mitigation)
§ 5:263	§ 14.2.1.1—Owner's right to terminate for lack of progress (risk mitigation)
§ 5:264	§ 14.2.2—Termination upon notice and architect's certification (risk mitigation)
§ 5:265	§ 14.2.3—No right to payment upon termination (risk allocation)
§ 5:266	§ 14.2.4—Distribution of excess contract sum/ contractor's reimbursement obligation (risk allocation)

- § 5:267 § 14.3.1 and § 14.3.2—Suspension by the owner for convenience (risk allocation)
 § 5:268 § 14.4.1—Owner's right to terminate for convenience (risk allocation)
- § 5:269 § 14.4.2—Contractor's obligations upon owner's termination for convenience (risk allocation)
- § 5:270 § 14.4.3—Payment in the event of termination for convenience (risk allocation)

O. CLAIMS AND DISPUTES

- § 5:271 § 15.1.1—Claim definition (claims administration)
- § 5:272 § 15.1.2—Time limits on claims (claims administration)
- § 5:273 § 15.1.3.1—Notice of claims discovered prior to the expiration of the period for correction (claims administration)
- § 5:274 § 15.1.3.2 Notice of claims discovered after expiration of correction of the work period (claims administration)
- § 5:275 § 15.1.4.1—Continuing contract performance (risk allocation)
- § 5:276 § 15.1.4.2—Initial decision maker's decision governs contract adjustments until final resolution in accordance with Article 15 (claims administration)
- § 5:277 § 15.1.5 Claims for additional costs (claim administration)
- § 5:278 § 15.1.6.1—Notice for claims for additional time (claims administration)
- § 5:279 § 15.1.6.2—Weather delays (claims administration)
- § 5:280 § 15.1.7—Claims for consequential damages (risk allocation)
- § 5:281 § 15.2.1—Initial decision maker's decision (dispute resolution)
- § 5:282 § 15.2.2—IDM to act within ten days of receipt of claim (dispute resolution)
- § 5:283 §§ 15.2.3 and 15.2.4—IDM's evaluation of claims (dispute resolution)
- § 5:284 § 15.2.5—IDM's decision is final and binding but subject to further dispute procedures (dispute resolution)
- § 5:285 § 15.2.6 and § 15.2.6.1—IDM decision: Waiver of

xxxii

	the right to pursue claims (dispute resolution)	
§ 5:286	§ 15.2.7 and § 15.2.8—Claims involving bond	
	and lien rights (dispute resolution)	
§ 5:287	§ 15.3.1 and § 15.3.2—Mediation (dispute resolution)	
§ 5:288	§ 15.3.3—Conclusion of mediation without resolution: Waiver of the right to proceed to litigation or arbitration (dispute resolution)	
§ 5:289	§ 15.3.4—Costs, location and enforcement of mediation process and settlements (dispute resolution)	
§ 5:290	§ 15.4.1 through § 15.4.3—Arbitration (dispute resolution)	
§ 5:291	§ 15.4.4.1 through § 15.4.4.3—Consolidation or joinder (dispute resolution)	
IV. AIA INSURANCE AND BONDS EXHIB		

§ 5:292	American Institute of Architects' (AIA) 2017 Insurance Exhibit
§ 5:293	AIA Insurance Exhibit: Growing complexity and diversity of insurance products for design and construction risks
§ 5:294	AIA Insurance Exhibit: Prompting parties to discuss insurance coverage options and avoiding overreaching requirements
§ 5:295	AIA Insurance Exhibit: Defining with more specificity the types and extent of insurance coverage
§ 5:296	AIA Insurance Exhibit: Information expressly required to be provided by the parties in completing the exhibit
§ 5:297	AIA Insurance Exhibit: Tailoring coverage by exercising options and specifying limits and durations
§ 5:298	AIA Insurance Exhibit: Insurance requirements contained in the 2017 general conditions document
§ 5:299	AIA Insurance Exhibit: Summary of major changes

Volume 2A

CHAPTER 6. PROJECT DELIVERY

METHODS AND CONTRACT PRICING ARRANGEMENTS

-		(GEINEEL LE
§	6:1	Choosing a delivery approach: General observations
§	6:2	Choosing a delivery approach: Design-bid-build
§	6:3	Choosing a delivery approach: Design-bid-build—Build phase
§	6:4	Choosing a delivery approach: Design-bid-build—Advantages and disadvantages of design-bid-build approach
§	6:5	Choosing a delivery approach: Design-negotiate-build
	6:6	Choosing a delivery approach: Design-GMP-build
	6:7	Choosing a delivery approach: Engineer-procure-construct
§	6:8	Choosing a delivery approach: Turnkey
§	6:9	Choosing a delivery approach: Build-operate-transfer
§	6:10	Choosing a delivery approach: Build-own-operate
§	6:11	Choosing a delivery approach: Program management
§	6:12	Choosing a delivery approach: Agency construction management
§	6:13	Choosing a delivery approach: Construction management at risk
§	6:14	Choosing a delivery approach: Design-bid-multi-prime
§	6:15	Choosing a delivery approach: Design-build
§	6:16	Choosing a delivery approach: Indefinite- delivery, Indefinite-quantity (IDIQ) contracts
§	6:17	Choosing a delivery approach: Hybrid approaches
§	6:18	Design-assist process
§	6:19	Contracting for design-assist services
§	6:20	Design-assist and disappointed expectations
§	6:21	Design-assist from the perspective of the architectural and steel construction community
§	6:21.50	AIA's design assist agreement form
§	6:22	Partnering agreements
§	6:23	Alliance agreements

xxxiv

§ 6:24	Integrated Project Delivery
§ 6:25	Integrated Project Delivery—Rewards and risks
§ 6:26	Integrated Project Delivery—Keys to success—People: selecting the team
§ 6:27	Integrated Project Delivery—Keys to success— Process: managing the team
§ 6:28	Integrated Project Delivery—Keys to success— Promises: motivating the team
§ 6:29	Integrated Project Delivery—Are Integrated Project Delivery agreements a new breed of contract?
§ 6:30	Integrated Project Delivery—Prerequisites for successful collaborative undertaking
§ 6:31	Integrated Project Delivery—Basic features of AIA and ConsensusDocs Integrated Project Delivery agreements
§ 6:32	Integrated Project Delivery—Cost control—The economic model
§ 6:33	Integrated Project Delivery—Cost control— Assuring cost integrity through incentives
§ 6:34	Integrated Project Delivery—Cost control— Assuring cost integrity through IPD processes
§ 6:35	Integrated Project Delivery—Cost control— Assuring cost integrity through cost transparency
§ 6:36	Integrated Project Delivery—Project control— The management model
§ 6:37	Integrated Project Delivery—Risk control— The liability model
§ 6:38	Factors relevant to selecting delivery method
§ 6:39	Importance of selecting the proper project delivery approach
§ 6:40	Factors relevant to selecting delivery method— Importance of delivery method: Boston Harbor project
§ 6:41	Factors relevant to selecting delivery method— Building Future's Council report: Importance of choosing appropriate delivery method
§ 6:42	Factors relevant to selecting delivery method— Relative merits of design-bid-build, construction management, and design-build delivery methods
§ 6:43	Contractor design responsibility in traditional design-bid-build delivery method

DEFAULT

§ 6:44	Contractor design responsibility in traditional design-bid-build delivery method—Express delegation of design responsibility via contract
§ 6:45	Standard form agreements address design delegation
§ 6:46	Limits on design delegation
§ 6:47	Contractor design responsibility in traditional design-bid-build delivery method—Design delegation via shop drawings
§ 6:48	Limits on delegating design responsibility through shop drawing process
§ 6:49	Contractor design responsibility in traditional design-bid-build delivery method—Design delegation through performance specifications
§ 6:50	Contractor design responsibility in traditional design-bid-build delivery method—Design delegation through coordination responsibilities
§ 6:51	Contractor design responsibility in traditional design-bid-build delivery method—Design delegation through disclaiming adequacy of government furnished design
§ 6:52	Contractor design responsibility in traditional design-bid-build delivery method—Patent ambiguity doctrine as vehicle for flowing design responsibility to contractor
§ 6:53	Contractor design responsibility in traditional design-bid-build delivery method—Superior knowledge doctrine: Defense to operation of patent ambiguity rule
§ 6:54	Contractor design responsibility in traditional design-bid-build delivery method—Design responsibility undertaken by failing to discover obvious design errors
§ 6:55	Contractor design responsibility in traditional design-bid-build delivery method— Consequences of accepting design responsibility
§ 6:56	Contractor design responsibility in traditional design-bid-build delivery method— Government contractor defense and design liability
§ 6:57	Predominant characteristics of design-build delivery method

xxxvi

§ 6:58	Predominant characteristics of design-build delivery method—2004 AIA design-build document series
§ 6:59	Predominant characteristics of design-build delivery method—2014 AIA design-build document series
§ 6:60	Predominant characteristics of design-build delivery method—Bridging: Sharing design responsibility between owner and design-builder
§ 6:61	Predominant characteristics of design-build delivery method—Liability for inaccurate preliminary design information
§ 6:62	Predominant characteristics of design-build delivery method—Where design-build firm is special purpose entity with few assets: Economic loss rule problem
§ 6:63	Predominant characteristics of design-build delivery method—Restrictions placed on design-builder's performance through use of owner-furnished preliminary design data
§ 6:64	Predominant characteristics of design-build delivery method—Design-build in federal procurement
§ 6:65	Predominant characteristics of design-build delivery method—Design-build in federal procurement—Evaluating past performance
§ 6:66	Predominant characteristics of design-build delivery method—Design-build contracting in state and local government procurement
§ 6:67	Predominant characteristics of design-build delivery method—Design-build contracting in state and local government procurement—Licensing law restrictions on design-build
§ 6:68	Predominant characteristics of design-build delivery method—Owner's right to review and approve design-builder's design submissions
§ 6:80.50	Design-build and the <i>Spearin</i> implied warranty of design adequacy
§ 6:69	Predominant characteristics of design-build delivery method—Standard form agreement approaches to owner's involvement in design process
§ 6:70	Predominant characteristics of design-build

Bruner & O'Connor on Construction Law

	delivery method—Communication failures within design-build team
§ 6:71	Predominant characteristics of design-build delivery method—Control and ownership of design documents under design-build approach
§ 6:72	Predominant characteristics of design-build delivery method—Controlling design through Copyright Act and Lanham Act
§ 6:73	Predominant characteristics of design-build delivery method—Nature and extent of owner's right to own and control the design documents
§ 6:74	Predominant characteristics of design-build delivery method—Allocation of ownership and control of design among design-build team members
§ 6:75	Predominant characteristics of design-build delivery method—Breadth of license granted to use design documents
§ 6:76	Predominant characteristics of design-build delivery method—Effects of default or termination on right to use design documents
§ 6:77	Predominant characteristics of design-build delivery method—Indemnification against loss resulting from use of design documents
§ 6:78	Predominant characteristics of design-build delivery method—Design-build contract formation risks
§ 6:79	Predominant characteristics of design-build delivery method—Scope of work disputes in design-build contracting
§ 6:80	Warranties and guarantees in design-build and EPC contracting
§ 6:81	Predominant characteristics of design-build delivery method—Design-build and doctrine of divisible contracts
§ 6:82	Construction management
§ 6:83	Construction management—Agency construction management
§ 6:84	Construction management—At-risk construction management
§ 6:85	Construction management—Designer as construction manager
§ 6:86	Construction management—Typical
xxxviii	

	construction management services
§ 6:87	Construction management—Agency
	construction management under AIA standard form agreements
§ 6:88	Construction management—AIA construction
3 0.00	manager at risk contract forms
§ 6:89	Construction management—ConsensusDocs
0	CM agreement form
§ 6:90	Construction management—Construction
	management under CMAA forms
§ 6:91	Construction management—Litigation risk:
	Construction manager's liability
§ 6:92	Construction management—Construction
	management: Procurement risk on public
\$ G.09	projects Construction management Advantages and
§ 6:93	Construction management—Advantages and disadvantages of CM approach
§ 6:94	Rewards and challenges of construction
3 0.01	management delivery models
§ 6:95	Fast-track construction
§ 6:95.50	Modular construction
§ 6:96	Price arrangements: Introduction
§ 6:97	Price arrangements: General types of pricing
0	arrangements for construction contracts
§ 6:98	Price arrangements: Introduction—General
	types of pricing arrangements for
	construction contracts—Fixed price contracts
§ 6:99	Price arrangements: Unit price contracts
§ 6:100	Price arrangements: Unit price contracts— Unbalanced pricing
§ 6:101	Price arrangements: Unit price contracts—
8 0.101	Complex unit price arrangements
§ 6:102	Price arrangements: Unit price contracts—
Ü	Inaccurate estimated quantities
§ 6:103	Price arrangements: Unit price contracts—
	Estimation discrepancies: Variation in
	estimated quantity clause
§ 6:104	Price arrangements: Unit price contracts— Poorly defined units
§ 6:105	· · · · · · · · · · · · · · · · · · ·
8 0.109	Price arrangements: Unit price contracts— Measurement problems
§ 6:106	Price arrangements: Unit price contracts—
	Mixing unit price and lump sum concepts
§ 6:107	Price arrangements: Unit price contracts—

Bruner & O'Connor on Construction Law

	Application of VEQ to indefinite quantity contracts where no purchases are made
§ 6:108	Price arrangements: Cost plus fee contracts
§ 6:109	Price arrangements: Guaranteed maximum price contracts
§ 6:110	Price arrangements: Time and material contracts
§ 6:111	Price arrangements: Force account work
§ 6:112	Price arrangements: Types of pricing arrangements for design contracts
§ 6:113	Price arrangements: Types of pricing arrangements for design contracts— Percentage of construction cost
§ 6:114	Price arrangements: Types of pricing arrangements for design contracts—Multiple of direct personnel expense
§ 6:115	Price arrangements: Types of pricing arrangements for design contracts—Hourly rates
§ 6:116	Price arrangements: Types of pricing arrangements for design contracts—Fixed price
§ 6:117	Price arrangements: Types of pricing arrangements for design contracts— Guaranteed maximum price

CHAPTER 7. RISK MANAGEMENT: IDENTIFYING, ALLOCATING AND MITIGATING CONSTRUCTION RISKS

I. GENERAL PRINCIPLES OF RISK MANAGEMENT

A. WHAT IS RISK MANAGEMENT?

- § 7:1 Introduction
- § 7:2 What is "risk"?
- § 7:3 Risk identification
- § 7:4 Risk measurement
- § 7:5 Managing or handling risk
- § 7:6 Risk characterization
- § 7:7 General risk allocation principles—Control/benefit risk allocation model

DEFAULT

- § 7:8 General risk allocation principles—Foreseeability risk allocation model
- § 7:9 Allocation of risks distinguished from delegation of duties

B. RISK MANAGEMENT APPLIED TO CONSTRUCTION UNDERTAKINGS

- § 7:10 Modeling construction risk
- § 7:11 Materiality of risk assessment for construction cost estimation process
- § 7:12 Role of contracts in managing and allocating construction risk
- § 7:13 Creating incentives through risk allocation
- § 7:14 Managing risk through contingency accounts

C. ROLE OF INSURANCE AND SURETY BONDS IN MANAGING CONSTRUCTION RISKS

- § 7:15 Risk management and insurance
- § 7:16 Risk management and insurance—Standard insurance program
- § 7:17 Risk management and insurance—Extended insurance programs
- § 7:18 Risk management and surety bonds

D. OWNER RISK IN CONTRACTOR SELECTION PROCESS

- § 7:19 Owner's duty to select a competent contractor
- § 7:20 Owner's duty to select a competent contractor— Peculiar risk doctrine
- § 7:21 Owner's duty to select a competent contractor— Abnormally dangerous activities
- § 7:22 Owner's duty to select a competent contractor— Allocating the risk of nondelegable duties

II. GOVERNMENT-IMPOSED RISK ALLOCATION: CONSTRUCTION LIMITATION OF ACTION STATUTES

A. GENERAL CONSIDERATIONS

§ 7:23 Builder statutes of limitation and repose and the

parties' expectation interests

- § 7:24 Statutes of repose vs. statutes of limitation
- § 7:25 Determining the applicable statute of limitation

B. GENERAL FEATURES OF BUILDER LIMITATION OF ACTION LAWS

- § 7:26 What is an "improvement" for purposes of builder statutes of limitation?
- § 7:27 Persons covered by builder statutes of limitation
- § 7:28 Claims covered under builder statutes of limitation
- § 7:29 When do builder statutes of repose begin to run?
- § 7:30 When do statutes of limitation begin to run?
- § 7:31 Time limitations governing indemnity and contribution claims

C. MISCELLANEOUS STATUTES OF LIMITATION AND REPOSE ISSUES

- § 7:32 Constitutional challenges to builder statutes of limitation and statutes of repose
- § 7:33 Application of builder statute of repose to asbestos claims
- § 7:34 Agreements to shorten limitation period or alter accrual date
- § 7:35 Tolling statutes of limitation and repose
- § 7:36 Tolling statutes of limitation and repose due to bankruptcy filing
- § 7:37 Application of statutes of limitation to claims by governmental bodies

III. MANAGING CONSTRUCTION DISPUTE RESOLUTION RISK

A. COST CONTAINMENT OF ELECTRONIC DISCOVERY

- § 7:38 Risks of burdensome electronic discovery
- § 7:39 Allocating the cost of electronic discovery
- § 7:40 Cost shifting and sanctions
- § 7:41 Proportionality as a guide to reducing electronic discovery costs
- § 7:42 Predictive coding

B. MITIGATING DOCUMENT

COLLECTION CHALLENGES

- § 7:43 Planning electronic discovery
- § 7:44 Litigation or legal holds
- § 7:45 Scope of collection activities
- § 7:46 Duty to preserve back-up tapes
- § 7:47 Accessible vs. inaccessible electronically stored information (ESI)
- § 7:48 Specifying the forms of production
- § 7:49 Metadata
- § 7:50 Search, software and science

C. SAFEGUARDING PRIVILEGED DOCUMENTS

- § 7:51 Preserving privilege after inadvertent production of electronic discovery; claw backs and quick peeks
- § 7:52 Maintaining privilege in the digital world
- § 7:53 2006 electronic discovery amendments to the Federal Rules of Civil Procedure

D. AVOIDING DISCOVERY SANCTIONS

- § 7:54 Zubulake and the duty to preserve
- § 7:55 Spoliation; who bears the burden of proof of prejudice?
- § 7:56 Sanctions
- § 7:57 Rule 37's safe harbor from sanctions
- § 7:58 Manual collection of electronic documents
- § 7:59 Specifying the forms of production

IV. MANAGING AND ALLOCATING TERRORISM AND PANDEMIC RISKS: CONCEPT OF FORCE MAJEURE

- § 7:60 Risk allocation approaches to the events of September 11, 2001
- § 7:61 Assessing risks of terrorism and pandemic events
- § 7:62 Common law allocation of terrorism risk
- § 7:63 Terrorism as a force majeure event
- § 7:64 Allocating terrorism risk through *force majeure* clauses

V. ROLE OF TECHNOLOGY IN

GENERATING AND MANAGING DESIGN AND CONSTRUCTION RISK

A. BASICS OF BUILDING INFORMATION MODELING (BIM)

- § 7:65 What is Building Information Modeling (BIM)
- § 7:66 From paper and pencil to computer-aided design to Building Information Modeling
- § 7:67 BIM and the practice of architecture
- § 7:68 Data exchange in the BIM environment: The cost of inadequate interoperability
- § 7:69 3D, 4D, 5D BIM and beyond
- § 7:70 Lonely BIM vs. social BIM
- § 7:71 Developing a BIM execution plan
- § 7:72 BIM procurement: an owner's perspective
- § 7:73 Developing BIM scopes of work

B. ROLE OF BIM IN GENERATING INNOVATION AND INCREASING PRODUCTIVITY

- § 7:74 Productivity and innovation in the construction industry: The case for building information modeling ("BIM")
- § 7:75 Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Productivity in the construction industry: productivity problems
- § 7:76 Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Importance of productivity in the construction industry
- § 7:77 Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Indicia of poor productivity in the construction industry
- § 7:78 Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Impact of productivity on labor requirements
- § 7:79 Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Relationship between productivity and innovation

§ 7:80	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Innovation in the construction industry
§ 7:81	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—What is BIM?
§ 7:82	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Why BIM, why now?
§ 7:83	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—BIM is changing the current project development landscape
§ 7:84	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—BIM and the practice of architecture
§ 7:85	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Benefits of BIM
§ 7:86	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—The model as a deliverable
§ 7:87	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—Who should pay for BIM
§ 7:88	Productivity and innovation in the construction industry: The case for building information modeling ("BIM")—BIM as an agent for process change
§ 7:89	Productivity and innovation in the construction industry: The case for building information

C. CYBER THREATS IN THE DESIGN AND CONSTRUCTION INDUSTRY

modeling ("BIM")—Changing the legal landscape

- § 7:90 Cyber risk in the design and construction
- § 7:91 Frequency and severity of cyber loss

to permit BIM to flourish

- § 7:92 Types of cyber threats
- § 7:93 Managing cyber risk
- § 7:94 Matching specific prevention measures with particular threats

D. DESIGNING AND BUILDING "GREEN": ACHIEVING HIGH LEVELS OF SUSTAINABILITY AND RESILIENCY IN THE BUILT ENVIRONMENT

§ 7:95 Challenges of green contracting
§ 7:96 Office of Federal Procurement Policy (OFPP)
 "green" contracting guidelines
§ 7:97 Guiding principles for federal leadership in high
 performance and sustainable buildings
§ 7:98 Office of Federal Procurement Policy's proposed
 policy letter on green procurement
§ 7:99 Department of Defense's green contracting
 initiatives

VI. CONTRACT BREACH DAMAGES AND MANAGING PARTIES' EXPECTATION INTERESTS

§ 7:100 Owner expectation interest in contract compliance—Direct, special, and incidental § 7:101 Calculating damages for defective design or construction—Examination of the "lesser of" rule between "cost to repair" and "diminution Preference for the "cost rule" over the "value § 7:102 rule" for calculating defective diminution damages § 7:103 Calculating diminution in value damages § 7:104 Common law limitations on breach of contract damages § 7:105 Excuse doctrines Limitations on the cost of repair measurement— § 7:106 Economic waste doctrine § 7:107 Restrictions on the use of the disproportionality or economic waste rules § 7:108 Stigma damages and the rule of avoiding speculative recoveries

VII. PROJECT RISKS: DEVELOPING A RISK MATRIX

A. INTRODUCTION

§ 7:109 Project risks

B. PLANNING AND SELECTION RISKS

D. 11	MINING AND SELECTION INS
§ 7:110	Planning and selection risks
§ 7:111	Inadequate project planning
§ 7:112	Choosing inappropriate or inefficient project delivery system
§ 7:113	Choosing inappropriate or inadequate contract award process
§ 7:114	Choosing inappropriate or inadequate pricing arrangements
§ 7:115	Poor client selection
§ 7:116	Condominium or multi-family housing developments
§ 7:117	Assembling the primary design and construction team
§ 7:118	Subcontractor and supplier selection

C. CONTRACT FORMATION RISKS § 7:119 Contract formation risks

8 1.119	Contract formation risks
§ 7:120	Illegal contracts: Agreements in violation of statutory or regulatory law
§ 7:121	Miscommunications and ambiguities in contract formation process
§ 7:122	Disappointed expectations with respect to contract award: Use of alternates in competitive bidding
§ 7:123	Subcontractor disappointment over award process: Bid shopping
§ 7:124	Reverse auction bidding
§ 7:125	Bid chiseling
§ 7:126	Doing business with foreign suppliers: Application of international law to domestic contracts
§ 7:127	Confusing public and private work: Suretyship and other consequences
§ 7:128	Refusal of prime contractor to honor its bid: Bid bond
§ 7:129	Refusal of subcontractors to honor their bids
§ 7:130	Bid repudiation defense: Obvious mistake
§ 7:131	Bid repudiation defense: Contractor's "acceptance" constitutes counteroffer
§ 7:132	Bid repudiation defense: Bid-shopping

Bruner & O'Connor on Construction Law

§ 7:133	Bid repudiation defense: Delayed acceptance
§ 7:134	Bid repudiation defense: Statute of Frauds
§ 7:135	Bid repudiation: Damages and mitigation
§ 7:136	Socioeconomic contractor selection programs
§ 7:137	Constitutional challenges
§ 7:138	Project labor agreements
§ 7:139	Procurement restrictions on materials: Buy
	American Act

D. ENTITY FORMATION RISKS

§ 7:140	Entity formation risks
§ 7:141	Inadequate corporate form
§ 7:142	Risk of personal liability: Piercing the
	corporate veil
§ 7:143	Litigation risk of doing business with sole
	proprietors: Nonclaim statutes
§ 7:144	Doing business with sole proprietors:
	Workers' compensation risks
§ 7:145	Doing business without proper license
§ 7:146	Ill-conceived joint ventures
§ 7:146.50	Joint ventures and contracting with government as a
	small business

E. ENTITY MANAGEMENT RISKS

§ 7:147	Entity management risks
§ 7:148	Inadequate safety programs: Civil and criminal
	liability
§ 7:149	Inadequate quality management procedures
§ 7:150	Suspension and debarment from public
	contracting
§ 7:151	Inadequate internal financial controls
§ 7:152	Generational changes in ownership: Bane of the
	family-run construction business

F SITE RISKS

xlviii

r. 51	IE RISKS
§ 7:153	Site risks
§ 7:154	Site availability: Failure to obtain ownership
	easements or rights-of-way
§ 7:155	Zoning and land use regulation
§ 7:156	Limitations on access: remote sites and problems with government approvals
§ 7:157	Underground utilities
§ 7:158	Damage to adjacent property or underground

DEFAULT

	structures
§ 7:159	Poor soils
§ 7:160	Poor drainage
§ 7:161	Congestion
§ 7:162	Underground water
§ 7:163	Security problems
§ 7:164	Inadequate site investigation
§ 7:165	Insufficient time or access to perform adequate investigation
§ 7:166	Site investigation impracticable or impossible
§ 7:167	Latent conditions in existing construction
§ 7:168	Lack of readily available power and/or other utilities
§ 7:169	Navigable waterways: Application of admiralty law to construction projects
	ESOURCE RISKS
§ 7:170	Resource risks
§ 7:171	Unavailability of sufficient amounts of skilled labor
§ 7:172	Labor unrest and strikes
§ 7:173	Managerial/supervisory inadequacy or inefficiency
§ 7:174	Injuries to employees
§ 7:175	Injury to nonemployee workers
§ 7:176	Material shortages
§ 7:177	Equipment availability
-	NVIRONMENTAL RISKS
§ 7:178	Environmental risks
§ 7:179	Asbestos
§ 7:180	Underground storage tanks
§ 7:181	Lead paint
§ 7:182	Contaminated soils
§ 7:183	Wetlands
§ 7:184	Projects in coastal zone areas
§ 7:185	Brownfields
§ 7:186	Endangered species
§ 7:187	Sedimentation and storm water runoff
§ 7:188	Disposal of construction waste
§ 7:189	Polychlorinated biphenyls (PCBs)
§ 7:190	Importation by construction team of hazardous materials

§ 7:191 § 7:192	· ·
§ 7:193	•
§ 7:194	
§ 7:195	
I. T	ECHNOLOGY RISKS
§ 7:196	
§ 7:197	
§ 7:198	
§ 7:199	
§ 7:200	problems
§ 7:201	
§ 7:202	Glass curtain wall
§ 7:203	Complex building materials: Water infiltration— Brick veneer curtain wall
§ 7:204	Complex building materials: Curtain wall cracking and spalling
§ 7:205	Complex building materials: Aesthetic curtain wall defects
§ 7:206	Complex building materials: Curtain wall collapse
§ 7:207	Complex building materials: Curtain walls and sick building syndrome
§ 7:208	Complex building materials: Design professional's reliance on curtain wall marketing information
§ 7:209	Complex building materials: Contractor's defenses to defective curtain wall claims— Implied warranty of the design
§ 7:210	
§ 7:211	Complex building materials: Risk management techniques practiced by curtain wall manufacturers—Disclaimers and limitations of liability provisions
§ 7:212	Complex building materials: Risk that curtain wall product information will give rise to tort of

DEFAULT

	misrepresentation
§ 7:213	Complex building materials: Allocating risk of loss from curtain wall failures—Contribution
§ 7:214	Exterior insulation and finish systems (EIFS) or synthetic stucco cladding systems
§ 7:215	Exterior insulation and finish systems (EIFS) or synthetic stucco cladding systems—Litigation
§ 7:216	Systems performance requirements or guarantees
§ 7:217	Patent liability
§ 7:217 § 7:218	Copyright liability
J. CO	OMMUNICATION RISKS
§ 7:219	Communication risks
§ 7:220	Different languages
§ 7:221	Cultural differences
§ 7:222	Doing business with Indian tribes
§ 7:223	Ambiguous contract documents
§ 7:224	Poorly coordinated contract documents
§ 7:225	Vague, indefinite or ambiguous contract or work scopes
§ 7:226	Contract documents fail to accurately describe project conditions
§ 7:227	Confusion over the responsibility for taxes, duties and fees: Tax exempt and federal projects
§ 7:228	Confusion over the shop drawing process
§ 7:229	Ill-defined costs
§ 7:230	Failure or delay in giving notice of material information
§ 7:231	Claim notice requirements: Enforcement and compliance problems
§ 7:232	Confusion over scope of authority
§ 7:233	Failure to clearly delineate design responsibilities of contracting team
§ 7:234	Scope of design and construction team's obligation to comply with all laws, regulations, ordinances and codes
§ 7:235	Personality conflicts between member participants
§ 7:236	Tortious communications: Defamation risks
§ 7:237	Confusion over meaning of unit-price arrangements

K. WAIVER/ESTOPPEL RISKS

Д	.X. VV.	
§	7:238	Waiver/estoppel risks
§	7:239	Waiver/estoppel risks—Concepts of waiver, estoppel and release
§	7:240	Relative significance of waiver, estoppel and release to construction disputes
§	7:241	Determining the scope of broad release language
§	7:242	Waiver of right to terminate
§	7:243	Waiver in shop drawing approval process
§	7:244	Waiver through acceptance of defective work
§	7:245	Waiver of impact costs
§	7:246	Waiver of insurance rights
§	7:247	Waiver of claims through execution of change order release language
§	7:248	Waiver in course of executing settlement agreements
§	7:249	Waiver of completion date
§	7:250	Waiver of written change order requirements
§	7:251	Waiver of notice requirements
§	7:252	Waiver in bid process
§	7:253	Waiver of cost guarantees
§	7:254	Waiver of exculpatory provisions

L. EXPECTATION RISKS

§ 7:255	Expectation risks
§ 7:256	Owner's reliance upon inaccurate cost estimates
§ 7:257	Unanticipated site conditions
§ 7:258	Contractor's failure to accurately cost work
§ 7:259	Unusually high performance expectations: Interplay between concepts of "strict compliance" and "substantial performance"
§ 7:260	Expectation disagreements over quality: the role of industry standards and course of dealing
§ 7:261	Disagreements over architect's payment certification decisions
§ 7:262	Unreasonable completion schedule
§ 7:263	Failure of recoverable damages to meet injured party's expectations
§ 7:264	Failed damages expectations: Case study, increased insurance premiums
§ 7:265	Failed damages expectations: Case study, impaired bonding capacity
§ 7:266	Frustrated profit motive

DEFAULT

§ 7:267 § 7:268	Unrealistic risk allocation Disappointed value engineering expectations
§ 7:269	Unrealistic claim pricing: Establishing the existence and amount of loss
	NANCIAL RISKS
§ 7:270	Financial risks
§ 7:271	Major participant insolvency
§ 7:272	Bankruptcy of major contractor or subcontractor participant
§ 7:273	Bankruptcy of major participant—Executory contracts
§ 7:274	Insufficient unencumbered value in project for mechanics' lien recovery
§ 7:275	Inadequate project budget or funding
§ 7:276	Loss or damage incurred by third parties
§ 7:277	Consequential damages
§ 7:278	Inflation, increased interest or financing costs
§ 7:279	Lender, surety, or insurer insolvency
	OMPLETION RISKS (TIME)
§ 7:280	Completion risks (time)
§ 7:281	Delays to design work
§ 7:282	Delays in transmittal/submittal process
§ 7:283	Delays in issuing and responding to requests for information or interpretation (RFIs)
§ 7:284	Completion delay not within parties' control
§ 7:285	Completion delay within one or more of the parties' control
§ 7:286	Completion delay within one or more of the parties' control—Concurrent delay
§ 7:287	Completion delay within one or more of the parties' control—Liquidated damages: An allocation solution:
§ 7:288	Untimely inspection and testing
§ 7:289	Multiple primes/coordination failures
§ 7:290	Delay responding to and giving direction in face of changed conditions or changed work
O. CO	OMPLETION RISKS (COST)
§ 7:291	Completion risks (cost)
§ 7:292	Cost escalation of critical labor, materials or equipment

Bruner & O'Connor on Construction Law

	Bruner & O'Connor on Construction I
§ 7:293	Cost overruns within contractor's control
§ 7:294	Voluntary owner changes
§ 7:295	Involuntary changes in scope of work
§ 7:296	Increase in work units
§ 7:297	Unproductive/disrupted work conditions
§ 7:298	Accelerated and/or out-of-sequence work
§ 7:299	Overly burdensome inspection and testing requirements
§ 7:300	Improper or inefficient construction means and methods
§ 7:301	Constructability problems
P. CO	OMPLETION RISKS (QUALITY)
§ 7:302	Completion risks (quality)
§ 7:303	Inadequate or insufficient plans and specifications
§ 7:304	Specification and/or use of unsuitable products
§ 7:305	Defective construction
§ 7:306	Nonconforming work
§ 7:307	Inadequate warranties/remedies
§ 7:308	Failure to achieve performance requirements
§ 7:309	Inadequate inspection and testing
§ 7:310	Nonconforming or defective goods
Q. P.	AYMENT RISKS
§ 7:311	Payment risks
§ 7:312	Nonpayment
§ 7:313	Late payment: Liability for interest
§ 7:314	Overpayment
§ 7:315	Preferences
R. P	ROJECT ADMINISTRATION RISKS
§ 7:316	Project administration risks
§ 7:317	Inadequate record-keeping procedures
§ 7:318	Inadequate policies and procedures to ensure effective communication
§ 7:319	Inefficient dispute resolution procedures
S. FO	ORCE MAJEURE RISKS
§ 7:320	Force majeure risks
§ 7:321	Unusually severe weather
§ 7:322	Relief from disruption caused by COVID-19
	-

DEFAULT

pandemic

\mathbf{T}	PO	T.T	TIC	LAT.	RI	SKS
				//		

§ 7:323	Political risks
§ 7:324	War or hostilities
§ 7:325	Strike or lockout or other industrial action by workers not due to fault of any construction participant
§ 7:326	Changes in law that adversely affect project
§ 7:327	Government refusal to issue permits or licenses necessary for project
§ 7:328	Expropriation
§ 7:329	Repudiation of necessary governmental approvals or agreements
§ 7:330	Governmental orders and penalties adversely impacting construction
§ 7:331	Import/export restrictions
§ 7:332	Local courts or administrative bodies failing to recognize choice of law, venue and dispute resolution choices made by parties
§ 7:333	Inability to gain entry for key personnel
§ 7:334	Threats to in-country management
§ 7:335	Running afoul of the Foreign Corrupt Practices Act

U. CURRENCY RISKS

	<u> </u>
§ 7:336	International taxation
§ 7:337	Currency risks
§ 7:338	Inconvertibility of currency
§ 7:339	Transfer risk
§ 7:340	Devaluation risk

Volume 3

CHAPTER 8. PAYMENT PROCESS: FINANCING, SECURING AND MAKING PAYMENT

I. INTRODUCTION AND PAYMENT TYPES

§ 8:1	Introduction
§ 8:2	Progress payments

Bruner & O'Connor on Construction Law

§ 8:3	Progress payments—Calculation methodologies		
§ 8:4	Payment for stored materials		
§ 8:5	Unit pricing: Introduction		
§ 8:6	Unit pricing—Payment of units within defined		
	space		
§ 8:7	Unit pricing—General unit price payment terms		
§ 8:8	Unit pricing—Blending lump-sum and unit-price payment items		
§ 8:9	Unit pricing—Conversion issues		
§ 8:10	Unit pricing—Parol evidence altering the meaning of unit price terms		
§ 8:11	Unit pricing—Applicability where contract has been terminated		
§ 8:12	Unit pricing—Unspecified measurement methods		
§ 8:13	Unit pricing—Ambiguous measurement specifications		
§ 8:14	Unit pricing—Overlapping and vague categories		
§ 8:15	Unit pricing—VEQ clause		
§ 8:16	Unit pricing—Requirement for written change order		
§ 8:17	Payment measurements based upon quality assessments		
§ 8:18	Consequences of withholding progress payments		
II. R	ETAINAGE		
§ 8:19	Retainage		
§ 8:20	Retainage—Retainage statutes		
§ 8:21	Retainage—Warranty retainage		
§ 8:22	Rights of third parties to retainage		

III. CERTIFYING PAYMENT AND PROGRESS

- § 8:23 Design Professional's certificates for payment
- § 8:24 Punch list work

IV. WAIVERS ARISING FROM MAKING OR ACCEPTING PAYMENT

- § 8:25 Waiver through acceptance of final payment
- § 8:26 Waiver through making of final payment

V. ROLE OF SUBSTANTIAL COMPLETION ON THE PAYMENT AND CLAIMS PROCESS

DEFAULT	
§ 8:27	Substantial completion—In general
§ 8:28	Substantial completion—Statutes of limitation and repose
§ 8:29	Substantial completion—Entitlement to contract balance
§ 8:30	Substantial completion—Liquidated damages
§ 8:31	Substantial completion—Lien rights
§ 8:32	Substantial completion—Termination
§ 8:33	Substantial completion—Bid relief
§ 8:34	Substantial completion—Claim notification
§ 8:35	Substantial completion—Overhead costs
§ 8:36	Substantial completion—Owner's damages
§ 8:37	Substantial completion—Effect of substantial
	performance on calculating defective
	construction damages
§ 8:38	Substantial completion—Attorney's fees
§ 8:39	Substantial completion—Interest
§ 8:40	Substantial completion—Allocation of risks and
	commencement of warranties
	NAUTHORIZED PAYMENT AND OTHER
P	PAYMENT MISHAPS
§ 8:41	Unauthorized public contracts
§ 8:42	Unauthorized public contracts—Inadequate appropriations
§ 8:43	Front-end loaded contracts and unbalanced bids
§ 8:44	Overpayment: Defense for the surety
§ 8:45	Payment misapplication
Ü	
	TRUST FUND CREATION AND LIABILITY
_	IN THE PAYMENT PROCESS
§ 8:46	Trust fund statutes
§ 8:47	Creating construction trust fund obligations by implication
§ 8:48	Trust fund contract provisions
§ 8:49	Individual liability for trust fund violations
-	·
§ 8:50	Dischargeability of trust fund debts
§ 8:50 § 8:51	Dischargeability of trust fund debts Effect of trust fund laws on lenders and taxing

VIII. CONTRACTUAL LIMITATIONS ON RIGHT TO PAYMENT

§ 8:52 Contractual limitations on right to receive payment: Introduction § 8:53 Owner's liability for construction manager's failure to pay trade contractors: A question of agency § 8:54 Conditional payment arrangements (e.g., pay-ifpaid provisions) Enforceability of conditional payment clauses § 8:55 containing express "condition precedent" § 8:56 Conditional payment clauses and prompt payment legislation § 8:57 Conditional payment provision as a defense for the payment bond surety Liquidation or pass-through claims agreements § 8:58

IX. JOINT PAYMENT

- § 8:59 Joint check arrangements: Consequences for payor
- § 8:60 Consequences of joint check arrangements on payees: The "joint check rule"
- § 8:61 Joint checks and bankruptcy law

X. INTEREST ON LATE PAYMENT

- § 8:62 Prejudgment interest under Contract Disputes
- § 8:63 Entitlement to prejudgment interest under state law

XI. PROMPT PAYMENT LEGISLATION

- § 8:64 Federal prompt payment legislation
- § 8:65 State prompt payment acts
- § 8:66 Setoff rights under prompt payment laws
- § 8:67 State prompt payment acts—Payment bond surety's liability for prompt payment act penalties

XII. ASSIGNING PAYMENT

- § 8:68 Assignment of payment rights
- § 8:69 Effects of factoring on payment process

XIII. STATUTORY LIABILITY FOR FALSE

PAYMENT REQUESTS

A. FALSE CLAIMS ACT (FCA) LIABILITY RELATED TO THE PAYMENT AND CLAIM PROCESS

§	8:70	Contractor FCA liability—Introduction			
§	8:71	· · · · · · · · · · · · · · · · · · ·			
§	8:72	Surety exposure to FCA liability			
_	8:73	v i			
8	8:74	FCA liability in contract formation process			
§	8:75	Submission of false information in course of			
		payment process: False Claims Act (FCA)—FCA liability on federally funded state and local projects			
8	8:76	Element of materiality under FCA			
	8:77	FCA liability in claims certification process			
-	8:78	FCA liability for non-conforming work			
_	8:79	FCA liability for non-compliance with women/			
Ü		minority or disadvantaged business programs			
§	§ 8:80 FCA liability for violations of the Buy American Act				
§	8:81	FCA liability for Davis-Bacon Act violations			
§	8:82	FCA liability for pass-through claims			
§	8:83	Fraud liability under Contract Disputes Act			
§	8:84	Constitutional concerns over FCA penalties			
§	8 8:85 Private suits under False Claims Act: Qui tam actions				
	В.	CRIMINALIZING THE PAYMENT PROCESS			
§	8:86	Criminalizing the payment process: Criminal False Claims Act			
§	8:87	Is materiality an element of criminal FCA?			
§	8:88	State law criminal penalties for nonpayment			
	C.	STATE FALSE CLAIM LEGISLATION			
§	8:89	State false claims statutes: Introduction			
§	8:90	California's False Claims Act			
§	8:91	Delaware's False Claims Act			
§	8:92	Florida's False Claims Act			
8	8:93	Hawaii's False Claims Act			
_	§ 8:94 Illinois's False Claims Act				
i					

§ 8:95	Massachusetts's False Claims Act
§ 8:96	Montana's False Claims Act
§ 8:97	New Jersey's False Claims Act
§ 8:98	Nevada's False Claims Act
§ 8:99	Tennessee's False Claims Act
§ 8:100	Virginia's False Claims Act
§ 8:101	Washington D.C.'s False Claims Act

XIV. SOVEREIGN IMMUNITY ISSUES RELATED TO PAYMENT

§ 8:102	Federal sovereign immunity: Tucker Act and Contract Disputes Act
§ 8:103	Waiver of immunity through Federal Tort Claims Act
§ 8:104	Administrative Procedure Act's waiver of sovereign immunity
§ 8:105	Sovereign immunity: State and local government contracts
§ 8:106	Waiver of state and local governmental immunity in contract actions: Scope and compliance
§ 8:107	Eleventh Amendment's bar against federal court actions

XV. BANKRUPTCY ISSUES ARISING IN CONNECTION WITH THE PAYMENT PROCESS

§ 8:108	Section 362: Automatic stay		
§ 8:109	Application of automatic stay to trust property		
§ 8:110	Relief from automatic stay		
§ 8:111	Preferences: Recapturing payments made		
§ 8:112	Preferences and letters of credit		
§ 8:113	Preference defined in terms of Chapter 7 distribution		
§ 8:114	Calculating the preference period		
§ 8:115	Affirmative defenses to preference actions		
§ 8:116	Contemporaneous new value exchange preference exception		
§ 8:117	Ordinary course of business preference exception		
§ 8:118	Statutory lien preference exception		
§ 8:119	Unsecured credit exception		
§ 8:120	Setoff and recoupment		

DEFAULT

§ 8:121	Setoff rights of surety
8:122	Right of setoff as applied to mechanics' liens
§ 8:123	Recoupment
88:124	Bankruptcy Abuse and Consumer Protection Act

XVI. LENDER LIABILITY ARISING IN CONNECTION WITH THE PAYMENT PROCESS

§ 8:125	Lender liability in construction financing			
§ 8:126	Construction loan underwriting and project relationships			
§ 8:127	Loan agreement and construction documents			
§ 8:128	"Obligatory Advance Rule" and the lender's dilemma			
§ 8:129	Fall of privity and rise of equity from a construction lender's perspective			
§ 8:130	Ownership theory: Lender assignment of and subrogation to owner's position under owner- contractor contract			
§ 8:131	Ownership theory: Lender as "co-venturer"			
§ 8:132	Ownership theory: Lender control and domination of owner			
§ 8:133	Contract theory: Contractor as "third-party beneficiary" of construction loan agreement			
§ 8:134	Construction lender's "joint check" agreement			
§ 8:135	Lender's direct contract or guarantee			
§ 8:136	Construction lender liability for tortious interference			
§ 8:137	Construction lender liability for misrepresentation or fraud			
§ 8:138	Construction lender's implied warranty liability			
§ 8:139	Construction lender liability for negligence in inspecting or approving design or construction			
§ 8:140	Construction lender liability for negligence disbursement			
§ 8:141	Equitable theory: Construction lender liability for unjust enrichment			
§ 8:142	Construction lender liability—Equitable lien or constructive trust			
§ 8:143	Use of equitable lien and constructive trust against government agencies and private construction lenders			
§ 8:144	Construction lender liability and quantum			

	meruit
§ 8:145	Construction lender liability and equitable
3 0.140	estoppel
§ 8:146	Construction lender liability and equitable subordination
§ 8:147	Construction lender defenses to equitable claims
§ 8:148	Construction lender's recourse against surety's dual-obligee bond
§ 8:149	Construction lender's duty to fund where there are substantial cost overruns
XVII.	SECURING PAYMENT: MECHANICS'
	LIENS
§ 8:150	Mechanics' liens
§ 8:151	Mechanics' liens and "forum selection" clauses
§ 8:152	Construing mechanics' lien statutes: Blend of strict and liberal statutory construction
§ 8:153	Constitutional challenges to mechanics' lien laws
§ 8:154	Claims for union contributions and fringe benefits: ERISA and other matters
§ 8:155	Rights of design professionals to assert mechanics' liens
§ 8:156	Determining what work qualifies as commencing improvement
§ 8:157	Lien for materials
§ 8:158	Lien for equipment
§ 8:159	What is an "improvement" justifying a lien?
§ 8:160	Miscellaneous lien costs: General home office overhead, profits, insurance premiums, financing and the like
§ 8:161	Remote lien claimants
§ 8:162	Unlicensed lien claimants
§ 8:163	Liening public property
§ 8:164	Public improvement lien
§ 8:165	Liens for work provided to those with a leasehold interest
§ 8:166	Liening jointly owned property
§ 8:167	Liening condominiums, townhomes and other
	such property
§ 8:168	Calculating amount of the lien
§ 8:169	Consequences of liening property for an amount in excess of what is owed
§ 8:170	Lien notice and filing requirements

DEFAULT	
§ 8:171	Time limitations for foreclosing mechanics' liens
$\S 8:172$	Stop notice legislation
§ 8:173	Effect of bankruptcy on mechanics' lien rights: Automatic stay issues
§ 8:174	Effect of bankruptcy on mechanics' lien rights: Preference challenges
§ 8:175	Priority issues: Mechanics' lien claimants versus the construction lender
§ 8:176	Priority issues: "Commencement of the improvement"—Determining accrual of mechanics' lien
§ 8:177	Priority issues: The <i>D'Oench Duhme</i> doctrine
§ 8:178	Equitable liens
§ 8:179	Constitutional liens
§ 8:180	Waiver of lien rights
XVIII.	SECURING PAYMENT: PAYMENT BONDS
§ 8:181	Payment bonds: Introduction
8:182	Types of payment bond obligations
§ 8:183	Statutory or private combined payment- performance bond
§ 8:184	Statutory payment bond
§ 8:185	Private payment bond
§ 8:186	AIA A312 Bond
§ 8:187	Private "mechanics' lien" bond
§ 8:188	Private indemnity bond
§ 8:189	Distinguishing between public and private payment bonds: "Statutory bonds" versus "common-law bonds"
§ 8:190	Public owner liability for failure to obtain statutory payment bond
§ 8:191	Public owner liability for failure to verify sufficiency of bond and solvency of payment bond surety
§ 8:192	Payment bond class of protected claimants
§ 8:193	Payment bond "Double Jeopardy"
§ 8:194	Class of costs covered by payment bond
§ 8:195	Costs covered by payment bond: Labor
8:196	Costs covered by payment bond: Materials
8:197	Costs covered by payment bond: Equipment
8:198	Costs covered by payment bond: Insurance premiums
§ 8:199	Costs covered by payment bond: Loans

§ 8:200	Costs covered by payment bond: Lost profits
§ 8:201	Costs covered by payment bond: Delay damage
§ 8:202	Costs covered by payment bond: Recovery for bond principal's tortious conduct
8 0.000	
§ 8:203	Payment bond surety's responsibility for prejudgment interest
§ 8:204	Payment bond surety's responsibility for attorneys' fees
§ 8:205	Payment bonds notice and commencement of suit requirements
§ 8:206	Payment bond surety's "bond defenses"
§ 8:207	Assignment of bond rights
§ 8:208	Waiver of payment bond rights
§ 8:209	Surety's duty to investigate

CHAPTER 9. WARRANTIES

I. INTRODUCTION

- § 9:1 Doctrine of warranty: Express and implied warranties in construction
- § 9:2 Warranty coverages: Overlays, duplications and gaps among the contracting tiers

II. TYPES AND ORIGINS OF WARRANTIES

- § 9:3 Warranty as tort, contract, statutory or otherwise: Significance of characterization
- § 9:4 Warranties implied-in-fact as distinct from implied-in-law
- § 9:5 Warranty-type representations serving as basis for liability in tort, contract or warranty
- § 9:6 Evolution of strict liability from origins of warranty

III. WARRANTY CONTRASTED WITH OTHER ACTIONS

- § 9:7 Contrasting breach of express warranty and product defect liability
- § 9:8 Warranties as distinct from rights of rejection and revocation
- § 9:9 Warranties as distinct from certifications
- § 9:10 Warranty contrasted with strict liability: Recovery for personal injury or property damage

- caused by defective products
- § 9:11 Warranty liability and state consumer protection laws
- § 9:12 Implied duty of good faith and fair dealing in warranty obligations

IV. SCOPE OF UNIFORM COMMERCIAL CODE

- § 9:13 Applicability of Uniform Commercial Code
- § 9:14 Application of U.C.C. to sales of goods from foreign sellers: The Vienna Convention
- § 9:15 Application of U.C.C. to equipment leases

V. EXPRESS WARRANTIES GOVERNED BY UNIFORM COMMERCIAL CODE

A. TYPES OF EXPRESS WARRANTIES

- § 9:16 U.C.C. express warranties: Introduction
- § 9:17 U.C.C. express warranties—General types of express warranties

B. CREATION OF EXPRESS WARRANTIES

- § 9:18 U.C.C. express warranties—Basis of bargain requirements
- § 9:19 U.C.C. express warranties—Warranties arising from the promise to supply goods pursuant to detailed specifications
- § 9:20 U.C.C. express warranties—"Puffing" and vague expressions and affirmations of quality and value
- § 9:21 Acceptance of goods as critical to formation of a warranty claim
- § 9:22 U.C.C. express warranties—Brochures and sales literature: Liability for passing along another's representations
- § 9:23 Implied warranty of whole product by way of express warranty of integral part
- § 9:24 U.C.C. express warranties—Samples and models
- § 9:25 U.C.C. express warranties—Statements that goods will comply with plans and specifications
- § 9:26 U.C.C. express warranties—Comparisons to competing products
- § 9:27 U.C.C. express warranties—Promises of delivery of materials or equipment at specified time

C. WARRANTIES OF FUTURE PERFORMANCE

- § 9:28 U.C.C. express warranties—Warranty of future performance: Requirement of clarity of expression
- § 9:29 U.C.C. express warranties—Warranty of future performance: Accrual and limitations

VI. U.C.C. IMPLIED WARRANTIES

- § 9:30 U.C.C. Implied product warranties of merchantability and fitness of purpose
- § 9:31 U.C.C. implied warranty of merchantability
- § 9:32 U.C.C. implied warranty of fitness for particular purpose
- § 9:33 Implied warranties arising from course of dealing or usage of trade

VII. PRODUCT WARRANTY DISCLAIMERS AND LIMITATIONS

- § 9:34 U.C.C. implied warranty disclaimers
- § 9:35 U.C.C. express warranty disclaimers
- § 9:36 Consequences of disclaiming warranties
- § 9:37 Disclaimers and Magnuson-Moss Warranty Act
- § 9:38 U.C.C. Limitations of liability
- § 9:39 Warranty disclaimers or limitations contained in multiple forms: Proper application under U.C.C. § 2-207
- § 9:40 Regulating use of disclaimers and limitations of liability under U.C.C.: Concept of unconscionability

VIII. ROLE OF PAROL EVIDENCE IN WARRANTY LIABILITY

- § 9:41 U.C.C. express warranties—Oral representations as basis for express warranty
- § 9:42 Precontractual negotiations: Using parol evidence rule as shield against U.C.C. express warranty liability
- § 9:43 Integration clauses and parol evidence: U.C.C.'s approach to striking the proper balance

IX. ROLE OF PRIVITY IN U.C.C. WARRANTY

CREATION AND RECOVERY

- § 9:44 Extent of U.C.C. warranty protection: Issue of privity
- § 9:45 Extent of U.C.C. warranty protection: Issue of privity—U.C.C. § 2-318
- § 9:46 Many manifestations of privity and privity substitutes in connection with U.C.C. warranties

X. U.C.C. PRODUCT REMEDIES

- § 9:47 Remedies which "fail of their essential purpose"
- § 9:48 Effect of failure of exclusive repair remedy upon limitation of liability for consequential damages
- § 9:49 Damages available under U.C.C. for breach of warranty

XI. BREACH OF PRODUCT WARRANTIES

- § 9:50 U.C.C. express warranties—Establishing breach: Scope and meaning of representations
- § 9:51 U.C.C. express warranties—Proof of causation of loss
- § 9:52 U.C.C. express warranties—Consequences of inspection
- § 9:53 U.C.C. express warranties—Buyer's notification obligation under U.C.C

XII. ECONOMIC LOSS DOCTRINE'S ROLE IN RECOVERY FOR PRODUCT AND CONSTRUCTION-RELATED LOSS

- § 9:54 Economic loss rule: Introduction
- § 9:55 Economic loss doctrine: Protean spawn of the marriage between Lernaean Hydra and Oedipean Sphinx
- § 9:56 Economic loss under an "integrated system" analysis
- § 9:57 Recovery of economic loss under express warranty theory
- § 9:58 Recovery of economic loss under implied warranty theory
- § 9:59 Recovery of economic loss under state consumer protection laws
- § 9:60 Recovery of economic loss under misrepresentation, fraud, and special duty

theories

XIII. CONSTRUCTION WARRANTIES

Δ	CONTRACTOR	EXPRESS	WARRANTIES
			

§ 9:61	Common law express warranties, guarantees, and correction remedies
§ 9:62	Contractor express warranties of materials and workmanship
§ 9:63	Contractor express warranties of materials and workmanship: Misuse/abuse defense
§ 9:64	Does the workmanship warranty extend to design defects?
§ 9:65	Contractor warranties of title
§ 9:66	Contractor express warranty that materials and equipment will be of good quality and new
§ 9:67	Contractor express warranty that the work will be defect-free
§ 9:68	Contractor express warranty that work will conform with requirements of contract documents
§ 9:69	Performance specifications and contractor's conformance warranty
§ 9:70	Contractor express warranty of satisfactory operation
§ 9:71	Contractor's promise to correct nonconforming work for a specified time after substantial

B. CONTRACTOR IMPLIED DUTY TO SEEK CLARIFICATION

completion: Post-completion repair guarantees

- § 9:72 Contractor's implied duty to seek clarification of obvious design discrepancies: Control over "last clear chance" to avoid dispute
- § 9:73 Contractor's implied duty to seek clarification distinguished from contractor's AIA review obligations
- § 9:74 Contractor's implied duty to seek clarification compared with duty to alert owner of errors or discrepancies
- § 9:75 Contractor's implied duty to warn of defects, errors and code violations

C. IMPLIED WARRANTY OF WORKMANLIKE

lxviii

PERFORMANCE

§ 9:76	Common law implied warranties: Introduction
§ 9:77	Contractor's implied warranty of workmanlike performance
§ 9:78	Contractor's implied warranty of suitability of construction work
§ 9:79	Workmanlike performance: Warranting a standard of conduct
§ 9:80	Scope of implied warranty of workmanlike performance
§ 9:81	Workmanlike performance evaluated by examining what contractor was hired to do
§ 9:82	Workmanlike performance and habitability: Distinct concepts sometimes confused
\mathbf{D}	. IMPLIED WARRANTY OF HABITABILITY
§ 9:83	Implied warranty of habitability: Nature of implied obligation

- § 9:84 Strict liability and home builders
- § 9:85 Home warranties or service contracts
- § 9:86 Disclaiming implied warranty of habitability
- § 9:87 Application of implied warranties of habitability and workmanlike performance to subsequent purchasers

XIV. STATUTORY WARRANTIES APPLYING TO CONSTRUCTION UNDERTAKINGS

- § 9:88 Statutory warranties applying to residential construction
- § 9:89 Construction defect and right-to-repair statutes

XV. OWNER'S IMPLIED WARRANTY OF DESIGN ADEQUACY: SPEARIN DOCTRINE

A. SPEARIN DOCTRINE: ORIGINS AND SCOPE

- § 9:90 Implied warranty of design adequacy: Spearin doctrine
- § 9:91 Spearin doctrine: Product specifications and manufacturing defects
- § 9:92 Owner's implied design adequacy warranty influenced by the chosen project delivery

		Bruner & O'Connor on Construction L
_	9:93 9:94	approach Adoption of Spearin doctrine by state courts Delegation of implied warranty of design adequacy
§	9:95	Spearin warranty used as shield against liability
	В.	SPEARIN DOCTRINE DISCLAIMERS AND LIMITATIONS
_	9:96 9:97	Disclaiming implied warranty of design adequacy Limitations of liability applying to construction undertakings
	C.	OWNER'S IMPLIED DESIGN WARRANTY CONTRASTED WITH OTHER OBLIGATIONS
§	9:98	Implied warranty of design adequacy distinguished from design professional malpractice
§	9:99	Owner's implied warranty of design adequacy versus contractor's warranty of materials
	D.	APPLICATION OF OWNER'S IMPLIED DESIGN WARRANTY TO SPECIFIC SITUATIONS

Application of implied warranty of design § 9:100

- adequacy for jointly developed design specifications § 9:101 Application of implied warranty of design
- adequacy to performance specifications
- § 9:102 Application of implied warranty of design adequacy to mixed design and performance specifications
- § 9:103 Application of implied warranty of design adequacy to performance acceptance requirements

BREACH OF THE OWNER'S IMPLIED Ε. **DESIGN WARRANTY**

§ 9:104 Establishing breach of implied warranty of design adequacy

DESIGN/BUILD WARRANTIES XVI.

DEFAULT	
§ 9:105 § 9:106	Warranties in design/build contracting Implied warranties unique to design/build contracting
XVII.	OWNER'S IMPLIED DUTIES AND APPROVALS
§ 9:107	Owner's implied duty of full disclosure: Control over information material to construction
§ 9:108	Owner's implied warranty of commercial availability under "brand name" specifications
§ 9:109	Implications of owner's approval of contractor plant, equipment or "work plan"
§ 9:110	Implications of owner's approval of concrete mix design
§ 9:111	Implications of owner's specifying construction methods
§ 9:112	Owner's implied duty to provide achievable design
§ 9:113	Owner's implied duty of cooperation
§ 9:114	Owner's implied warranty of adequacy of contract time
XVIII.	DAMAGES FOR BREACH OF COMMON LAW CONSTRUCTION WARRANTIES
§ 9:115	Damage measures for breach of construction warranties
§ 9:116	Effect of contract provision guaranteeing repair of defective work on application of "diminution in value" measure
8 9.117	Determining the date for calculating damages

XIX. WARRANTIES ON FEDERAL CONSTRUCTION PROJECTS

defective construction

§ 9:118 Negotiating warranties on federal projects

and interest for warranty breach due to

§ 9:119 Express warranties in federal procurement: F.A.R. warranty of construction clause

CHAPTER 10. INDEMNITY AND CONTRIBUTION

I. INDEMNITY AND CONTRIBUTION:

INTRODUCTION

8 10.1	Introduction
-	
	Express indemnity
§ 10:3	Common-law indemnity
§ 10:4	Comparative implied indemnity
§ 10:5	Contribution

II. INDEMNITY AND CONTRIBUTION: ACCRUAL, CONDITIONS AND LIMITATIONS

§ 10:6	Accrual of right to contribution or indemnity
§ 10:0 § 10:7	·
8 10:7	When is an indemnity claim ripe for adjudication?
§ 10:8	Conditioning indemnity upon notice
§ 10:9	Survival of indemnity obligation beyond termination of parties' contractual relationship
§ 10:10	Statutory time bars affecting the right to indemnity and contribution
§ 10:11	Contribution and statutes of repose: Minnesota's bridge-collapse litigation

III. POLICY CONSIDERATIONS AFFECTING INDEMNITY RIGHTS

§ 10:12	Policy considerations in favor of risk	
	transference through express indemnity	
§ 10:13	Policy considerations in favor of restricting use	
	of indemnity agreements	
§ 10:14	Indemnity and sovereign immunity	
§ 10:15	Judicial treatment of public policy arguments	

IV. INTERPRETATION OF INDEMNITY AGREEMENTS

A. ORIGINS OF INDEMNITY INTERPRETATION

§ 10:16 Equitable origins of indemnity impact and interpretation theory

B. STRICT CONSTRUCTION OF INDEMNITY LANGUAGE

§ 10:17	Strict construction	of indemnity language
0 10 10	Q	77

§ 10:18 Stricter than strict: Express negligence test for

lxxii

Ī)	E.	FΔ	١T	TT	7	١

§ 10:19	indemnity agreements Role of parol evidence in interpreting indemnity language under strict construction test
§ 10:20	"Construed against the drafter" rule applied to indemnity agreements
C.	LIBERAL CONSTRUCTION OF INDEMNITY LANGUAGE
§ 10:21	"Liberal" or "fair construction" rule applied to indemnity agreements
§ 10:22	Role of parol evidence in interpreting indemnity agreements under liberal construction test
D.	MANAGING THE INDEMNITY INTERPRETATION PROCESS
§ 10:23	Contractually agreeing to standard of interpretation governing the indemnity undertaking
§ 10:24	Blue-penciling indemnity covenants
§ 10:25	Flow-down or incorporation-by-reference language and indemnification
E.	INTERPRETING PARTICULAR INDEMNITY LANGUAGE
§ 10:26	Interpretations of "arising out of" language in indemnity agreements: Shades of causation
§ 10:27	Drafting and interpreting fault-free triggers
§ 10:28	Interpretation and purpose of sole-negligence exception to the indemnification undertaking
§ 10:29	Interpreting mutual indemnity clauses
§ 10:30	Interpretive challenges posed by multiple indemnity provisions in same or related documents
F.	MISCELLANEOUS INDEMNITY INTERPRETATION ISSUES
§ 10:31	Interpreting agreements to procure insurance contrasted with indemnity agreements

V. DETERMINING THE LAW GOVERNING INDEMNITY AGREEMENTS

\$ 10:32 Choosing the law governing the indemnity undertaking: Choice-of-law provisions
 \$ 10:33 Conflict-of-laws analysis governing indemnity actions where no choice-of-law provision applies
 \$ 10:34 Choice-of-law analysis and anti-indemnity statutes
 \$ 10:35 Statutory restrictions on construction agreement choice-of-law and venue provisions

VI. ANATOMY OF AN EXPRESS INDEMNITY AGREEMENT

A. INDEMNITY SCOPE LANGUAGE

- § 10:36 Indemnity "savings" language "to the fullest extent permitted by law"
- § 10:37 Core indemnity undertaking language
- § 10:38 Defining scope of indemnity obligation: Triggering language
- § 10:39 Scope of indemnity determined by extent of insurance
- § 10:40 "Work itself" exception to indemnity for property damage

B. PARTIES COVERED BY INDEMNITY OBLIGATION

- § 10:41 To whom indemnity obligation runs: Usual suspects
- § 10:42 To whom indemnity obligation runs: Joint ventures
- § 10:43 To whom indemnity obligation runs: Third-party beneficiaries
- § 10:44 To whom indemnity obligation runs: Parents and subsidiaries
- § 10:45 To whom indemnity obligation runs: Agents and representatives
- § 10:46 Consequences of contractors indemnifying design professionals
- § 10:47 Suing design professionals for indemnity

C. CLAIMS AND LOSSES COVERED BY INDEMNITY OBLIGATION

§ 10:48 Significance of use of such terms as "liabilities,"

lxxiv

DI	ALTE	TIT	m
IJĦ	IFA	чUI	Hill:

D	EFAULT	
		"claims," "losses," "judgments"
§	10:49	
§	10:50	Indemnity for environmental liability
§	10:51	Indemnity for strict liability
§	10:52	Indemnity for intentional torts
§	10:53	Indemnity for subrogation claims
§	10:54	v i v
§	10:55	Indemnity for costs to correct defective construction
§	10:56	
-	10:57	2
§	10:58	Indemnity for Fair Housing Act and Americans with Disabilities Act exposures: Federal preemption issues
§	10:59	Indemnity for violations of the Fair Labor
		Standards Act: Public policy concerns
	7TT	DECOMPONIO DE ARRODNEMOS DEEC DIVINI
`	II.	RECOVERY OF ATTORNEYS' FEES: DUTY TO DEFEND VS. DUTY TO INDEMNIFY
	A	. INDEMNITOR'S DEFENSE VS. INDEMNITY OBLIGATIONS
§	10:60	Is duty to defend distinct from or subsumed within duty to indemnify?
	10:61	of duty to defend
	10:62	indemnity
_	10:63	duty to indemnify
	10:64	contrasted with insurer's duty to defend
§	10:65	Anti-indemnity laws and the indemnitor's duty to defend the indemnitee
	В	RECOVERY OF ATTORNEYS' FEES UNDER EXPRESS INDEMNITY AGREEMENT
§	10:66	Language specifying certain costs and expenses recoverable: Quest for attorneys' fees
§	10:67	Timing of indemnitor's obligation to pay fees: Issue of tender
§	10:68	Indemnitor's obligation to pay fees: Issue of

§ 10:69	ripeness Obligation for indemnitee's fees notwithstanding determination that indemnitor free from fault
§ 10:70	Fees incurred in resisting underlying claim distinguished from fees incurred in prosecuting indemnity claim
§ 10:71	· ·
§ 10:72	
VIII.	RELATIONSHIP OF WORKERS' COMPENSATION LAWS TO INDEMNITY
	AND CONTRIBUTION RECOVERIES
§ 10:73	Indemnity and workers' compensation liability bar
§ 10:74	Express indemnity provision trumps workers' compensation statutes' exclusive remedy provisions
§ 10:75	Effect of injured worker's comparative fault on operation of anti-indemnity laws
§ 10:76	Relationship of workers' compensation immunity to implied-in-fact and implied-in-law indemnity
§ 10:77	Ambiguities in employment status affecting contribution and indemnity recovery for worker injuries
§ 10:78	Workers' compensation laws and contribution claims
	ENFORCEMENT OF INDEMNITY AGREEMENTS
A.	ENFORCEMENT OF WORK-RELATED INDEMNITY PROVISIONS
§ 10:79	General overview of work-related indemnity
§ 10:80	Work-related indemnity: Concept of fault
§ 10:81	Work-related indemnity: Space and time limitations
§ 10:82	Work-related indemnity: Causation requirements
§ 10:83	Work-related indemnity: Contemplation of parties
§ 10:84	Grafting negligence requirement onto work- related indemnity language

J	D.	E.	FΖ	٩I	IJ	Ľ	ľ

§ 10:99

§ 10:85	"Presence"-type indemnity clauses: Broader than "work-related" indemnity
В.	FAULT-BASED INDEMNITY
§ 10:86	Indemnity triggered by indemnitor being wholly or partially at fault
§ 10:87	Challenges over scope of indemnity afforded by "to the extent caused in whole or in part" language
§ 10:88	Imputing negligence of injured employee to indemnitor/employer
C.	INDEMNITY AND SOLE NEGLIGENCE
§ 10:89	Indemnity and sole negligence: Introduction
§ 10:90	Fault-free indemnity vs. sole negligence indemnity
§ 10:91	Carving out sole negligence from coverage
§ 10:92	Effect of injured party's contributory negligence or comparative fault on prohibition against sole negligence indemnity
§ 10:93	Sole negligence indemnity: Issue of proximate cause
§ 10:94	Sole negligence indemnity contrasted with obligation to secure additional insured coverage for indemnitee's fault
D.	MISCELLANEOUS INDEMNITY ENFORCEMENT ISSUES
§ 10:95	Express indemnity in unusual documents: Question of authority
§ 10:96	Enforcement consequences where indemnity agreement violates public policy
§ 10:97	Implied covenant of good faith and indemnity enforcement
§ 10:98	Enforcing indemnity provision as shield against defective construction claims
X. AN	TI-INDEMNITY LAWS
A.	PURPOSE AND STRUCTURE OF ANTI- INDEMNITY LAWS

Anti-indemnity statutes: Varying approaches to

§ 10:100	limiting indemnity obligation Anti-indemnity laws contrasted with judicial pronouncements of public policy prohibitions on broad indemnity
В.	UNDERTAKINGS CAPTURED BY ANTI- INDEMNITY LAWS
§ 10:101	What is "construction contract" for purposes of an anti-indemnity law?
§ 10:102	Anti-indemnity laws and equipment leases
§ 10:103	Anti-indemnity laws and design contracts
§ 10:104	Anti-indemnity laws and miscellaneous agreements
C.	APPLICATION OF ANTI-INDEMNITY LAWS TO INSURANCE OBLIGATIONS
§ 10:105	Agreements to procure insurance and anti- indemnity laws
§ 10:106	Insurance as an instrument to "save" an otherwise invalid indemnity agreement
D.	APPLICATION OF ANTI-INDEMNITY LAWS TO SPECIFIC FORMS OF INDEMNITY
D. § 10:107	
	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due
§ 10:107 § 10:108 § 10:109	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due to the indemnitee's sole negligence Statutory prohibitions against indemnity for sole negligence contrasted with strict liability Statutory prohibitions against indemnity for one's own negligence
§ 10:107 § 10:108 § 10:109 § 10:110	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due to the indemnitee's sole negligence Statutory prohibitions against indemnity for sole negligence contrasted with strict liability Statutory prohibitions against indemnity for one's own negligence Anti-indemnity statutes and work-related indemnity clauses
§ 10:107 § 10:108 § 10:109	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due to the indemnitee's sole negligence Statutory prohibitions against indemnity for sole negligence contrasted with strict liability Statutory prohibitions against indemnity for one's own negligence Anti-indemnity statutes and work-related
§ 10:107 § 10:108 § 10:109 § 10:110	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due to the indemnitee's sole negligence Statutory prohibitions against indemnity for sole negligence contrasted with strict liability Statutory prohibitions against indemnity for one's own negligence Anti-indemnity statutes and work-related indemnity clauses
\$ 10:107 \$ 10:108 \$ 10:109 \$ 10:110 \$ 10:111	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due to the indemnitee's sole negligence Statutory prohibitions against indemnity for sole negligence contrasted with strict liability Statutory prohibitions against indemnity for one's own negligence Anti-indemnity statutes and work-related indemnity clauses Atypical anti-indemnity statutory prohibitions ANTI-INDEMNITY LEGISLATION:
§ 10:107 § 10:108 § 10:109 § 10:110 § 10:111 E.	TO SPECIFIC FORMS OF INDEMNITY Statutes prohibiting indemnity against loss due to the indemnitee's sole negligence Statutory prohibitions against indemnity for sole negligence contrasted with strict liability Statutory prohibitions against indemnity for one's own negligence Anti-indemnity statutes and work-related indemnity clauses Atypical anti-indemnity statutory prohibitions ANTI-INDEMNITY LEGISLATION: MISCELLANEOUS ISSUES Anti-indemnity laws contrasted with statutory indemnity restrictions on product sellers and

lxxviii

XI. LIMITATION OF LIABILITY PROVISIONS

AIN	D INDEMINITY AGREEMENTS
§ 10:115	Indemnity agreements contrasted with limitation-of-liability provisions
§ 10:116	Limitation of liability provisions in design and construction agreements
§ 10:117	Do anti-indemnity laws apply to limitation-of-liability agreements?
§ 10:118	Where limitation-of-liability provisions have been captured by anti-indemnity legislation
§ 10:119	Risk management theory and limitation-of- liability clauses
§ 10:120	Public policy issues arising from limitation of liability clauses
XII. CO	OMMON LAW VOUCHER
§ 10:121	Preclusive effect of judgments and settlements

§ 10:121	Preclusive effect of judgments and settlements incurred by indemnitee: Historical roots of "vouching-in" process
§ 10:122	Voucher: Constitutional considerations
§ 10:123	Voucher: Conflicts of interest
§ 10:124	Voucher: Adequate representation
§ 10:125	Voucher: Material procedural differences
§ 10:126	Collateral estoppel distinguished from voucher
§ 10:127	Seeking indemnity via vouching-in where the underlying procedure was arbitration
§ 10:128	Vouching-in product suppliers in construction defect litigation

XIII. SURETY'S GENERAL AGREEMENT OF INDEMNITY

A. STRUCTURE OF SURETY INDEMNITY AGREEMENTS

§ 10:129	Surety's general agreement of indemnity
§ 10:130	Surety's indemnity rights in absence of express agreement
§ 10:131	Surety's right to secure collateral for indemnity obligation
§ 10:132	Surety's core indemnity language vs. common law exoneration rights
§ 10:133	Common indemnity agreement provisions in

aid of surety's recovery rights

В.	ENFORCEMENT OF SURETY'S
	INDEMNITY AND COLLATERAL RIGHTS

§ 10:134	Events triggering indemnitor's liability under
	general agreement of indemnity
§ 10:135	Surety's right to specific performance under general agreement of indemnity
§ 10:136	Surety's conduct entitling it to indemnity:
	Reasonableness vs. good-faith standards
§ 10:137	Surety's indemnity rights: Good faith as
	absence of bad faith and role of motive
§ 10:138	Surety's obligations to obligee, principal, and
	indemnitors as a condition for indemnity:
	Implied duty of good faith

C. MISCELLANEOUS SURETY INDEMNITY ISSUES

§ 10:139	Surety's duty to indemnify obligee for personal
	injury liability
§ 10:140	Surety's obligation to disclosure information
	under general agreement of indemnity
§ 10:141	Are surety general agreements of indemnity
	governed by anti-indemnity laws?

XIV. IMPLIED CONTRACTUAL INDEMNITY

231 V • 1.	
§ 10:142	Implied contractual indemnity contrasted with equitable indemnity
§ 10:143	Elements of implied contractual indemnity
§ 10:144	Relationship of implied contractual indemnity
	to express indemnity
§ 10:145	Scope of implied contractual indemnity

XV. EQUITABLE INDEMNITY

§ 10:146	Equitable indemnity: Introduction
§ 10:147	Special relationships giving rise to equitable
	indemnity
§ 10:148	Equitable indemnity: Active/passive test
§ 10:149	New York's version of equitable indemnity:
	Authority to act vs. acting with authority
§ 10:150	Equitable indemnity: Vicarious or derivative
	liability test

lxxx

§ 10:151	Effect of express indemnity clause on equitable
§ 10:152	indemnity
§ 10:15Z	Effect of tort reform legislation on common-law indemnity
§ 10:153	Proportional indemnity
§ 10:154	Indemnity and contribution applied to
	economic loss recoveries
§ 10:155	Equitable indemnity: Claims by product
	manufacturers

XVI. CONTRIBUTION

§ 10:156	Contribution: Origin and nature
§ 10:157	Contribution: Need for joint liability in tort
§ 10:158	Contribution: Effect of tort reform legislation on right of contribution
§ 10:159	Third-party defendant's liability to plaintiff: Derivative nature of contribution
§ 10:160	Ability of contribution to secure recovery for economic loss

XVII. EFFECT OF SETTLEMENTS ON INDEMNITY AND CONTRIBUTION RIGHTS

upon subsequent indemnity action: Indemnitee's burdens § 10:163 Settlement in aid of contribution or indemnity erecovery: Loan receipts and Mary Caragreements § 10:164 Effect of settlements on indemnity claims § 10:165 Contribution: Settlement and set-off issues § 10:166 Good faith settlement as bar to right of	§ 10:161	
type recovery: Loan receipts and Mary Car agreements § 10:164 Effect of settlements on indemnity claims § 10:165 Contribution: Settlement and set-off issues § 10:166 Good faith settlement as bar to right of	§ 10:162	upon subsequent indemnity action:
§ 10:165 Contribution: Settlement and set-off issues § 10:166 Good faith settlement as bar to right of	§ 10:163	Settlement in aid of contribution or indemnity type recovery: Loan receipts and Mary Carte agreements
§ 10:166 Good faith settlement as bar to right of	§ 10:164	
	§ 10:165	Contribution: Settlement and set-off issues
	§ 10:166	

Volume 4Pt1

CHAPTER 11. INSURANCE

I. GENERAL CONSIDERATIONS

A. WHAT IS INSURANCE?

§ 11:1 Introduction	
---------------------	--

- § 11:2 Risk pooling and indemnification
- § 11:3 Fortuity doctrine
- § 11:4 Indemnity agreements distinguished from insurance contracts
- § 11:5 Surety contracts distinguished from insurance contracts
- § 11:6 Guaranty and warranty distinguished from insurance

B. STANDARDIZATION OF POLICY LANGUAGE

- § 11:7 Generally
- § 11:8 How the same standard form provides different coverage to differently situated insureds
- § 11:9 Missing policies

C. INSURANCE BINDERS

- § 11:10 Binding coverage before issuance of a policy
- § 11:11 Coverage disputes where insurance afforded through a binder

D. ANATOMY OF AN INSURANCE POLICY

- § 11:12 Generally
- § 11:13 Declarations
- § 11:14 Insuring agreement
- § 11:15 Supplementary payments
- § 11:16 Definitions
- § 11:17 Exclusions
- § 11:18 Endorsements
- § 11:19 Conditions
- § 11:20 Schedules

E. LIMITS, SUBLIMITS, DEDUCTIBLES AND SELF-INSURED RETENTIONS

- § 11:21 Limits of liability: Per occurrence, aggregate and sublimits
- § 11:22 Deductibles and self-insured retentions (SIRs)
- § 11:23 Who bears loss within the deductible

lxxxii

D.	וים	$\Gamma \Lambda$	Т	TT	т

ş	11:24	Interpreting deductibles expressed in percentages
s	11:25	Who may satisfy insured's SIR obligation
	11:26	When is satisfaction of a SIR a condition
3	11.20	precedent to the insurer's policy obligations?
Ş	11:27	Satisfaction of SIR as precondition to insurers'
	11.00	defense obligations
	11:28	Determining how many SIR limits apply
3	11:29	Fronting policies
	F.	CERTIFICATES OF INSURANCE
ş	11:30	Certificates of insurance—Generally
ş	11:31	Authority of agent issuing certificate of
		insurance to alter terms of coverage
ş	11:32	Fraud liability for inaccurate certificates
ş	11:33	Insured's right to rely on certificate
ş	11:34	Certificate as a condition of additional insured
		status
	G.	DRAFTING CONSTRUCTION CONTRACT INSURANCE PROVISIONS
Ş	11:35	How not to draft policy language
ş	11:36	AIA document A201 insurance article as a
		guide
ş	11:36.10	
		Insurance Exhibit
Ş	11:36.20	
		diversity of insurance products for design and
	11 00 00	construction risks
3	11:36.30	1 01
		insurance coverage options and avoiding
ę	11:36.40	overreaching requirements AIA Insurance Exhibit: Defining with more specificity
8	11.00.40	the types and extent of insurance coverage
s	11:36.50	
0	11.00.00	required to be provided by the parties in completing the exhibit
Ş	11:36.60	AIA Insurance Exhibit: Tailoring coverage by
•		exercising options and specifying limits and durations
ş	11:36.70	AIA Insurance Exhibit: Insurance requirements
		contained in the 2017 general conditions document
Ş	11:36.80	

Bruner & O'Connor on Construction Law

§ 11:37	Description of coverages
§ 11:38	Contractor's liability insurance
§ 11:39	Property insurance
§ 11:40	Drilling down on general liability insurance
§ 11:41	Commercial general liability checklist
§ 11:42	Drilling down on property coverage
§ 11:43	Builder's risk/installation floaters checklist
§ 11:44	Contractor's equipment floater coverage
§ 11:45	Additional insured coverage
§ 11:46	Subrogation waivers
§ 11:47	Coverage limits
§ 11:48	Excess and umbrella coverage
§ 11:49	Umbrella/excess liability checklist
§ 11:50	Workers' compensation and employer's liability insurance
§ 11:51	Professional liability insurance
§ 11:52	Pollution liability insurance
§ 11:53	Carrier financial thresholds
§ 11:54	Evidence of coverage
II. INTE	ERPRETING INSURANCE CONTRACTS
A. G	ENERAL CONSIDERATIONS
§ 11:55	General overview
§ 11:55.10	Interpreting policy language: Blending traditional contract interpretation theory with concepts tailored for adhesion agreements
§ 11:56	Interpreting policy language through the lens of particular belief systems as to nature or purpose of insurance
§ 11:57	Role of insurance applications in policy interpretation
	ULES OF INSURANCE POLICY NTERPRETATION
§ 11:58	Many rules of insurance policy interpretation
§ 11:59	Plain and ordinary meaning
§ 11:60	Application of the <i>ejusdem generis</i> rule
§ 11:61	Construing policy language in pari materia
§ 11:62	Role of headings and titles
§ 11:63	Importance of good punctuation
§ 11:64	Construing undefined terms
	-

lxxxiv

	8	11:64.50	Ambiguities	construed	against	the	drafter	ru	le
--	---	----------	-------------	-----------	---------	-----	---------	----	----

C.	AMBIGUITY AND THE ROLE OF EXTRINSIC EVIDENCE
§ 11:65	When is policy language ambiguous?
§ 11:66	Is the determination whether language is ambiguous for the court or jury?
§ 11:67	Analytical conflict—Role of extrinsic evidence
§ 11:68	Effect of negotiations on policy interpretation
§ 11:69	Parol evidence rule and the use of extrinsic
	evidence in interpreting insurance language
D.	PARTICULAR INTERPRETATION CHALLENGES
§ 11:70	Interpreting exclusionary language
§ 11:71	Interpreting policy endorsements
§ 11:72	Confusion over policy limits—Interpretive approaches
§ 11:73	Construing policy language "arising out of"
§ 11:74	Interpreting policy language by way of analogy to policies of a different type
§ 11:75	Interpreting one edition of a standard insurance policy form by reference to a different edition
§ 11:76	Interpreting foreign-language insurance policies
E.	REASONABLE EXPECTATIONS DOCTRINE
§ 11:77	Reasonable expectations doctrine
§ 11:78	Various formulations of the reasonable
	expectations doctrine

F. POLICY REFORMATION

§ 11:79 Illusory coverage

§ 11:80	Reforming policy terms
§ 11:81	Rewriting policy language to correct a
	"scrivener's error"
§ 11:82	Reforming policy language because of mutual
	mistake
§ 11:83	Modifying policy language

III. WHERE AND WHEN TO SUE AND WHAT LAW TO APPLY

Δ	VENIII	EAND	FORUM

- § 11:84 Forum selection provisions
 - B. TIME REQUIREMENTS FOR COMMENCING SUIT
- § 11:85 Suit limitation provisions

C. BURDENS OF PROOF

§ 11:86 Shifting burdens of proof and persuasion in insurance coverage disputes

D. CHOICE OF LAW

- § 11:87 Generally
- § 11:88 Choice of law: So many rules, so little clarity
- § 11:89 Survey of choice-of-law decisions: A cornucopia of complexity
- § 11:90 First Restatement vs. Second Restatement
- § 11:91 Choice of law provisions
- § 11:92 Federal court sitting in diversity applying state law
- § 11:93 Federal court predictions of state insurance law

E. FEDERAL COURT JURISDICTION OVER INSURANCE COVERAGE DISPUTES

- \S 11:94 Declining to exercise jurisdiction under Colorado River abstention doctrine
- § 11:95 Declining to exercise federal jurisdiction over insurance coverage declaratory judgment actions: *Wilton/Brillhart* abstention doctrine

IV. DUTIES OF INSURED

A. DUTY TO GIVE NOTICE

§ 11:96	Insured's duty to provide timely notice
§ 11:96.50	Notice as condition precedent vs. covenant
§ 11:97	When does the insured's obligation to give notice arise?
§ 11:98	Insured's duty to give notice "as soon as practicable"
§ 11:99	Who must give notice?

lxxxvi

§ 11:100	To whom must notice be given?
§ 11:100.50	Sufficiency of notice
§ 11:101	Notice under claims-made policies
§ 11:101.50	Claims-made-and-reported policies and renewal of coverage
§ 11:102	New York changes course on notice: Emergence of prejudice as a required showing
§ 11:103	New York's statutory law requiring insurers to timely disclaim coverage
§ 11:104	Insured's duty to timely submit proof of loss
§ 11:105	Notice owed to excess insurers
B. D	UTY OF TRUTHFULNESS
§ 11:106	Insured's duty to be truthful
§ 11:107	Need to establish prejudice
§ 11:108	Misrepresentations classified so as to permit insurer to void policy <i>ab initio</i> : Void vs. voidable distinction
§ 11:109	Materiality of misrepresentations sufficient to warrant rescission of policy
§ 11:109.50	Prior knowledge representations
§ 11:110	Unintentional misrepresentations in applications for insurance
§ 11:111	Waiving the right to rescind based on misrepresentation
§ 11:112	Role of agent or broker in application process
§ 11:113	Agent or broker status influencing coverage—Imputing agent's knowledge to insured or insurer
C. D	UTY OF COOPERATION
	sured's duty to cooperate: General principles
§ 11:115 Ir	nsured's duty to safeguard covered property
	nsured's duty to make damaged property available for inspection
	re-suit compliance: Examination under oath (EUO)
	nsured's duties with respect to settlement— Consent judgments
§ 11:119 Ir	nsured's duty to protect insurer's subrogation rights

lxxxvii

§ 11:120	Policy endorsements requiring insured to secure similar coverages from subcontractors
§ 11:121	Insured's duty to appeal unfavorable rulings
§ 11:122	Insured's admission of liability in the course of litigation as a breach of the duty to cooperate
§ 11:123	Loss of right to demand cooperation—Insurer conduct as basis of estoppel
§ 11:124	Role of legislation in insured's duty to cooperate
D.	DUTY TO SEEK CONSENT
§ 11:125	No-action clauses
§ 11:126	Anti-assignment clauses
§ 11:127	Anti-assignment clauses and changes in corporate structure
§ 11:128	Coverage for successor liabilities
§ 11:129	Consent clauses
§ 11:130	No voluntary payments clauses
§ 11:131	No voluntary payments clause: Is a showing of prejudice required?

V. DUTIES OF LIABILITY INSURER

A. DUTY TO DEFEND

1. Prerequisites for the Duty to Arise

§ 11:132	When does obligation to defend arise?
§ 11:132.50	Insurer's defense obligation is broad
§ 11:133	Who is an insured for defense purposes: Employees, partners and officers
§ 11:134	Must a suit exist in order to trigger an insurer's duty to indemnify?
§ 11:135	Triggering the duty to defend: "Suit" requirement broadly defined
§ 11:136	Insured's demand for a defense vs. insurer's actual notice of a claim
§ 11:137	Effect of a self-insured retention limit upon the duty to defend
§ 11:138	Selective or targeted tenders
§ 11:139	Pre-tender defense costs

2. Determining Whether a Duty to Defend Exists

§ 11:140 When is duty to defend determination ripe for

lxxxviii

D	D.	$F\Delta$	т	TT	п

	consideration?			
11:141	Comparing pleading with corners" or "eight corner			
11:142 Drilling down on the "four-corners/eight-corners" test for determining duty to defend				
11:143	Defense duty analysis un			
3 11.140	policy form	der a claims-made		
3 11:144	Cross-suits exclusion: no between insureds	duty to defend suits		
	. Role of Extrinsic E Whether a Duty to	Evidence in Evaluating Defend Exists		
11:145	Duty to defend and rol	e of evidence extrinsic		
3 11:146	Extrinsic evidence and Texas vs. California	the duty to defend:		
§ 11:147	Exceptions to Texas ru extrinsic evidence wh obligations	le forbidding resort to en evaluating defense		
11:147.5	_	se of extrinsic evidence		
	Scope of the Duty			
11:148	Common expressions of	f the duty's scope		
11:149	Scope of the duty to de duty to indemnify	efend broader than		
§ 11:149.5	indemnify: Does lack	duty to defend and duty to of the former determine the it" exist for there to be a duty		
11:149.5	Duty to defend determ duty to indemnify	ines timing of challenging the		
11:150	Duty to defend where intentional conduct	claims implicate		
11:151	Duty to defend affirma	tive defenses		
	. Insurer's Obligation Respond to Tender	n to Investigate and		
11:152	To defend or not to defend	l—that is the		
	quandary			
11:153	Insurer's duty to promptly or limitation of coverage	y give notice of denial		
11:154	Reservation-of-rights lette			
11:155	Adequacy and necessity o letters	f reservation-of-rights		

	6. Insurer's Reservation of Rights
§ 11:156	Dance of the porcupines: Consequences of insurer's reserving rights to disclaim indemnity on the duty to defend
	7. Insurer's Right to Recoup Defense Costs
§ 11:157	Insurer's right to recoup defense costs from insured
§ 11:158	Insured's obligation to reimburse insurer for costs incurred in defending noncovered claims
§ 11:159	In for one, in for all: Complete defense rule vs. insurer's right of recoupment
§ 11:159.	
	8. Application of the Defense Duty in Specific Situations
§ 11:160	Duty to defend additional insureds
§ 11:160	Duty to defend joint ventures
§ 11:161	Defending the defenseless—Suspended
§ 11.102	corporations
§ 11:163	Duty to defend within context of an Owner
3 11.100	Controlled Insurance Program
§ 11:164	Surety as beneficiary of insurer's duty to
ζ 11.10 1	defend
§ 11:165	Loan receipt agreements
3 11,100	
	9. Appointment of Defense Counsel
§ 11:166	Selection of defense counsel
§ 11:167	Conditions giving rise to insured's right to independent counsel
§ 11:168	Common conflict-of-interest situations in
8 11.100	construction disputes
§ 11:169	Insured's resistance to appointed counsel and
5 11.100	the duty of cooperation
§ 11:170	Insurer reimbursement obligations regarding
	independent counsel
§ 11:171	Extent of insurer's obligation to pay
	independent counsel rates
	10. Duties of Defense Counsel
§ 11:172	Duties of defense counsel
§ 11:173	Obligations of defense counsel to give general

		cc	verage advice to insured
		11.	Breaching the Duty to Defend
§	11:174		nsequences of breaching duty to defend
§	11:175		nsequences of breaching duty to defend: unishment or restitution?
§	11:176		ect of another insurer's defense on breaching surer's liability
§	11:177	w	ured's right to settle underlying dispute by ay of a consent or stipulated judgment upon surer's refusal to defend
§	11:178	re ai	nsequences of breaching duty to defend on sponsibility for allocating settlement mounts among covered and non-covered aims
§	11:179	Re	covery of attorney's fees in coverage actions
		12.	Termination of the Duty to Defend
§	11:180		Extinguishing the defense obligation through exhausting policy limits
§	11:181		Termination of defense duty through settlements of less than all claims
§	11:181.5	50	Termination of defense duty upon dismissal of the only potentially covered claim
		13.	Supplementary Payments
§	11:182	Du	ty to defend the insured's indemnitees
§	11:183		urer's obligation to pay indemnitee's defense sts
§	11:184		verage for insured's obligation to pay aimant's attorneys' fees
	В.	DU	TY TO SETTLE
		1.	Nature of the Duty
8	11.185	Ge	nerally

- § 11:186 Standards governing insurer's evaluation of settlement offers
- § 11:187 Insurer's duty to initiate settlement

Control Over the Right to Make Settlement

Consequences of maintaining control of settlement while reserving rights: Insurer's § 11:188

		ptions upon receipt of reasonable settlement
§ 11:189		rcumstances under which insured may
	3.	Insurer's Settlement Duties in Particular Situations
§ 11:190		surer's settlement duties where policy limits assufficient to secure release of all insureds
§ 11:191	Ins	surer's settlement duties when funds assufficient to resolve all claims
§ 11:192		ope of insurer's settlement duties where laim is in excess of policy limits
	4.	Settlement Duties Owed Among Insurers
§ 11:193		ttlement duties owed by primary insurer to
§ 11:194		ttlement duties owed by excess insurers to rimary insurers
	5.	Reimbursement and Allocation Issues
§ 11:195	ir	ght of insurer to seek reimbursement from assured for sums paid to settle non-covered laims
§ 11:196	Ri	ght of reimbursement and other allocation
§ 11:197		location of settlement between covered and on-covered claims
	6.	Breaching the Duty to Settle
§ 11:198		Factors relevant to evaluating whether insurer improperly failed to settle within policy limits
§ 11:199		Insurer's liability for a judgment in excess of policy limits: Florida's law of insurer bad faith
§ 11:199.	30	Bad faith exposure arising from settlement duties of third-party liability insurers
§ 11:199.	50	Bad faith exposure arising from first-party insurers' duty to settle

VI. COMMERCIAL GENERAL LIABILITY (CGL) COVERAGE

A. OVERVIEW

§ 11:200 § 11:201 § 11:202	Recurring issues Coverage A insuring agreement Coverage B: Personal injury distinguished from bodily injury		
В.	OC	CCURRENCE ELEMENT	
	1.	Intentionality	
\$ 11:203 \$ 11:204 \$ 11:205 \$ 11:206 \$ 11:207 \$ 11:208	In In De In	ccurrence and foreseeability jury arising from poor workmanship tention and expectation egrees of intentionality terpreting occurrence element where overage grant applies to intentional torts abstantially certain test	
	2.	Continuous or Repeated Exposures	
§ 11:209		ecurrence as a continuous or repeated xposure	
	3.	Poor Workmanship and the Occurrence Element	
§ 11:210		Some basic misunderstandings about the relationship between poor workmanship and an "occurrence"	
§ 11:211		Repair of defective work and the occurrence element	
§ 11:212		Florida, Texas, and Tennessee rule "faulty workmanship" an "occurrence"	
§ 11:213		Faulty workmanship an "occurrence"—A developing trend?	
§ 11:214		South Carolina, Kentucky, Alabama, Indiana, Mississippi and Georgia rule on whether faulty workmanship is an "occurrence"	
§ 11:215		Connecticut, Ohio, North Dakota, and West Virginia rule on whether faulty workmanship is an "occurrence"	
§ 11:216		"Occurrence" analysis—A fact-based inquiry	
§ 11:216.	50	Legislative enactments related to the "occurrence" element	
§ 11:217		Liability policy as performance bond	
	4.	Determining the Number of Occurrences	

			DRONER & O CONNOR ON CONSTRUCTION LAV
_	11:218 11:219	Aj	etermining number of "occurrences" oplying the "cause test" in determining the
§	11:220	In v	number of occurrences reportance of the proper characterization of what constitutes the "occurrence" when letermining the number of occurrences
§	11:221	In	nportance of whether and how the policy lefines "occurrence" in determining the number of occurrences
		5.	Legislative Attempts to Influence the Occurrence Analysis
§	11:222		egislative developments addressing occurrence"
	C.	ВС	DDILY INJURY ELEMENT
§	11:223	Ge	enerally
§	11:224		odily injury and the need for physical nanifestation
	D.	PF	ROPERTY DAMAGE ELEMENT
		1.	Physical Injury to Tangible Property
§	11:225		Evolution of the "property damage" requirement
§	11:226		Physical injury to tangible property— Odorless gas
§	11:226.	50	Physical injury to tangible property—Dumping of unwanted debris on property
		2.	Property Damage and Poor Workmanship: Does it Matter Whose Property is Injured?
§	11:227		roperty damage" and "third-party property"
§	11:228	t	ocus on "what" property was damaged rather han "whether" property was damaged— Conflating insuring grant and policy exclusions
§	11:229		pes it matter what property is damaged for he insuring clause?
		3.	Loss of Use as Property Damage

§ 11:230 Loss of use injury § 11:231 Loss of use of property that is not physically

xciv

injured

G. EXCLUSIONS

	4.	Coverage Scope: Damages "Because of" Property Damage
§ 11:232		Scope of coverage for damages "because of" property damage
§ 11:232.		Attorneys' fees as damages "because of" bodily injury or property damage
§ 11:232.	70	Costs incurred by insured to comply with an injunction as damages
§ 11:233		Property damage and economic loss
§ 11:234		Economic loss as covered damage
§ 11:235		Role of economic loss doctrine in coverage analysis
§ 11:236		Attorney's fees as an element of damages
	5.	Specific Situations
§ 11:237	Re	epair of defective work as "property damage"
§ 11:238	Cc	overage for costs incurred to prevent property damage"
§ 11:239		overage for rip and tear damages to non- efective work
§ 11:240	In	corporation of defective products or work
§ 11:241	Pr	operty damage and electronic data
E.		AMAGES" FOR PURPOSES OF SURING GRANT
§ 11:242		re sums paid in settlement "damages" under he CGL policy?
§ 11:243	Ar	re attorneys' fees awarded against an insured damages" for purposes of the CGL policy?
§ 11:244		junctive relief and punitive damages as overed "damages" under CGL policy
F.	LE	GAL COMPULSION TO PAY
§ 11:245	W	hen is one "legally obligated to pay?"
§ 11:246	Mu fo tl	ust suit be brought and a judgment secured or coverage to exist on grounds that only hen is the insured "legally obligated to pay" amages?
§ 11:247		overage for breach of contract liability

	1. Exclusions Regarding Volitional Conduct
§ 11:248 § 11:249	Intentional acts exclusions Expected or intended injury exclusion
	2. Ongoing Operations Exclusions
\$ 11:250 \$ 11:251 \$ 11:252 \$ 11:253 \$ 11:254 \$ 11:255 \$ 11:256 \$ 11:257	Concept of "business risk" Generally Property owned, rented, or occupied exclusion Alienated premises exclusion Property loaned to named insured exclusion Care, custody, or control exclusion Property being worked on exclusion Faulty workmanship exclusion
	3. Completed Operations Exclusions
§ 11:258 § 11:259	Work product exclusion Completed operations work exclusion— Generally
§ 11:260	Products-Completed Operations Hazard
§ 11:261 § 11:262	Completed operations work exclusion— Application of Products-Completed Operations Hazard work exclusion to faulty repairs performed on completed work When is work complete for purposes of completed-operations coverage?
§ 11:263	Subcontractor exception to completed operations work exclusion
	Volume 4Pt2
	4. Impaired Property Exclusion
§ 11:264	Exclusions addressing "loss of use" damages— Impaired property exclusion and its predecessors
	5. Exclusion Pertaining to Product Recalls
§ 11:265	Sistership exclusion
	6. Contractual Liability Exclusion
§ 11:266	Overview of contractual liability exclusion
§ 11:267	Scope of contractual liability coverage
§ 11:268	Contractual liability exclusion broadly

xcvi

		construed
§ 11:268.50		
§	11:269	Contractual liability exclusion in Texas: a long and winding road
§	11:270	"Insured contract" exception to contractual liability exclusion
§	11:271	Liability in any event exception
		7. Exclusions for Pollution-Related Injury
§	11:272	Historical evolution of the pollution exclusion
Ş	11:273	"Sudden and accidental" exception
§	11:274	Application to construction operations
§	11:275	Coverage for environmental injuries under coverage B (personal injury coverage)
Ş	11:276	Absolute pollution exclusion
	11:277	Varying interpretations of "absolute pollution" exclusion
§	11:278	What is a pollutant?
§	11:279	When is the insured "performing operations" for purposes of the pollution exclusion
§	11:280	Pollution and the concurrent causation doctrine
		8. Coverage Challenges Presented by Indoor Pollution
8	11:281	Generally
	11:282	Literal reading of pollution exclusion
_	11:283	Reasonable expectations of coverage for harm due to indoor pollution
§	11:284	Is pollution exclusion ambiguous in context of indoor pollution?
§	11:285	Pollution exclusion enforced in the indoor pollution context
§	11:286	Release or discharge requirement in the context of indoor pollution
§	11:287	Sick-building coverage and "occurrence" requirement
§	11:288	Sick buildings and bodily injury
	11:289	Sick buildings and property damage
	11:290	Sick buildings and consequential losses
	11:291	Sick buildings and loss of use damages
_	11:292	Sick buildings and timing of property damage—Trigger theories

9. Coverage and Exclusions for Specific Environmental Matters

§ 11:293 § 11:294	Insurance coverage for mold damage Specific mold exclusions
§ 11:295	Coverage for silica claims
§ 11:296	Coverage for <i>E. Coli</i> bacteria-related loss
§ 11:297	Welding fume exposure claims
§ 11:298	Coverage for lead paint claims
§ 11:299	Coverage for Chinese drywall losses
	10. Exclusions Pertaining to Professional Services
§ 11:300	Elimination of professional risks from CGL coverage form
§ 11:301	"Professional services" exclusion
§ 11:302	Causal nexus between professional services and the injury
§ 11:303	Application of the professional-services exclusion where the insured also performs construction services
§ 11:304	Interplay between "professional services" exclusion and "separation of insureds" provision
	11. Employee and Independent Contractor Exclusions
§ 11:305	Employee exclusion—Generally
§ 11:306	Employee exclusion—Independent contractors exclusion
§ 11:307	Employee exclusion—Coverage responsibility for another's employees
§ 11:308	Broadly-drafted employee exclusions and additional insured coverage
§ 11:309	"Contractor-subcontractor" exclusion
§ 11:310	Interplay between "employee exclusion" and "separation of insureds" or "severability of interests" provisions
	12. <i>Montrose</i> and Prior Work or Injury Exclusions
§ 11:311	Prior injury exclusions

xcviii

§ 11:312

Prior work exclusions

13. Type of Work Exclusions

DEFAULT		
§	11:313	

§ 11:333

§ 11:313	Exterior insulation and finish system (EIFS) exclusions		
§ 11:314	Roofing exclusions		
§ 11:314	Commercial work exclusion		
8 11.515			
	14. Joint Venture Limitations or Exclusions		
§ 11:316	Joint venture exclusions		
§ 11:317	Insuring the joint venture		
	15. Insured vs. Insured Exclusions		
§ 11:318	Cross-liability exclusions		
	16. Miscellaneous Exclusions		
§ 11:319	Earth movement exclusion		
§ 11:320	Watercraft exclusion		
§ 11:321	Automobile exclusion		
5 11.021	The one of the order of the ord		
H.	ADDITIONAL INSURED COVERAGE		
	1. Creation of Coverage		
§ 11:322	Additional insured coverage generally		
§ 11:323	Creation of coverage—Writing requirement		
§ 11:324	Writing requirement as an "insured contract"		
§ 11:325	When is additional insured coverage primary		
5	and noncontributory to insured's own		
	insurance?		
§ 11:326	Additional insured endorsement requirement of		
	a written agreement is not equivalent to a		
	privity requirement		
§ 11:327	Atypical requirements		
§ 11:328	Blanket and scheduled endorsements		
§ 11:329	Does contract obligation to name contractor an		
Ü	additional insured under "all policies" include		
	excess insurance?		
	2. Scope of Coverage		
§ 11:330	Scope of additional insured coverage—		
,	Narrow view		
§ 11:331	Nexus between named insured's work and		
	additional insured coverage		
§ 11:332	Coverage for additional insured's own		
o 11.002	negligence—Broad view		

Slippery scope of additional insured coverage

Bruner & O'Connor on Construction Law

§ :	11:334	"Caused, in whole or in part, by" endorsements
8	11:335	Scope of named insured's work or operations
	11:335.50	Intersection between additional insured coverage and workers' compensation laws
§ :	11:336	Nexus between named insured's activities and claim against additional insured
8	11:337	General supervisory coverage
_	11:338	2004 ISO additional insured endorsements
_	11:338.50	2013 ISO additional insured endorsement revisions
	11:339	Completed operations versus ongoing operations
8	11:340	Meaning of "out of" ongoing operations
	11:341	Application of policy exclusions to an additional insured
§ :	11:342	Cross-suits exclusion and additional insured coverage
	3.	Rights of Additional Insureds
§ :		dditional insured's right to notice of cancellation
§ :	11:344 D	Defense obligations owed to additional insureds
§ :		Conflict issues created by additional insureds
§ :		Determining whether additional insured coverage is primary or excess
§ :		affect of named insured's representations on additional insured coverage
	4.	Relationship Between Named Insured's Indemnity Obligations and Additional Insured Coverage
§ :		ndemnity agreements and allocation of coverage
§ :	11:349 A	dditional insured coverage and state anti- indemnity laws
§ :	11:350 A	dditional insured coverage contrasted with coverage for indemnity obligations
	5.	Miscellaneous Additional Insured Matters
§ :		Additional insured coverage contrasted with Owner's and Contractor's Protective (OCP) liability coverage
§ :	11:352 T	hird-party beneficiary status in lieu of additional insured coverage

I. DETERMINING WHEN INJURY OR DAMAGE OCCURS FOR PURPOSES OF TRIGGERING COVERAGE

A. How and When is Coverage Triggered?

8	11:353	When	does	damage	occur?
•	11.000	111011	acco	addition	occur.

- § 11:354 Proving injury occurred during policy period
- § 11:355 Common misconceptions as to when coverage is triggered
- § 11:356 Conflating "injury" with "occurrence"
- § 11:357 Coverage triggers influenced by definition of "occurrence"

B. Trigger Theories

- § 11:358 Coverage trigger theories under occurrencebased policies
- § 11:359 Consequences of different coverage triggers on loss allocation
- § 11:360 Manifestation trigger
- § 11:361 Exposure trigger
- § 11:362 Injury-in-fact trigger
- § 11:363 Continuous injury trigger

C. Aggregating Triggered Policies: Stacking

- § 11:364 Aggregating triggered policies: Stacking
- § 11:365 Stacking limits of triggered policies—California permits stacking unless policy language expressly states otherwise

D. Miscellaneous Coverage Trigger Issues

- § 11:366 Coverage triggers and ownership of injured property
- § 11:367 Coverage triggers and limits of coverage
- § 11:367.50 Allocation of defense costs between insurer and insured where injuries occur over multiple policy periods

VII. ALLOCATING LOSS AND EXPENSE AMONG INSURERS

A. ALLOCATION PURSUANT TO "OTHER INSURANCE" PROVISIONS

§ 11:368 Overview of "other insurance" allocation

§ 11:369	Types of "other insurance" provisions
§ 11:370	"Other insurance" provisions contrasted with true excess coverage
§ 11:371	Concept of "being on the same risk" for purposes of allocation through "other insurance"
§ 11:372	Role insurance premiums play in applying "other insurance" provisions
§ 11:373	"Other insurance" and additional insured coverage
§ 11:374	Common applications of "other insurance" provisions in construction disputes
§ 11:375	Effect of indemnity agreements on the "other insurance" provision
В.	ALLOCATION OF LOSS AMONG SUCCESSIVE INSURERS
§ 11:376	Allocation among successively-triggered policies: All sums vs. <i>pro rata</i> theories
§ 11:377	Allocating loss where "other insurance" provisions do not apply
§ 11:378	Equitable contribution vs. equitable subrogation: Allocating loss to insurers released by insured
C.	ALLOCATION OF DEFENSE COSTS
§ 11:379	Theories for allocating defense costs among insurers: Contribution vs. subrogation
§ 11:380	Approaches for allocating defense costs among insurers
§ 11:381	Allocation of defense costs among successive insurers
§ 11:382	Equitable contribution—Shifting burdens of proof where non-participating insurer fails to provide a defense
§ 11:383	Right of defending insurer to seek declaratory relief against non-participating insurers
D.	MISCELLANEOUS ALLOCATION MATTERS
§ 11:384	Effect of targeted-tender rule on insurers' contribution rights
§ 11:385	Role deductibles and self-insured retentions play in allocation of loss or expense among

	insurers
§ 11:386	
§ 11:387	where no coverage is designated primary Rights of contribution among primary and
ş 11.00 <i>1</i>	additional insured carriers
VIII.	INSURER'S RECOVERY RIGHTS FROM OTHERS: SUBROGATION AND WAIVER OF SUBROGATION
A.	CREATION AND NATURE OF EQUITABLE REMEDY OF SUBROGATION
§ 11:388	
§ 11:389	ι
§ 11:390	
§ 11:391	
§ 11:392	subrogation recovery
§ 11:393	Subrogation rights against parties insured under state insurance guaranty funds
§ 11:394	
§ 11:395	Effect of additional insured status on insurer's subrogation rights
В.	ALLOCATION OF SUBROGATION PROCEEDS
§ 11:396	0 11
§ 11:397	
\$ 11:398	
§ 11:399	Reduction of damage award due to insurance recoveries—Application of the collateral-source rule
C.	ANTI-SUBROGATION RULE
§ 11:400	Prohibition against insurers seeking recovery from insureds
§ 11:401	New York approach to the anti-subrogation rule
§ 11:402	Application of the no-subrogation rule to contractors and design professionals
D.	WAIVING THE RIGHT OF SUBROGATION
§ 11:403	Waiver of subrogation provisions—Generally

§ 11:404	Creation of the waiver
§ 11:405	Waivers of subrogation and notice
§ 11:406	Application of waivers of subrogation to owner's other contractors and own forces
§ 11:407	Application of waivers of subrogation to claims by liability insurers
§ 11:408	Relationship of waiver to other contract remedy clauses
§ 11:409	Scope of the waiver
§ 11:410	Scope of the waiver: Are suppliers covered?
§ 11:411	Temporal scope of waiver of subrogation provision
§ 11:412	Gross negligence as a means around the waiver
§ 11:413	Post-loss waivers

IX. PROMISES TO PROCURE INSURANCE FOR OTHERS

§ 11:414	Language giving rise to obligation to procure insurance for another
§ 11:415	Construction industry practice of lower-tier parties purchasing insurance for upper-tier participants: Consequences of breach
§ 11:416	Effect of self-insured retentions on duty to procure insurance
§ 11:417	Insurance for failure to secure insurance for another

X. PROPERTY INSURANCE

A. COMMON COVERAGE FORMS AND GENERAL MATTERS

§ 11:418	Historical development and general overview of
	property insurance
§ 11:419	Builder's risk policy form overview
§ 11:420	Types of property insurance relevant to
	construction undertakings
§ 11:421	Inland marine coverage
§ 11:422	Boiler and machinery insurance
§ 11:423	Is builder's risk coverage a form of fire
	insurance?
§ 11:424	Limits and sublimits
§ 11:425	Does a property insurer have duty of
	indemnification?

D	D.	DΑ	T.	TT	T
Ъ.	Ľ.	ΓA	ıL	ı	11

§ 11:426	Insurer recommended repair contractors
В.	INSURABLE INTEREST REQUIREMENT
§ 11:427 § 11:428 § 11:429	Concept of "insurable interest" Property policies "insurable-interest" clause Insurable interest in property slated for demolition
C.	FORTUITY REQUIREMENT
§ 11:430	Fortuity requirement and coverage for defective work
D.	SUE AND LABOR CLAUSE
§ 11:431 § 11:432	Sue and labor clause Insured's duty to mitigate loss under common law and sue and labor clause and recovery of business losses
E.	INSURING AGREEMENT: DIRECT PHYSICAL LOSS
§ 11:433 § 11:434 § 11:435	Requirement of physical loss Distinguishing between loss and cause of loss Direct physical loss limitation on increased completion costs due to covered loss
F.	PROPERTY INSURED
§ 11:436 § 11:437 § 11:438	Covered property Common exclusions to Covered Property Real property vs. personal property
G.	PERSONS INSURED
§ 11:439 § 11:440	Persons insured Achieving insured status under property insurance
§ 11:441	Standard mortgage clause
H.	CAUSES OF LOSS
§ 11:442 § 11:443 § 11:444	Coverage implications of multiple causes of loss Efficient proximate cause doctrine Efficient proximate cause test contrasted with

	concurrent cause doctrine
§ 11:445	6 Contracting out of "efficient proximate cause" doctrine—Sequential loss provisions
§ 11:446	
§ 11:447	Challenges in applying anti-concurrent causes
§ 11:448	Apportioning loss between covered and
	noncovered causes
I.	COVERAGE FOR LOSS DUE TO POOR
	WORKMANSHIP
§ 11:449	a covered peril/cause of loss?
§ 11:450	
§ 11:451	Faulty workmanship exclusion and contextual ambiguity
§ 11:452	Paulty work as "product" or "process"
§ 11:453	B Ensuing loss exception to faulty workmanship exclusion
§ 11:454	Ensuing loss as distinct and separable from the excluded damage
§ 11:455	Ensuing loss exception to faulty workmanship exclusion—The curious case of collapse and what ensues, peril or loss?
§ 11:456	6 Coverage for faulty work and "efficient proximate cause" doctrine
J.	COVERAGE FOR COLLAPSE
§ 11:457	Various policy approaches to collapse
§ 11:458	
§ 11:459	
§ 11:460	
K.	EXCLUSIONS
§ 11:461	Overview of property policy exclusions
§ 11:462	2 Mold exclusion and the ensuing loss exception
§ 11:463	B Consequential loss exclusion
§ 11:464	Ordinance or law exclusion
§ 11:465	Freeze/thaw or pressure/weight of water exclusion
§ 11:466	
§ 11:460 § 11:467	-
X II.TU	Communicas scepage of leakage of water

DE	$F\Delta$	TIT	T

_	2111021		
		e	xclusion
ş	11:468	Wa	ater without roof damage exclusion
	11:469	Su	rface water exclusion
ş	11:470	Rc	otting exclusion
Ş	11:471	In	herent vice exclusion
	11:472	La	tent defects exclusion
	11:473		ast and corrosion exclusion
_	11:474		rinking and cracking exclusion
_	11:475		arth movement exclusion
	11:476		neft exclusion
Ş	11:477		neft exclusion—Burglary ingress/egress exception
ş	11:478	Va	cancy exclusion
ş	11:479	Si	nkhole exclusion
	11:480	W	ind exclusion
Ş	11:481	Pr	operty coverage for pollution-related injuries
	L.	CC	VERAGE EXTENSIONS
ş	11:482	Βι	ailder's risk soft cost coverage
ş	11:483		overage for debris removal
ş	11:484	Te	sting and commissioning coverage
ş	11:485	La	w or ordinance endorsements
Ş	11:486	In	creased cost of construction coverage
	M.	TI	ME ELEMENT COVERAGE
		1.	Extra Expense Coverage
Ş	11:487	Ex	tra expense loss
		2.	Business Interruption Coverage
_	11:488		Business interruption loss
	11:488.	50	Business interruption coverage for COVID-19 losses
	11:489		Overview of business interruption insurance
	11:490		Traditional business interruption coverage
Ş	11:491		Establishing physical damage to covered property
ş	11:492		A covered "cause of loss" must cause physical damage
§	11:493		Business interruption must be caused by the physical damage
Ş	11:494		Business interruption causation element in light of area-wide disruption due to

Bruner & O'Connor on Construction Law

	massive infrastructure failure—The Katrina effect
§ 11:495	Extent of suspension or business
5 11.100	interruption necessary to trigger coverage
§ 11:496	Establishing an actual business interruption loss
§ 11:497	Period of indemnity
	3. Miscellaneous Time Element Covers
§ 11:498	Contingent business interruption coverage
§ 11:499	Civil authority coverage
§ 11:500	Ingress/egress coverage
§ 11:501	Service interruption coverage
N.	VALUATION OF LOSS
§ 11:502	Calculation of loss
§ 11:503	Replacement cost value vs. actual cash value
§ 11:504	Determining actual cash value
§ 11:505	Calculation of actual cash value on replacement cost minus depreciation
§ 11:506	Cost elements within actual cash value
§ 11:507	Replacement cost value—"Build first" requirement
§ 11:508	Replacement cost value—"Doctrine of prevention"
§ 11:509	Policy value statutes and replacement cost valuation
§ 11:510	"Like kind and quality" provision
§ 11:511	Increased cost to complete undamaged work
§ 11:512	Valuation methodologies—Blanket vs. scheduled policies
§ 11:513	Establishing actual cash value—Proof considerations
§ 11:514	Coinsurance penalties
Ο.	APPRAISAL PROCESS
§ 11:515	Overview of appraisal process
§ 11:516	Appraiser qualifications
§ 11:517	Scope of appraisers' authority
§ 11:518	Preconditions to appraisal
§ 11:519	Waiving the right to proceed to appraisal
§ 11:520	Limiting authority of umpire to decide only

	matters upon which appraisers disagree
\$ 11:5	
\$ 11:5	~
§ 11:5	23 State laws regulating the appraisal process
XI.	PROFESSIONAL LIABILITY INSURANCE
1	A. CLAIMS-MADE POLICY FORM
§ 11:5	Claims-made policy forms: History and general matters
§ 11:5	
§ 11:5	
§ 11:5	27 "Extended reporting" periods or "tails"
]	B. PROFESSIONAL LIABILITY INSURING GRANT
§ 11:5	28 Contractor design cover insuring agreement
§ 11:5	
§ 11:5	Insuring agreement of professional liability insurance
§ 11:5	When is an insured "legally obligated to pay" under a professional liability policy?
(C. POLICY CONDITIONS, LIMITATIONS AND EXCLUSIONS
§ 11:5	When is a claim a "claim" under a claims-made policy?
§ 11:5	B3 Definitions and exclusions
§ 11:5	liability policy?
§ 11:5	guaranty
§ 11:5	- · · · · · · · · · · · · · · · · · · ·
§ 11:5	Protection against contract claims
]	D. MISCELLANEOUS MATTERS
§ 11:5	
§ 11:5	Insurance coverage for design-build projects
§ 11:5	Additional insured coverage under professional liability policies

XII. E	XCESS AND UMBRELLA INSURANCE
A.	FOLLOW-FORM COVERAGE
§ 11:541	Introduction to excess insurance
§ 11:542	Excess "follow-form" coverage
§ 11:543	"Following the form" coverage and anti- assignment provisions
§ 11:544	Role of policy language in scope and conditions of coverage
В.	UMBRELLA INSURANCE
§ 11:545	Umbrella coverage
C.	ATTACHMENT POINT OF COVERAGE: EXHAUSTION OF UNDERLYING INSURANCE
§ 11:546	When does an excess insurer's indemnity obligation attach?
§ 11:547	Excess insurer's duties where primary limits "exhausted" through something less than a full tendering of policy limits
§ 11:548	Exhaustion of primary coverage: Interpretation issues
§ 11:549	Exhaustion of self-insured retention limits
§ 11:550	Vertical vs. horizontal exhaustion doctrines
§ 11:551	Functional exhaustion
§ 11:552	Horizontal exhaustion in excess layers
§ 11:553	Horizontal exhaustion and the selective- or targeted-tender rule
§ 11:554	Challenges horizontal exhaustion presents to traditional construction industry risk allocation
D.	DEFENSE AND SETTLEMENT OBLIGATIONS OF EXCESS INSURERS
§ 11:555	Defense obligations
§ 11:556	Excess insurers' duty to defend
§ 11:557	Rights and obligations regarding settlement
§ 11:558	Construing "ultimate net loss"
§ 11:559	Excess policy's no-action provision

E. OBLIGATIONS OF EXCESS INSURER

UPON INSOLVENCY OF UNDERLYING CARRIER

- § 11:560 Excess insurer's responsibilities when primary insurer becomes insolvent
 § 11:561 "Drop down" coverage
 § 11:562 Must an excess insurer provide a defense to an insured whose primary carrier is insolvent or
 - F. EXCESS INSURANCE AND ADDITIONAL INSURED COVERAGE
- § 11:563 Follow-form excess insurer's responsibility for providing coverage to primary policy's additional insureds
- § 11:564 Coverage gaps due to language of additional insured endorsements and application of exhaustion doctrine

XIII. WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE

§ 11:565 Claims between employees

exhausted?

- § 11:566 Boundary disputes with CGL coverage— Determining employment status
- § 11:567 Effect of employment status on employer liability

XIV. AUTOMOBILE INSURANCE

§ 11:568 Auto insurance in the construction industry

XV. WRAP-UP INSURANCE

- § 11:569 Basics of wrap-up insurance
- § 11:570 Determining who are insureds under wrap-up programs
- § 11:571 Regulation of wrap-up programs

XVI. INSURING CYBER-RISK EXPOSURES

- § 11:572 Underwriting cyber risk: Challenges presented by the application process
- § 11:573 Types of cyber coverage
- § 11:574 Recovery for cyber-related loss under coverage

	A of commercial general liability policy
11:575	Recovery for cyber-related loss under coverage
11:576	B of the commercial general liability policy Coverage for cyber loss under commercial
3 11.570	property policies
XVII.	MISCELLANEOUS INSURANCE
11:577	Terrorism insurance
11:578	Delayed completion and force majeure insurance
11:579	First-party design coverage—Owner's protective professional indemnity coverage
11:580	Systems performance coverage (efficacy insurance)
11:581	Inherent defects insurance
11:582	Subcontractor default insurance
11:583	Pollution liability coverage
11:584	Insurance for leased, rented, or borrowed equipment
11:585	Political risk insurance
11:586	Stop-loss coverage
11:587	Contractor's rework endorsement
XVIII.	CANCELLATION OF INSURANCE
11:588	Cancellation of insurance
11:589	Policy cancellation and timing of injury
XIX.	INSURANCE AGENTS AND BROKERS
11:590	Agent and broker liability
11:591	Agent liability: No available coverage defense
XX. N	IISCELLANEOUS MATTERS
11:592	Insurance guaranty associations
11:593	Discovering insurance records

Volume 4A

CHAPTER 12. SURETYSHIP: ASSURING CONTRACT PERFORMANCE

I. GENERAL CONSIDERATIONS

DI	ALTE	TIT	m
IJĦ	IFA	чUI	Hill:

DEFAULI	
§ 12:1	Role of construction surety
§ 12:2	Suretyship: A tripartite relationship
§ 12:3	Historical development of suretyship
§ 12:4	Suretyship and the Statute of Frauds
§ 12:5	Rise of compensated suretyship
§ 12:6	Regulation of the surety industry: Antitrust and claims practice laws
§ 12:7	Suretyship and "bad faith"
§ 12:8	Suretyship distinguished from guaranty
§ 12:9	Suretyship distinguished from insurance
§ 12:10	Interpretation of suretyship obligations
§ 12:11	Surety bond underwriting
§ 12:12	Surety's reinsurance of bond risk
II. PI	ERFORMANCE BONDS
§ 12:13	Generally
§ 12:14	Types of performance bond obligations— Generally
§ 12:15	Types of performance bond obligations—What "performance" is required—Typical performance bond surety's options upon its principal's default
§ 12:16	Types of performance bond obligations— Performance bond surety's options upon its principal's default—American Institute of Architects' performance bond
§ 12:17	Types of performance bond obligations— ConsensusDOCS performance bond
§ 12:18	Types of performance bond obligations— "Indemnity bond"
§ 12:19	Types of performance bond obligations— "Indemnity bond"—Federal Standard Form 25 Performance Bond
§ 12:20	Types of performance bond obligations— "Completion bond"
§ 12:21	Types of performance bond obligations— "Manuscript bond"
§ 12:22	Financial limit of performance bond obligation: "Penal sum"
§ 12:23	Duration of performance bond obligation
§ 12:24	Beneficiaries of performance bond obligation— Generally
8 19.95	Ranaficiarias of parformance hand obligation

	Named obligee
§ 12:26	Beneficiaries of performance bond obligation— Successor obligees
§ 12:27	Beneficiaries of performance bond obligation— Assignees of performance bond obligees
§ 12:28	Beneficiaries of performance bond obligation— Subrogees of performance bond obligees
§ 12:29	Beneficiaries of performance bond obligation— Third-party beneficiary claimants
§ 12:30	Beneficiaries of performance bond obligation— Third-party beneficiary claimants—Unpaid subcontractors and suppliers
§ 12:31	Beneficiaries of performance bond obligation— Third-party beneficiary claimants—Other prime contractors
§ 12:32	Beneficiaries of performance bond obligation— Third-party beneficiary claimants—Personal injury/wrongful death claimants
§ 12:33	Beneficiaries of performance bond obligation— Third-party beneficiary claimants—Adjacent business or property owners
§ 12:34	Beneficiaries of performance bond obligation— Owner and lender third-party rights against a subcontractor's performance bond
§ 12:35	Damages recoverable under the performance bond
§ 12:36	Triggering performance bond surety's obligation to perform—Generally
§ 12:37	Triggering performance bond surety's obligation to perform—"Default" and "material breach"
§ 12:38	Triggering performance bond surety's obligation to perform—Termination of contract for default
§ 12:39	Triggering performance bond surety's obligation to perform—Termination of contract for default—Validity of termination clause
§ 12:40	Triggering performance bond surety's obligation to perform—Termination of contract for default—Importance of good-faith motive
§ 12:41	Triggering performance bond surety's obligation to perform—Termination of contract for default—Requirement for independent discretion by contractually authorized representative
§ 12:42	Triggering performance bond surety's obligation to perform—Termination of contract for

	1 0 1: 7
§ 12:43	default—Importance of proper "cure notice" Triggering performance bond surety's obligation to perform—Termination of contract for default—Obligee's waiver of the right to
	terminate for default
§ 12:44	Performance bond surety's "contract defenses"— Generally
§ 12:45	Performance bond surety's "contract defenses"— Substantial performance
§ 12:46	Performance bond surety's "contract defenses"— Owner's duties incident to project design
§ 12:47	Performance bond surety's "contract defenses"— Owner's duties incident to project design— Owner's implied warranty of design adequacy
§ 12:48	Performance bond surety's "contract defenses"— Owner's duties incident to project design— Owner's implied warranty of commercial availability of specified construction materials
§ 12:49	Performance bond surety's "contract defenses"— Owner's duties incident to project design— Government contractor defense
§ 12:50	Performance bond surety's "contract defenses"— Owner's implied duty of disclosure
§ 12:51	Performance bond surety's "contract defenses"— Owner's Blended design and performance specifications
§ 12:52	Performance bond surety's "contract defenses"— Owner's approval of contractor plant and equipment or "work plan"
§ 12:53	Performance bond surety's "contract defenses"— Owner's implied warranty of design versus contractor's warranty of materials
§ 12:54	Performance bond surety's "contract defenses"— Owner's responsibility for latent ambiguities in design
§ 12:55	Performance bond surety's "contract defenses"— Owner's implied duty of cooperation
§ 12:56	Performance bond surety's "contract defenses"— Owner's responsibility for differing site conditions
§ 12:57	Performance bond surety's "contract defenses"— Owner's failure to properly administer contract
§ 12:58	Performance bond surety's "contract defenses"— Owner's failure to properly administer contract—Change order resolution

§ 12:59	Performance bond surety's "contract defenses"— Owner's failure to properly administer
	contract—Owner nonpayment
§ 12:60	Performance bond surety's "contract defenses"—
	Owner's failure to properly administer
	contract—"Cardinal" changes
§ 12:61	Performance bond surety's "contract defenses"—
Ü	Owner's failure to properly administer
	contract—Failing to give direction
§ 12:62	Performance bond surety's "contract defenses"—
3 12.02	Impossibility/impracticability of performance
§ 12:63	Performance bond surety's "contract defenses"—
§ 12.00	Owner's implied waiver of contract
	requirements
\$ 10.64	•
§ 12:64	Performance bond surety's "contract defenses"—
	Owner's insistence upon strict compliance in
0.40.05	face of economic waste
§ 12:65	Performance bond surety's "contract defenses"—
	Hypertechnical inspection
§ 12:66	Performance bond surety's "contract defenses"—
	Fraud, misrepresentation and duress
§ 12:67	Performance bond surety's "contract defenses"—
	Release or settlement of claims
§ 12:68	Contractor's dispute resolution rights against
	owner
§ 12:69	Performance bond surety's "bond defenses"—
	Generally
§ 12:70	Performance bond surety's "bond defenses"—
3	Material alteration of bonded contract
§ 12:71	Performance bond surety's "bond defenses"—
5 12.11	Changes in the obligee or the principal
§ 12:72	Performance bond surety's "bond defenses"—
8 12.12	Obligee's improper payment or nonpayment of
	contract funds
8 10.79	
§ 12:73	Performance bond surety's "bond defenses"—
0.40 = 4	Statutory exoneration defenses
§ 12:74	Performance bond surety's "bond defenses"—
	Obligee's failure to give timely notice of default
§ 12:75	Performance bond surety's "bond defenses"—
	Contractual and statutory limitations on time
	for commencement of suit
§ 12:76	Performance bond surety's "bond defenses"—
	Fraud or misrepresentation
§ 12:77	Performance bond surety's "bond defenses"—
	Extension of time

§ 12:78	Performance bond surety's options upon triggering of its bond obligation—Generally
§ 12:79	Performance bond surety's options upon triggering of its bond obligation—Financing the principal
§ 12:80	Performance bond surety's options upon triggering of its bond obligation—Surety's option to take over and complete
§ 12:81	Performance bond surety's options upon triggering of its bond obligation—Surety's tender of completing contractor
§ 12:82	Performance bond surety's options upon triggering of its bond obligation—Surety's "buy back" of bond
§ 12:83	Performance bond surety's options upon triggering of its bond obligation—Surety's Declination ("Do Nothing") Option

III. DESIGN-BUILD FROM PERFORMANCE BOND SURETY'S PERSPECTIVE

§ 12:84	Generally
§ 12:85	Surety concerns about design-build risks
§ 12:86	Surety's assessment of specific design-build risks
§ 12:87	Surety's assessment of specific design-build risks—First level of analysis—Bond coverage
§ 12:88	Surety's assessment of specific design-build risks—Second level of analysis—Unique design- build considerations
§ 12:89	Surety's assessment of specific design-build risks—Second level of analysis—Design inadequacy and miscoordination risks
§ 12:90	Surety's assessment of specific design-build risks—Second level of analysis—Scope of design/performance risks
§ 12:91	Surety's assessment of specific design-build risks—Second level of analysis—Construction conformance risks
§ 12:92	Surety's assessment of specific design-build risks—Second level of analysis—Disclaimers and limitations of liability or damages
§ 12:93	Design-build from performance bond surety's perspective—Surety's assessment of specific design-build risks—Second level of analysis—Differing site conditions risks

- § 12:94 Design-build from performance bond surety's perspective—Surety's assessment of specific design-build risks—Second level of analysis—Insurance gaps, conflicts and deficiencies in coverage
- § 12:95 Organization of bond principal to limit surety's exposure
- § 12:96 Surety's rights in design-build setting

IV. SURETY'S EQUITABLE RIGHTS

- § 12:97 Generally
- § 12:98 Exoneration and quia timet
- § 12:99 Indemnification, reimbursement, and restitution
- § 12:100 Subrogation
- § 12:101 Contribution—Co-suretyship and sub-suretyship

V. SURETY'S RIGHTS TO RETAINAGE AND OTHER CONTRACT FUNDS

- § 12:102 Theories of entitlement
- § 12:103 Surety salvage—Claim recoveries vs. contract funds
- § 12:104 Surety salvage—Federal projects
- § 12:105 Surety salvage—Governmental immunity
- § 12:106 Surety salvage—Performance bond vs. payment bond
- § 12:107 Surety salvage—Bankruptcy

VI. BANKRUPTCY AND THE COMPLETING SURETY

- § 12:108 Generally
- § 12:109 Prepetition activities that may influence the surety's rights and obligations postpetition—Generally
- § 12:110 Prepetition activities that may influence the surety's rights and obligations postpetition—
 Prepetition financing of the principal by the surety
- § 12:111 Prepetition activities that may influence the surety's rights and obligations postpetition—
 Prepetition termination of bonded contracts

cxviii

§ 12:112	Prepetition activities that may influence the surety's rights and obligations postpetition—Principal's waiver of the automatic stay
§ 12:113	Prepetition activities that may influence the surety's rights and obligations postpetition—Filing the general indemnity agreement as a financing statement
§ 12:114	Postpetition challenges and options for the completing surety—Generally
§ 12:115	Postpetition challenges and options for the completing surety—Notifying obligee of interest in bonded contract funds prior to lifting the automatic stay
§ 12:116	Postpetition challenges and options for the completing surety—Securing bonded contract funds
§ 12:117	Postpetition challenges and options for the completing surety—Gaining control of the bonded contracts—Saga of the executory contract
§ 12:118	Postpetition challenges and options for the completing surety—Securing the debtor's subcontractors and equipment in aid of contract performance
§ 12:119	Postpetition challenges and options for the completing surety—Postpetition financing by the surety

CHAPTER 13. INSPECTION AND ACCEPTANCE OF WORK

I. GENERAL CONSIDERATIONS

- § 13:1 Inspection's goal of assuring conformance
- § 13:2 Distinction between "quality control" and "quality assurance"
- § 13:3 Implications of legal doctrines of strict compliance and economic waste in judging conformance of work
- § 13:4 Implications of owner observation of work— Mitigation, practical interpretation, and constructive waiver
- § 13:5 Implications of owner "approval" of contractor's work plan, plant, or equipment
- § 13:6 Implications of owner "approval" of materials

- § 13:7 Implications of owner design inadequacy
- § 13:8 Implications of owner "field control"
- § 13:9 Implications of degree of hazardous risk

II. INSPECTION RIGHTS

- § 13:10 Inspection rights in federal procurement
- § 13:11 Inspection rights in private construction

III. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) INSPECTIONS

- § 13:12 Generally
- § 13:13 OSHA enforcement proceedings
- § 13:14 OSHA enforcement proceedings—Appeals from OSHA citations
- § 13:15 OSHA enforcement proceedings—Effect of OSHA violations on related civil litigation
- § 13:16 OSHA enforcement proceedings—Vicarious liability for OSHA violations

IV. BUILDING CODES AND INSPECTION REQUIREMENTS

- § 13:17 State and local building codes requirements
- § 13:18 The International Building Code and Inspection Requirements—Generally
- § 13:19 The International Building Code and Inspection Requirements—Building official inspections
- § 13:20 The International Building Code and Inspection Requirements—"Special inspections" of structural work
- § 13:21 The International Building Code and Inspection Requirements—Fire code inspections under international fire code
- § 13:22 The International Building Code and Inspection Requirements—Liability of public building officials for negligent inspections—"Public duty" doctrine
- § 13:23 The International Building Code and Inspection Requirements—Sovereign immunity and inspection liability regarding Discretionary and Ministerial Acts

V. INSPECTION LIABILITY

§ 13:24	Inspection liability of federal government agencies under Federal Tort Claims Act (FTCA)
§ 13:25	Inspection liability of lenders
§ 13:26	Inspection liability of insurers
§ 13:27	Inspection Liability regarding suitability of existing structure
§ 13:28	Inspection liability of design professionals for death or bodily injury
§ 13:29	Inspection liability of owner agents for failure to catch defects in the work
§ 13:30	Inspection liability of owner agents to third parties for failing to discover another's breaches
§ 13:31	Inspection liability of owner agents to third parties for failing to discover another's breaches—Liability of inspectors for economic loss—Privity and economic loss doctrine
§ 13:32	Inspection liability of owner agents to third parties for failing to discover another's breaches—Proving proximate cause of loss or damage due to inspector's failure to catch defective work

VI. CONTRACTOR'S RESPONSIBILITY TO INSPECT WORK

§ 13:33 Generally

VII. INSPECTION FOR PURPOSE OF DETERMINING PAYMENT

§ 13:34	Generally
§ 13:35	Owner's failure to conduct required tests

VIII. INSPECTION AND TESTING PROCEDURES THAT CHANGE TERMS OF CONTRACT

§ 13:36	"Hypertechnical" inspection and constructive
	change doctrine
§ 13:37	Unspecified testing procedures for determining
	conformance
§ 13:38	Laboratory versus field tests
§ 13:39	Hyper-technical inspection
§ 13:40	Hyper-technical inspection—Unduly strict

inspection and the performance of extra work § 13:41 Hyper-technical inspection—Reasonableness standard § 13:42 Inspection that delays work

IX. INSPECTOR AUTHORITY

§ 13:43	Generally
§ 13:44	Actual authorority to alter contract
§ 13:45	Apparent authority to alter contract
§ 13:46	Ratification of inspector's actions
§ 13:47	Acceptance of nonconforming work
§ 13:48	Federal Contracting—Generally
§ 13:49	Federal contracting—Implied authority
§ 13:50	Federal contracting—Contractual significance of inspector's approval or silence
§ 13:51	Evidentiary significance of inspector's failure to object

X. INSPECTION OF GOODS UNDER UNIFORM COMMERCIAL CODE

§ 13:52 Generally

XI. ACCEPTANCE OF WORK

3 13:53	Express and implied acceptance as form of waiver
3:54	Contractual approaches to handling consequences of acceptance
3:55	Acceptance of goods under Uniform Commercial Code
3:56	Acceptance doctrine—Defense to third-party liability
3 13:57	Acceptance in federal contracting— Conclusiveness of acceptance and waiver of rights
3 13:58	Acceptance in federal contracting—Significance of acceptance in government contracting contrasted with private contracting
3:59	Acceptance in federal contracting—Latent defect exception to the conclusiveness of acceptance
3 13:60	Acceptance in federal contracting—Latent defect exception to the conclusiveness of acceptance—Establishing existence of a "latent" defect

cxxii

DI	ALTE	TIT	m
IJĦ	IFA	чUI	Hill:

§ 13:61	Acceptance in federal contracting—Latent defect exception to the conclusiveness of acceptance— "Latent" defect was present at time of acceptance
§ 13:62	Acceptance in federal contracting—Latent defect exception to the conclusiveness of acceptance— "Latent" defect not discoverable through reasonable inspection procedures
§ 13:63	Acceptance in federal countracting—Latent defect exception to the conclusiveness of acceptance—What is reasonable inspection?
§ 13:64	Acceptance in federal contracting—Doctrines of strict compliance and economic waste in federal contracting
§ 13:65	Acceptance in federal contracting—Cause in fact—Allocating responsibility where both contractor and government are at fault
§ 13:66	Acceptance in federal contracting—Necessity of linking "defect" to claimed damages
§ 13:67	Acceptance in federal contracting—Latent design defects and credit based upon useful life analysis
§ 13:68	Acceptance in contracting—Limitations on government's remedies for latent defects
§ 13:69	Acceptance in federal contracting—Untimely claims

XII. BUYER'S RIGHTS UPON TENDER OF NONCONFORMING GOODS

§ 13:70	General U.C.C. principles
§ 13:71	Revoking acceptance of defective goods that
	substantially impair value to buyer
§ 13:72	Revocation rights after substantial alteration of accepted goods
§ 13:73	Buyer's obligation to act timely in accepting or rejecting goods
§ 13:74	Revocation must be timely made
§ 13:75	Damages available based upon acceptance, rejection, or revocation

XIII. ACCEPTANCE AS FORM OF WAIVER OR ESTOPPEL LIMITING RECOVERY FOR DEFECTIVE WORK IMPLICATIONS OF FINAL PAYMENT

§ 13:76	Generally
§ 13:77	Common-law doctrine of waiver
§ 13:78	Determining intention—When can owner be
	deemed to have knowingly accepted
	nonconforming work?
§ 13:79	Dual agent's acceptance of nonconforming work
§ 13:80	Acceptance by owner of work containing
	observable defects constituting waiver of right
	to assert claim for such defects
§ 13:81	
	recover for nonconforming work

CHAPTER 14. DIFFERING SITE CONDITIONS

I. GENERAL CONSIDERATIONS

§ 14:1 Construction industry's "great risk"
 § 14:2 Geotechnical engineering: Science of soil mechanics and art of soil exploration

II. UNANTICIPATED SOIL AND SITE CONDITIONS CAUSING CHANGES IN CONSTRUCTION MEANS AND METHODS

§ 14:3	Generally
§ 14:4	Inadequate bearing capacity
§ 14:5	"Tough" clay and cemented soils
§ 14:6	"Soft" clay soils
§ 14:7	Boulders
§ 14:8	Rock
§ 14:9	Groundwater
§ 14:10	Soils unsuitable as fill
§ 14:11	Surface water from extraordinary weather
§ 14:12	High tides, unanticipated lake and river elevations and heavy currents
§ 14:13	Permafrost
§ 14:14	Man-made obstructions and nonsoil/water conditions
§ 14:15	Soil exploration and site survey deficiencies
§ 14:16	Environmental issues

III. SOIL EXPLORATION FOR DESIGN AND

cxxiv

CONSTRUCTION: FORESEEING PROBLEMS AND PREVENTING DISPUTES

§ 14:17	Generally
§ 14:18	Standard guidelines for soil exploration
§ 14:19	Standard guidelines for soil exploration—
	Recognizance of area
§ 14:20	Standard guidelines for soil exploration—Field exploration of site
§ 14:21	Standard guidelines for soil exploration— Interpretation and reporting of results
§ 14:22	Owner and design professional liability for negligent geotechnical exploration and reporting

IV. AMERICAN COMMON-LAW ALLOCATION OF DIFFERING SITE CONDITIONS

§ 14:23	Generally
§ 14:24	Contractor risk under doctrine of "sanctity of contract"
§ 14:25	Owner risk of contract scope—Implications of "extra work" outside scope of contractor's "undertaking"
§ 14:26	Owner risk of contract scope—Interpretation of contract scope
§ 14:27	Owner risk of contract scope—"Extra work" clauses
§ 14:28	Owner risk of defective design—Implications of dependency of foundation design upon soils and of owner's implied warranty of adequacy of its detailed design plans and specifications
§ 14:29	Owner risk of misrepresentation—Implications of affirmative misrepresentation of site conditions
§ 14:30	Owner risk of misrepresentation—Positive misrepresentation
§ 14:31	Owner risk of misrepresentation—Materiality of misrepresentation
§ 14:32	Owner risk of misrepresentation—Inducement to bid or enter into contract
§ 14:33	Owner risk of misrepresentation—Justifiable reliance upon misrepresentation
§ 14:34	Owner risk of misrepresentation—Public policy considerations concerning enforcement of

	disclaimers
§ 14:35	Owner risk of misrepresentation—Interpretation of disclaimers—Specific representations prevail over general disclaimers
§ 14:36	Owner risk of misrepresentation—Policy considerations for disclaiming interpretative opinions but not factual information
§ 14:37	Owner risk of misrepresentation—Policy considerations for refusing to enforce duty to conduct detailed site exploration under general site examination requirement
§ 14:38	Owner risk of misrepresentation—Policy considerations for disallowing general knowledge about soils conditions in locale to override specific misrepresentations
§ 14:39	Owner risk of misrepresentation—Policy considerations surrounding disclaimers that exclude misrepresented soils information from contract documents
§ 14:40	Owner risk of misrepresentation—Policy considerations allowing enforcement of specific disclaimers of fact
§ 14:41	Owner risk of nondisclosure—Implications of wrongful withholding of information
§ 14:42	Owner's risk of mistake—Implications of mutual or induced mistake regarding site conditions
§ 14:43	Acceptance of Risk—Implications of a voluntary promise to pay additional compensation
§ 14:44	Owner's risk of impossibility—Excuse for contractual nonperformance

V. MODERN DIFFERING SITE CONDITION CLAUSES

clause and site inspection clause	ring ed
§ 14:46 Modern differing site conditions clauses—I general	n
§ 14:47 Purpose of modern clauses	
§ 14:48 Grounds for relief under modern differing conditions clauses—Type I and Type II cla	
§ 14:49 Grounds for relief under modern differing conditions clauses—Subsurface or latent	site

	existing physical conditions at site
§ 14:50	Grounds for relief under modern differing site conditions clauses—Actual conditions must differ "materially"
§ 14:51	Type I conditions—Erroneous "indications" in contract documents
§ 14:52	Type I conditions—Reliance upon reasonably inferred indications
§ 14:53	Type II conditions—Unknown and of unusual nature
§ 14:54	Justifiable reliance in face of contractual site investigation duties and disclaimers
§ 14:55	Justifiable reliance in face of contractual site investigation duties and disclaimers—Site investigation duty
§ 14:56	Justifiable reliance in face of contractual site investigation duties and disclaimers— Enforceability of disclaimers
§ 14:57	Notice of differing site conditions
§ 14:58	Owner's postnotice investigation
§ 14:59	Differing sites conditions clause in relation to unit price and variation in estimated quantities provisions

Volume 5

CHAPTER 15. RISKS OF CONSTRUCTION TIME: DELAY, SUSPENSION, ACCELERATION AND DISRUPTION

§ 15:1	Time: Critical construction resource
§ 15:2	Construction scheduling: Invaluable art and complex science
§ 15:3	Construction scheduling: Invaluable art and complex science—Early views of construction time and evolution of construction scheduling
§ 15:4	Construction scheduling: Invaluable art and complex science—Bar chart
§ 15:5	Construction scheduling: Invaluable art and complex science—Critical path method
§ 15:6	Construction scheduling: Invaluable art and

cxxvii

	complex science—Critical path method— Origins of critical path method as scheduling tool
§ 15:7	Construction scheduling: Invaluable art and complex science—Critical path method— Constraints on effectiveness of CPM schedule
§ 15:8	Construction scheduling: Invaluable art and complex science—Critical path method—Developing realistic CPM "baseline" schedule
§ 15:9	Construction scheduling: Invaluable art and complex science—Critical path method—Concept of "float"
§ 15:10	Construction scheduling: Invaluable art and complex science—Critical path method—Updating schedule during construction
§ 15:11	Contract time within "limits of the undertaking"
§ 15:12	Contract time within "limits of the undertaking"—Parameters of contract time: defining start and completion dates
§ 15:13	Contract time within "limits of the undertaking"—Parameters of contract time: defining start and completion dates—Time of commencement
§ 15:14	Contract time within "limits of the undertaking"—Parameters of contract time: defining start and completion dates—Time of completion
§ 15:15	Contract time within "limits of the undertaking"—Parameters of contract time: defining start and completion dates—Time of completion—Substantial completion
§ 15:16	Contract time within "limits of the undertaking"—Parameters of contract time: defining start and completion dates—Time of completion—Final completion
§ 15:17	Contract time within "limits of the undertaking"—Materiality of contract time
§ 15:18	Contract time within "limits of the undertaking"—Materiality of contract time—Materiality of time created during performance
§ 15:19	Contract time within "limits of the
cxxviii	

	undertaking"—Materiality of contract time—Materiality of time created by exercise of unilateral right to fix time of performance
§ 15:20	Contract time within "limits of the undertaking"—Materiality of contract time—Waiver of materiality of timely performance
§ 15:21	Contract time within "limits of the undertaking"—Implication of scheduled early completion
§ 15:22	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"
§ 15:23	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"—Implications of foreseeability of performance risks at time of contracting
§ 15:24	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"— Implications of legal "control"
§ 15:25	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"— Implications of exercise of actual physical "control"
§ 15:26	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"— Implications of fault, negligence or bad faith
§ 15:27	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"— Implications of failure to avoid or mitigate
§ 15:28	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"— Implications of legal impracticability
§ 15:28.50	Common-law allocation of risks impacting timely performance: Doctrine of Force Majeure and concept of "control"—Remedies for force majeure: Time extension or termination
§ 15:29	Delay: Using principle of "control" to assess liability for time impacts that delay performance

§ 15:30	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"
§ 15:31	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to foreseeable site, design or construction problems
§ 15:32	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay of subcontractors or suppliers
§ 15:33	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to contractor's failure to properly coordinate its subcontractors and suppliers
§ 15:34	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay in commencing work
§ 15:35	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to financial difficulty
§ 15:36	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to foreseeable "normal" weather
§ 15:37	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to foreseeable strikes and other labor problems

§ 15:38	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to defective or nonconforming work
§ 15:39	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to untimely availability of conforming materials or equipment
§ 15:40	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"— "Inexcusable" delay due to untimely or defective contractor design
§ 15:41	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Inexcusable" delay: Delay within the contractor's "control"—Other "inexcusable" causes
§ 15:42	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Excusable" delay: Delay outside the "control" of both contracting parties
§ 15:43	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Excusable" delay: Delay outside the "control" of both contracting parties—"Excusable" delay due to "abnormal" weather
§ 15:44	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Excusable" delay: Delay outside the "control" of both contracting parties—"Excusable" delay due to unforeseeable strikes and labor problems
§ 15:45	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Excusable" delay: Delay outside the "control" of both contracting parties—"Excusable" delay due to sovereign

0.45.40	acts of government
§ 15:46	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Excusable" delay: Delay
	outside the "control" of both contracting parties—"Excusable" delay due to acts of God
§ 15:47	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Excusable" delay: Delay
	outside the "control" of both contracting parties—"Excusable" delay due to acts of the public enemy
§ 15:48	Delay: Using principle of "control" to assess
\$ 10.40	liability for time impacts that delay
	performance—"Excusable" delay: Delay
	outside the "control" of both contracting
	parties—"Excusable" delay due to
	unavailability of materials
§ 15:49	Delay: Using principle of "control" to assess
	liability for time impacts that delay
	performance—"Excusable" delay: Delay
	outside the "control" of both contracting
	parties—"Excusable" delay due to
0.45.50	unenumerated causes
§ 15:50	Delay: Using principle of "control" to assess
	liability for time impacts that delay
	performance—"Compensable" delay: Delay within the contractee's "control"
§ 15:51	Delay: Using principle of "control" to assess
8 19.91	liability for time impacts that delay
	performance—"Compensable" delay: Delay
	within the contractee's "control"—
	"Compensable" delay due to providing
	untimely or restricted access to site
§ 15:52	Delay: Using principle of "control" to assess
	liability for time impacts that delay
	performance—"Compensable" delay: Delay
	within the contractee's "control"—
	"Compensable" delay due to untimely
8 15 50	issuance of notice to proceed
§ 15:53	Delay: Using principle of "control" to assess
	liability for time impacts that delay performance—"Compensable" delay: Delay
	within the contractee's "control"—
	"Compensable" delay due to failure to
	- 1

	properly administer contract payment and other material provisions
§ 15:54	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to untimely delivery of conforming owner-furnished materials, equipment or work
§ 15:55	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to failure to coordinate multiple contractors
§ 15:56	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to failure to coordinate participating owners
§ 15:57	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to failure to provide contract "direction"
§ 15:58	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to untimely response to shop drawings and submittals
§ 15:59	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to unreasonable inspection or rejection
§ 15:60	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to failure to furnish adequate design documents and to timely correct their deficiencies

§ 15:61	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to inaccurate, withheld or untimely material information
§ 15:62	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to failure to manage site conditions within one's control
§ 15:63	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to interference with contractor's work force or work plan
§ 15:64	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to change orders or failure to manage change order process
§ 15:65	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to differing site conditions
§ 15:66	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Compensable" delay: Delay within the contractee's "control"— "Compensable" delay due to otherwise noncompensable delays that would not have been encountered but for earlier compensable delay
§ 15:67	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Concurrent" delay
§ 15:68	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Concurrent" delay—Analysis of impact of concurrent events upon critical and noncritical activities: Importance of

	CPM scheduling	
§ 15:69	Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Concurrent" delay—	
§ 15:70	Consequence of "pacing" Delay: Using principle of "control" to assess liability for time impacts that delay performance—"Apportioned" delay	
§ 15:71	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Timely notice of delay	
§ 15:72	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks	
§ 15:73	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks—Contractual conversion for "inexcusable" into "excusable" delay: Time extension clause	
§ 15:74	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks—Contract conversion of "excusable" into "compensable" delay: "Pay for excusable delay" clause	
§ 15:75	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks— Contractual conversion of "compensable delay" into "excusable delay": "No damage for delay" clause	
§ 15:76	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks— Contractual conversion of "compensable delay" into "excusable delay": "No damage for delay" clause—"Fraud, misrepresentation or other bad faith" exception	
§ 15:77	Delay: Using principle of "control" to assess liability for time impacts that delay	

	performance—Contractual modification of common-law allocation of delay risks— Contractual conversion of "compensable delay" into "excusable delay": "No damage for delay" clause—"Active interference" exception
§ 15:78	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks—Contractual conversion of "compensable delay" into "excusable delay": "No damage for delay" clause—"Unreasonable delay" exception
§ 15:79	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks—Contractual conversion of "compensable delay" into "excusable delay": "No damage for delay" clause—"Not contemplated by the parties" exception
§ 15:80	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks— Contractual conversion of "compensable delay" into "excusable delay": "No damage for delay" clause—Waiver of the "no damage for delay" clause or its exceptions
§ 15:81	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks—Contractual limitation of amount recoverable as delay damages: "Limitation on delay damages" clause
§ 15:82	Delay: Using principle of "control" to assess liability for time impacts that delay performance—Contractual modification of common-law allocation of delay risks—Contractual "liquidation" of "inexcusable" delay damages: "Liquidated damages" clause
§ 15:82.51	Delay: Using principle of "control" to assess liability for time impacts that delay performance— Undercompensatory liquidated damages

§ 15:82.52	Delay: Using principle of "control" to assess liability for time impacts that delay performance— Interpretation of Liquidated Damage Clauses: Remedies vs. Alternative Performances
§ 15:83	Suspension of work: Contractually authorized "compensable" delay
§ 15:84	Suspension of work: Contractually authorized "compensable" delay—Origin of "suspension of work" clause
§ 15:85	Suspension of work: Contractually authorized "compensable" delay—Standard form "suspension of work" clauses
§ 15:86	Suspension of work: Contractually authorized "compensable" delay—Directed suspension
§ 15:87	Suspension of work: Contractually authorized "compensable" delay—Constructive suspension
§ 15:88	Suspension of work: Contractually authorized "compensable" delay—Voluntary suspension
§ 15:89	Acceleration: Compression of contract time
§ 15:90	Acceleration: Compression of contract time— "Acceleration" distinguished from "delay" and "disruption"
§ 15:91	Acceleration: Compression of contract time— "Normal" acceleration distinguished from "abnormal" acceleration
§ 15:92	Acceleration: Compression of contract time— Compensable "directed" acceleration
§ 15:93	Acceleration: Compression of contract time— Contractual conversion of compensable acceleration to noncompensable acceleration: "No pay for acceleration" clause
§ 15:94	Acceleration: Compression of contract time— "Constructive" acceleration
§ 15:95	Acceleration: Compression of contract time— "Constructive" acceleration—"Excusable" or "compensable" delay justifying an extension of time
§ 15:96	Acceleration: Compression of contract time— "Constructive" acceleration—Notice of delaying event and request for extension of time
§ 15:97	Acceleration: Compression of contract time— "Constructive" acceleration—Wrongful refusal or failure to grant additional time

cxxxvii

§ 15:98	Acceleration: Compression of contract time— "Constructive" acceleration—Express or
0.17.00	implied direction to accelerate
§ 15:99	Acceleration: Compression of contract time— "Constructive" acceleration—Notice of a claim for constructive acceleration
§ 15:100	Acceleration: Compression of contract time— "Constructive" acceleration—Actual acceleration and incurrence of damages
§ 15:101	Acceleration: Compression of contract time—
0.17.100	Noncompensable "voluntary" acceleration
§ 15:102	"Disruption": Reduction in expected productivity
§ 15:103	"Disruption": Reduction in expected productivity—"Disruption" distinguished from delay and suspension
§ 15:104	"Disruption": Reduction in expected
3 10.101	productivity—"Disruption" distinguished
	from "acceleration"
§ 15:105	"Disruption": Reduction in expected
§ 10.100	productivity—Causes of productivity
	variation
\$ 15.100	
§ 15:106	"Disruption": Reduction in expected
	productivity—Causes of productivity
	variation—Resource vulnerabilities to
0 4 5 4 0 5	environmental conditions
§ 15:107	"Disruption": Reduction in expected
	productivity—Causes of productivity
	variation—Resource vulnerabilities to
	environmental conditions—Temperature and
	humidity
§ 15:108	"Disruption": Reduction in expected
	productivity—Causes of productivity
	variation—Resource vulnerabilities to
	environmental conditions—Wind
§ 15:109	"Disruption": Reduction in expected
	productivity—Causes of productivity
	variation—Resource vulnerabilities to
	environmental conditions—Precipitation
§ 15:110	"Disruption": Reduction in expected
	productivity—Causes of productivity
	variation—Resource vulnerabilities to
	environmental conditions—Ground
	conditions
§ 15:111	"Disruption": Reduction in expected
	-

cxxxviii

	productivity—Causes of productivity variation—Resource vulnerabilities to quality, capacity and availability limitations
§ 15:112	"Disruption": Reduction in expected productivity—Causes of productivity
	variation—Resource vulnerabilities to project mismanagement
§ 15:113	"Disruption": Reduction in expected
	productivity—Causes of productivity variation—Resource vulnerabilities to "wear and tear"
§ 15:114	"Disruption": Reduction in expected
	productivity—Measurement of "abnormal" disruption
§ 15:115	"Disruption": Reduction in expected
	productivity—Measurement of "abnormal"
	disruption—Baseline for disruption measurement
§ 15:116	"Disruption": Reduction in expected
	productivity—Measurement of "abnormal" disruption—"Measured mile" method
§ 15:117	"Disruption": Reduction in expected
	productivity—Measurement of "abnormal"
	disruption—Other disruption measurement methods
§ 15:118	"Disruption": Reduction in expected
0.45.440	productivity—"Compensable disruption"
§ 15:119	"Disruption": Reduction in expected productivity—"Cumulative impact"
§ 15:120	Proving time impacts
§ 15:121	Proving time impacts—Burden of proof
§ 15:122	Proving time impacts—Problems in proving time impacts with a bar chart schedule
§ 15:123	Proving time impacts—Use of critical path method in time impact analysis
§ 15:124	Proving time impacts—Use of critical path method in time impact analysis— Determination of time impact during construction
§ 15:125	Proving time impacts—Use of critical path method in time impact analysis— Determination of time impact during construction—Consideration of "float"
§ 15:126	Proving time impacts—Use of critical path method in time impact analysis—

cxxxix

	Determination of time impact during construction—Sorting out concurrencies
§ 15:127	Proving time impacts—Use of critical path method in time impact analysis— Vulnerability of CPM analysis to abuse
§ 15:128	Proving time impacts—Selecting appropriate analytical method for proving time impact
§ 15:129	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Baseline" for analysis: Understanding contractor's "as planned" schedule
§ 15:130	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Contemporaneous" analysis method
§ 15:131	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Historical" analysis methods
§ 15:132	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Historical" analysis methods—"As-planned versus as-built analysis" method
§ 15:133	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Historical" analysis methods—"Total time" method
§ 15:134	Proving time impacts—Selecting appropriate analytical method for proving time impact— "Historical" analysis methods—"Impacted as-planned" method
§ 15:135	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Historical" analysis methods—"Collapsed as-built" method
§ 15:136	Proving time impacts—Selecting appropriate analytical method for proving time impact—"Window analysis" method

CHAPTER 16. GOVERNMENTAL REGULATION: LICENSING AND PERMITTING

§ 16:1	Governmental regulation of construction
§ 16:2	Governmental regulation of construction—
	Regulatory role of building codes
§ 16:2.10	Governmental regulation of construction—Building

		code non-compliance and negligence per se
§	16:2.20	Governmental regulation of construction—Building code compliance and standard of care
§	16:3	Governmental regulation of construction— Regulatory role of occupational safety and workplace laws
§	16:4	Licensing design professional
	16:5	Licensing design professional—Statutory schemes
§	16:6	Licensing design professional—Statutory schemes—Regulated acts of design professionals
§	16:6.10	Licensing design professional—Statutory schemes— State requirements for sealing engineering documents: Responsible charge
§	16:6.15	Licensing design professional—Statutory schemes—What is "responsible charge"?
§	16:6.20	Licensing design professional—Statutory schemes— Regulations governing sealing drawings and other instruments of service
§	16:6.30	Licensing design professional—Statutory schemes— Improper sealing: Establishing causation and damages
§	16:7	Licensing design professional—Statutory schemes—Regulatory Exemptions
§	16:8	Licensing design professional—Corporate practice by licensed professionals
§	16:9	Licensing design professional—Design-build practice
§	16:10	Licensing design professional—Architecture vs. engineering
§	16:11	Licensing the construction professional
	16:12	Licensing the construction professional—Policy and purpose
§	16:13	Licensing the construction professional— Regulatory scope
§	16:14	Licensing the construction professional— Regulatory scope—Exemptions
§	16:15	Licensing the construction professional— Construction managers
§	16:16	Licensing the construction professional— Prequalification requirements
§	16:17	Consequences of noncompliance
_	16:18	Consequences of noncompliance—Civil

	sanctions
§ 16:19	Consequences of noncompliance—Civil
	sanctions—Absence of express statutory
	prohibition
§ 16:20	Consequences of noncompliance—Civil
	sanctions—Substantial compliance vs. strict
	compliance
§ 16:21	Consequences of noncompliance—Civil
_	sanctions—Theories of recovery
§ 16:22	Consequences of noncompliance—Right to
	recover money back from unlicensed
0.1000	construction professional
§ 16:23	Consequences of noncompliance—Right to
	recover money back from unlicensed
	construction professional—Derivative effects of nonlicensure
\$ 16.94	
§ 16:24	Consequences of noncompliance— Administrative sanctions: Overview
\$ 16.95	
§ 16:25	Consequences of noncompliance— Administrative sanctions: Overview—
	Administrative sanctions: Overview— Administrative sanctions: Authority of license
	boards
§ 16:26	Consequences of noncompliance—
3 10.20	Administrative sanctions: Overview—
	Administrative sanctions: Procedural due
	process requirements
§ 16:27	Criminal sanctions
§ 16:28	Foreign incorporation requirements: Taxing
	authority
§ 16:29	Foreign incorporation requirements: Taxing
	authority—Level of activity required before
	one is deemed to have transacted business

CHAPTER 17. DESIGN PROFESSIONALS: ROLES AND RESPONSIBILITIES

	0 - 1,0
§ 17:1	Rise of design professions
§ 17:2	Rise of design professions—Project delivery
	systems: Traditional approach and beyond
§ 17:3	Rise of design professions—Evolving landscape of designer liability
§ 17:4	Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator
	and quasi-adjudicator

§ 17:5	Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as "independent contractor" for design services
§ 17:6	Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as agent during construction
§ 17:7	Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as agent during construction—Imputing designer's actions to owner
§ 17:8	Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as agent during construction—Scope of designer's authority
§ 17:9	Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as interpreter and arbiter
§ 17:10	Standard of care: Duty of care
§ 17:11	Standard of care: Duty of care—Contract and tort approaches determining designer's standard of care
§ 17:11.30	Standard of care: Duty of care—To whom does the design professional owe a duty of care?
§ 17:11.70	Standard of care: Duty of care—Foreseeability and control as twin influences in defining the boundaries of duty
§ 17:12	Standard of care: Duty of care—Contract and tort approaches determining designer's standard of care—Reasons for distinguishing between designer liability in tort and contract
§ 17:13	Standard of care: Duty of care—Contracting to higher standard of care
§ 17:13.10	Standard of care: Duty of care—Federal government's design-within-funding-limitations clause
§ 17:13.20	Standard of care: Duty of care—Warranting an end result or level of effort
§ 17:13.30	Standard of care: Duty of care—Incorporating standard of care language into the contract

§ 17:13.40	Standard of care: Duty of care—Altering the designer's standard of care via the scope of its contractual undertaking
§ 17:13.50	Standard of care: Duty of care—Effect of contract on duty owed to non-privity parties
§ 17:14	Standard of care: Duty of care—Establishing standard of care: Need for expert testimony
§ 17:14.10	Standard of care: Duty of care—Professional vs. ordinary negligence
§ 17:14.15	Standard of care: Duty of care—Establishing breach of a duty without expert testimony
§ 17:14.20	Standard of care: Duty of care—Must the expert be licensed to opine about a licensed professional?
§ 17:14.25	Standard of care: Duty of care—Evaluating the expert's opinions
§ 17:14.30	Standard of care: Duty of care—Trial court as gatekeeper of expert testimony
§ 17:14.35	Standard of care: Duty of care—Conclusory and speculative opinions inadmissible
§ 17:14.50	Standard of care: Duty of care—Certificate of merit statutes
§ 17:15	Standard of care: Duty of care—Violating building code or other government standards
§ 17:16	Theories of design professional liability
§ 17:17	Theories of design professional liability— Contractual liability
§ 17:17.50	Third-party beneficiary liability
§ 17:18	Theories of design professional liability— Contractual liability—Standard form design agreements
§ 17:19	Theories of design professional liability— Negligence Liability
§ 17:20	Theories of design professional liability— Negligence Liability—Comparative fault
§ 17:21	Theories of design professional liability— Contribution
§ 17:21.10	Theories of design professional liability— Contribution and malpractice liability: New York law
§ 17:22	Theories of design professional liability— Contribution—Effect of settlements on tort contribution rights
§ 17:23	Theories of design professional liability—
1'	

 cxliv

0	15.04	Contribution—Joint and several liability
8	17:24	Theories of design professional liability— Warranty liability
§	17:25	Theories of design professional liability— Strict liability
§	17:26	Theories of design professional liability— Liability in fraud
§	17:27	Theories of design professional liability— Liability for negligent misrepresentation
§	17:28	Theories of design professional liability— Liability for defamation
§	17:29	Theories of design professional liability— Liability for tortious interference with contractual relations
§	17:30	Theories of design professional liability— Liability to third-party beneficiaries
§	17:31	Theories of design professional liability— Indemnity liability
§	17:32	Theories of design professional liability— Liability for environmental injury
§	17:33	Theories of design professional liability— Liability for environmental injury— Expanding role of environmental statutory liability in construction
§	17:34	Theories of design professional liability— Liability for nuisance
§	17:35	Theories of design professional liability— Liability for abnormally dangerous activities
§	17:36	Theories of design professional liability— Liability for trespass
§	17:37	Theories of design professional liability— Liability under Americans with Disabilities Act
§	17:38	Theories of design professional liability— Personal liability of design professionals
§	17:38.50	"Green" development and the designer's rights and responsibilities for sustainable design
§	17:38.51	Why green buildings?
§	17:38.52	Green cost premium: Perception vs. reality
§	17:38.53	Managing green expectations
-	17:38.54	Green payback
§	17:38.55	U.S. Green Building Council's leadership in energy and environmental design (LEED) rating system
§	17:38.56	Energy performance contracting

State and local incentives for sustainable development
Challenges presented by state and local green initiatives
Green building codes and negligence per se
Challenges of green contracting
Standard of care
Green liability
Designing for the future, the incorporation of resilience concepts when assessing the impact of climate change over project life
Specific undertakings that pose liability concerns for design professionals
Specific undertakings that pose liability concerns for design professionals—Liability for failing to advise owner about flaws in another professional's report
Specific undertakings that pose liability concerns for design professionals—Liability for defective plans and specifications
Specific undertakings that pose liability concerns for design professionals—Designer liability for preliminary design documents
Specific undertakings that pose liability concerns for design professionals—Liability for defective plans and specifications— Construction means and methods
Specific undertakings that pose liability concerns for design professionals—Liability for defective plans and specifications— Design errors cast as misrepresentations
Specific undertakings that pose liability concerns for design professionals—Liability for negligent cost estimation and construction budget services
Specific undertakings that pose liability concerns for design professionals—Liability for negligent cost estimation and construction budget services—Establishing cost estimation liability
Specific undertakings that pose liability concerns for design professionals—Liability for negligent cost estimation and construction budget services—Cost estimation damages
Specific undertakings that pose liability

cxlvi

DEFAULT

	concerns for design professionals—Liability for negligent cost estimation and construction budget services—Cost estimation errors as fraud or
§ 17:47	misrepresentation Specific undertakings that pose liability concerns for design professionals—Liability for negligent cost estimation and construction budget services—Cost estimation liability to third parties
§ 17:48	Specific undertakings that pose liability concerns for design professionals—Liability for material selection and substitutions
§ 17:49	Specific undertakings that pose liability concerns for design professionals—Liability for material selection and substitutions—Restrictive specifications
§ 17:50	Specific undertakings that pose liability concerns for design professionals—Liability for material selection and substitutions—Unsuitable materials
§ 17:51	Specific undertakings that pose liability concerns for design professionals—Liability for poorly coordinated specifications
§ 17:52	Specific undertakings that pose liability concerns for design professionals—Liability for negligent construction observation, inspection, and site visitations
§ 17:53	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site
§ 17:54	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site—Right to stop work
§ 17:55	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site—Temporary construction
§ 17:56	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site—Volunteering to undertake responsibility for safety
§ 17:57	Specific undertakings that pose liability

	concerns for design professionals—Design professional's responsibility for safe work site—Illinois law as representative of shifting attitudes toward designer responsibility for worker injuries
§ 17:58	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site—Knowledge of unsafe conditions
§ 17:59	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site—Accepted work doctrine
§ 17:59.50	Design immunity defense
§ 17:60	Specific undertakings that pose liability concerns for design professionals—Design professional's responsibility for safe work site—OSHA liability
§ 17:61	Specific undertakings that pose liability concerns for design professionals—Liability for negligent or untimely shop drawing review
§ 17:62	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification
§ 17:63	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification—Schedule of values
§ 17:64	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification—Front-end loading
§ 17:65	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification—Withholding payment certification
§ 17:66	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification—Certification of substantial completion
§ 17:67	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification—Certifications for benefit of third parties
§ 17:68	Specific undertakings that pose liability
cxlviii	

DEFAULT

	concerns for design professionals—Liability for negligent certification—Effect of designer's certification upon owner
§ 17:69	Specific undertakings that pose liability concerns for design professionals—Liability for negligent certification—Noncertification of contractor claims
§ 17:70	Delegation of duties—Introduction
§ 17:71	Delegation of duties—Design team consultants
§ 17:72	Delegation of duties—Designer's recovery rights from his consultants: Indemnity and contribution
§ 17:73	Delegation of duties—Delegation of design responsibility to contractor team
§ 17:73.10	Design delegation: Rights and responsibilities
§ 17:74	Delegation of duties—Delegation of design responsibility to contractor team— Incorporation of outside design elements
	into plans and specifications
§ 17:75	Delegation of duties—Delegation of design responsibility to contractor team—Liability following placement of designer's seal upon documents
§ 17:76	Delegation of duties—Delegation of design responsibility to contractor team— Performance specifications
§ 17:77	Delegation of duties—Delegation of design responsibility to contractor team—Design delegation AIA style
§ 17:78	Delegation of duties—Liability for plan stamping
§ 17:79	Designer as interpreter of plans and specifications and arbiter of disputes: Designer as decision-maker
§ 17:80	Designer as interpreter of plans and specifications and arbiter of disputes: Designer as decision-maker—Liability over aesthetics
§ 17:81	Designer's role as arbiter: Two world views
§ 17:82	Designer's role as arbiter: Two world views— Immunity
§ 17:83	Designer's role as arbiter: Two world views— Immunity—Review rights
§ 17:84	Designer's role as arbiter: Two world views—

	Extent of immunity: When is designer acting as arbiter?
§ 17:85	Ownership and use of design works: Protection by contract
§ 17:86	Ownership and use of design works: Protection by contract—Copyright protection for architectural works: Status of copyright protection for architects prior to 1990
§ 17:87	Ownership and use of design works: Protection by contract—Copyright protection for architectural works under Architectural Works Copyright Protection Act of 1990
§ 17:87.50	Ownership and use of design works: Protection by contract—Copyright litigation in the construction industry
§ 17:87.70	Statute of limitations governing actions under Federal Copyright Act
§ 17:88	Damages theories limiting recovery: Economic loss rule
§ 17:89	Damages theories limiting recovery: Economic loss rule—Origins of rule
§ 17:90	Damages theories limiting recovery: Economic loss rule—Application of rule to services
§ 17:91	Damages theories limiting recovery: Economic loss rule—Florida's experience with economic loss rule
§ 17:92	Damages theories limiting recovery: Economic loss rule—Tort duty arising from nature of parties' relationship
§ 17:92.50	Economic loss doctrine: Negligent misrepresentation exception as applied to construction professionals
§ 17:93	Damages theories limiting recovery: Economic loss rule—Sudden and calamitous event exception
§ 17:94	Damages theories limiting recovery: Economic loss rule—Property damage
§ 17:95	Damages theories limiting recovery: Economic loss rule—Mixed transactions
§ 17:96	Damages theories limiting recovery: Economic loss rule—Evolving concepts of duty and foreseeability: Doctrine in flux
§ 17:97	Damages theories limiting recovery: Economic loss rule—California's experience with economic loss doctrine

DEFAULT

§ 17:97.50	Damages theories limiting recovery: Economic loss rule—New York's experience with the economic loss doctrine
§ 17:98	Damages theories limiting recovery: Economic loss rule—Limitation-of-liability provisions
§ 17:98.04	No-damages-for-delay provisions
§ 17:98.05	Contractual provisions immunizing design professionals from liability
§ 17:98.10	Damages theories limiting recovery: Economic loss rule—Waivers of consequential damages
§ 17:98.20	Damages theories limiting recovery: Economic loss rule—Gross negligence and limitation of liability clauses: New York law
§ 17:98.21	Damages theories limiting recovery: Economic loss rule—New York's highest court attempts to distinguish "gross negligence" from "ordinary negligence"
§ 17:98.22	Damages theories limiting recovery: Economic loss rule—Gross negligence from the standpoint of duty and damages: New York law
§ 17:98.23	Damages theories limiting recovery: Economic loss rule—Purpose behind rule of not enforcing exculpatory clauses in cases of gross negligence
§ 17:98.30	Damages theories limiting recovery: Economic loss rule—Willful misconduct and limitation of liability clauses
§ 17:98.35	Damages theories limiting recovery: Economic loss rule—Exculpatory provisions in contracts procured through fraud
§ 17:98.40	Damages theories limiting recovery: Economic loss rule—Enforceability of exculpatory provisions under New York law
§ 17:98.50	Damages theories limiting recovery: Economic loss rule—Statutory restrictions on the enforcement of exculpatory provisions
§ 17:99	Damages theories limiting recovery: Economic loss rule—Betterment
§ 17:100	Damages theories limiting recovery—Many faces of the defense of betterment—Proration for expended useful life

CHAPTER 18. CONTRACT BREACH AND TERMINATION

§ 18:1 Construction's formidable task: Determining breach

	and assessing its materiality as basis for contract termination for cause
§ 18:2	Determining construction contract "breach" and "material breach"
§ 18:3	Consequences of wrong assessment of materiality of breach upon termination for cause
§ 18:4	Amorphous legal standard of material breach
§ 18:5	Construction industry's approach to determining materiality of breach
§ 18:6	Construction industry's approach to determining materiality of breach—Role of design professional in evaluation of material breach
§ 18:7	Construction industry's approach to determining materiality of breach—Role of design professional in evaluation of material breach—Design professional's certificates
§ 18:8	Construction industry's approach to determining materiality of breach—Role of design professional in evaluation of material breach—Design professional's evaluation of quality of work
§ 18:9	Construction industry's approach to determining materiality of breach—Role of design professional in evaluation of material breach—Design professional's evaluation of progress
§ 18:10	Construction industry's approach to determining materiality of breach—Role of code enforcement officials in evaluation of material breach
§ 18:11	Construction industry's approach to determining materiality of breach—Role of independent experts in evaluation of material breach
§ 18:12	Doctrine of substantial performance and its impact upon materiality
§ 18:13	Doctrine of economic waste and its impact upon materiality
§ 18:14	Doctrine of mitigation and its impact upon materiality
§ 18:15	Principle of cure and its implications upon materiality
§ 18:16	Principle of cure and its implications upon
-1**	

clii

	materiality—Principle of "first uncured material breach" as justification for future contract nonperformance
§ 18:17	Doctrine of waiver: Elimination of materiality of breach
§ 18:18	Doctrine of waiver: Elimination of materiality of breach—Waiver of materiality of timely performance
§ 18:19	Doctrine of waiver: Elimination of materiality of breach—Waiver of materiality of specifications
§ 18:20	Doctrine of waiver: Elimination of materiality of breach—Waiver of materiality of other contract conditions
§ 18:21	Doctrines of impossibility, impracticability, frustration, and force majeure, and their impact upon materiality
§ 18:22	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)
§ 18:23	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—Anticipatory repudiation
§ 18:24	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—Failure of contractor to make adequate progress
§ 18:25	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—Defective work
§ 18:26	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—Nonpayment
§ 18:27	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—

	Cardinal change
§ 18:28	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—Violation of laws, ordinances, and regulations, and criminal activity
§ 18:29	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)—Insolvency or bankruptcy
§ 18:30	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)— Failure to maintain required licenses and permits
§ 18:31	Construction breaches judged sufficiently material to future performance to warrant termination (when otherwise unwaived, uncured, unexcused, and unmitigated)— Failure to obtain and maintain required bonds and insurance
§ 18:32	Contract termination for cause
§ 18:33	Contract termination for cause—Termination for cause clauses
§ 18:34	Contract termination for cause—Termination for cause clauses—American Institute of Architects termination for cause clauses
§ 18:35	Contract termination for cause—Termination for cause clauses—American Institute of Architects termination for cause clauses— Termination by contractor for cause
§ 18:36	Contract termination for cause—Termination for cause clauses—American Institute of Architects termination for cause clauses— Termination by owner for cause
§ 18:37	Contract termination for cause—Termination for cause clauses—Federal termination for default clause
§ 18:38	Contract termination for cause—Termination for cause clauses—Termination for cause clauses and public policy
§ 18:39	Contract termination for cause—Termination

 cliv

DEFAULT	
	for cause procedure
§ 18:40	Contract termination for cause—Adequacy of evaluation of materiality of breach
§ 18:41	Contract termination for cause—Adequacy of evaluation of materiality of breach— Adequacy of cure notice
§ 18:42	Contract termination for cause—Adequacy of evaluation of materiality of breach— Independence and good faith of termination decision
§ 18:43	Contract termination for cause—Adequacy of evaluation of materiality of breach— Reprocurement following termination for cause
§ 18:44	Contract termination for cause—Adequacy of evaluation of materiality of breach— Damages for wrongful termination
§ 18:45	Contract termination for convenience
§ 18:45.50	Contract termination for convenience—"Constructive" termination for convenience
§ 18:46	Contract termination for convenience— Termination for convenience clauses
§ 18:47	Contract termination for convenience— Judicial limitation of right to terminate for convenience
§ 18:48	Contract termination for convenience— Partial termination for convenience or deductive change
§ 18:49	Contract termination for convenience— Termination for convenience process
§ 18:50	No-cost contract termination

Volume 6

CHAPTER 19. REMEDIES AND DAMAGE MEASURES

I. GENERAL CONSIDERATIONS

- § 19:1 "Gordian Knot" of modern construction remedies
- § 19:2 Classical remedies governing construction disputes

II. CLASSICAL TORT REMEDIES

§ 19:3	Generally
§ 19:4	Expansion of tort damages—Remedy of punitive damages
§ 19:5	Limitation on tort damages—Principle of "proximate cause"
§ 19:6	Limitation on tort damages—Rule of "avoidable consequences"
§ 19:7	Limitation on tort damages—Concept of "benefit"
§ 19:8	Limitation on tort damages—Principle of apportionment
§ 19:9	Limitation on tort damages—Contract constraint
§ 19:10	Limitation on tort damages—Doctrine of economic loss
§ 19:11	Limitation on tort damages—Doctrine of economic loss—Contract or tort
§ 19:12	Limitation on tort damages-Doctrine of economic loss—Injury to person or damage to "other property" requirement
§ 19:13	Limitation on tort damages—Doctrine of economic loss—A doctrine in flux
III. C	CLASSICAL CONTRACT REMEDIES
§ 19:14	Generally
§ 19:15	Limitation on contract damages—Uncertainty
§ 19:16	Limitation on contract damages—Foreseeability
9 10.17	of consequential damages
§ 19:17	of consequential damages Limitation on contract damages—Foreseeability of consequential damages—Legal "guideposts" for determining foreseeability
§ 19:17 § 19:18	Limitation on contract damages—Foreseeability of consequential damages—Legal "guideposts" for determining foreseeability Limitation on contract damages—Foreseeability of consequential damages—Practical
	Limitation on contract damages—Foreseeability of consequential damages—Legal "guideposts" for determining foreseeability Limitation on contract damages—Foreseeability of consequential damages—Practical "foreseeability" of construction damages Limitation on contract damages—Foreseeability of consequential damages—Foreseeability"
§ 19:18	Limitation on contract damages—Foreseeability of consequential damages—Legal "guideposts" for determining foreseeability Limitation on contract damages—Foreseeability of consequential damages—Practical "foreseeability" of construction damages Limitation on contract damages—Foreseeability of consequential damages—Foreseeability after contract award Limitation on contract damages—Duty of
§ 19:18 § 19:19	Limitation on contract damages—Foreseeability of consequential damages—Legal "guideposts" for determining foreseeability Limitation on contract damages—Foreseeability of consequential damages—Practical "foreseeability" of construction damages Limitation on contract damages—Foreseeability of consequential damages—Foreseeability after contract award

through recoveries from third parties— Collateral source rule § 19:24 Limitation on contract damages—Duty of		
damage avoidance and mitigation—Mitigation through acquisition of replacement work § 19:25 Limitation on contract damages—Severin doctrine § 19:26 Limitation on contract damages—Concept of "betterment" § 19:27 Limitation on contract damages—Concept of "betterment"—Usage "betterment" § 19:28 Limitation on contract damages—Concept of "betterment"—Quality "betterment" § 19:29 Limitation on contract damages—Concept of "betterment"—Durability "betterment" § 19:30 Limitation on contract damages—Doctrine of economic waste § 19:31 Limitation on contract damages—Principle of disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:23	damage avoidance and mitigation—Mitigation through recoveries from third parties—
\$ 19:25 Limitation on contract damages—Severin doctrine \$ 19:26 Limitation on contract damages—Concept of "betterment" \$ 19:27 Limitation on contract damages—Concept of "betterment"—Usage "betterment" \$ 19:28 Limitation on contract damages—Concept of "betterment"—Quality "betterment" \$ 19:29 Limitation on contract damages—Concept of "betterment"—Durability "betterment" \$ 19:30 Limitation on contract damages—Doctrine of economic waste \$ 19:31 Limitation on contract damages—Principle of disproportionality \$ 19:32 Limitation on contract damages—Principle of causal apportionment \$ 19:33 Limitation on contract damages—Emotional distress \$ 19:34 Classical contract remedies—Limitation on	§ 19:24	damage avoidance and mitigation—Mitigation
"betterment" § 19:27 Limitation on contract damages—Concept of "betterment"—Usage "betterment" § 19:28 Limitation on contract damages—Concept of "betterment"—Quality "betterment" § 19:29 Limitation on contract damages—Concept of "betterment"—Durability "betterment" § 19:30 Limitation on contract damages—Doctrine of economic waste § 19:31 Limitation on contract damages—Principle of disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:25	Limitation on contract damages—Severin
"betterment"—Usage "betterment" § 19:28 Limitation on contract damages—Concept of "betterment"—Quality "betterment" § 19:29 Limitation on contract damages—Concept of "betterment"—Durability "betterment" § 19:30 Limitation on contract damages—Doctrine of economic waste § 19:31 Limitation on contract damages—Principle of disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:26	
"betterment"—Quality "betterment" § 19:29 Limitation on contract damages—Concept of "betterment"—Durability "betterment" § 19:30 Limitation on contract damages—Doctrine of economic waste § 19:31 Limitation on contract damages—Principle of disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:27	
"betterment"—Durability "betterment" § 19:30 Limitation on contract damages—Doctrine of economic waste § 19:31 Limitation on contract damages—Principle of disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:28	
economic waste § 19:31 Limitation on contract damages—Principle of disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:29	
disproportionality § 19:32 Limitation on contract damages—Principle of causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:30	<u> </u>
causal apportionment § 19:33 Limitation on contract damages—Emotional distress § 19:34 Classical contract remedies—Limitation on	§ 19:31	
distress § 19:34 Classical contract remedies—Limitation on	§ 19:32	
	§ 19:33	_
	§ 19:34	

IV. CLASSICAL RESTITUTION REMEDIES

§ 19:35	Generally
§ 19:36	Restitution's confusing landscape—Quantum meruit or unjust enrichment
§ 19:37	Restitutionary "unjust enrichment" benefit measurement under a quasi contract implied in law
§ 19:38	Restitutionary quantum meruit "value" measurement under a contract implied in fact
§ 19:39	Restitutionary quantum meruit "value" measurement under a contract implied in fact—Nonbreaching party's quantum meruit measure of "value"—Reasonable "cost"
§ 19:40	Restitutionary quantum meruit "value" measurement under a contract implied in fact—Breaching contractor's measure of "value"

§ 19:41 Restitutionary quantum meruit "value"
measurement under a contract implied in
fact—Irrelevancy of "profit" or "loss" to implied
contract measures
§ 19:42 Restitutionary disgorgement
§ 19:43 Restitutionary remedies of equitable lien and
constructive trust

V. STATUTORY REMEDIES

§ 19:44 Generally § 19:45 Uniform Commercial Code damage measures § 19:46 Uniform Commercial Code damage measures— U.C.C. preemption of common-law remedies and endorsement of "freedom to contract" § 19:47 Uniform Commercial Code damage measures— Buyer's U.C.C. damage measures Uniform Commercial Code damage measures— § 19:48 Seller's U.C.C. damage measures § 19:49 The federal "equitable adjustment" damage measure § 19:50 The federal "equitable adjustment" damage measure—Meaning of "equitable adjustment"? The federal "equitable adjustment" damage § 19:51 measure—Measurement of "equitable adjustment"

VI. AGREED REMEDIES AND DAMAGE MEASURES

§ 19:52 Generally § 19:53 Agreed remedies and damage measures—Types of damages limitation and exculpation clauses used in construction contracting § 19:54 Broad indemnity agreements § 19:55 Waivers of consequential damages § 19:56 No damage for delay clauses § 19:57 Conditional payment provisions § 19:58 Exclusive remedy provisions § 19:59 Waivers of subrogation § 19:60 Force majeure provisions Termination for convenience clauses § 19:61 § 19:62 Disclaimers of implied warranties § 19:63 Disclaimers of liability

clviii

DEFAULT	
§ 19:64	Disclaimers of specific responsibilities
§ 19:65	Undercompensatory liquidated damages
§ 19:66	Undercompensatory liquidated damages— Interpretation of liquidated damage clauses: Remedies vs. alternative performances
§ 19:67	Limitation of liability provisions
§ 19:68	Interpreting limitation of liability provisions
§ 19:69	Competing public policies affecting the enforceability of exculpatory provisions
§ 19:70	Role of bargaining in the enforcement of limitation of liability provisions
§ 19:71	Specific exceptions to enforceability of exculpatory clauses
§ 19:72	Statutory defenses to limitation of liability provisions
§ 19:73	Application of limitation of liability provisions to claims by third parties

VII. JUDICIAL APPROACHES REGARDING REMEDIES AND DAMAGES MEASURES

§ 19:74 Cutting through "Gordian Knot" of construction remedies and damages measures

VIII. MODERN CONSTRUCTION DAMAGE MEASURES

§ 19:75 Generally

IX. CONSTRUCTION CONTRACT COST ACCOUNTING

§ 19:76 The "art" of construction contract cost accounting

X. OWNER COMMON-LAW DAMAGE MEASURES FOR CONTRACTOR BREACH OF CONTRACT

§ 19:77	Generally
§ 19:78	Owner's contract completion damages
§ 19:79	
	contractor's defective or nonconforming
	workmanship
§ 19:80	Owner's contract damage measure for

	contractor's defective or nonconforming workmanship—"Cost to repair" rule
§ 19:81	Owner's contract damage measure for contractor's defective or nonconforming workmanship—"Diminution in value" rule
§ 19:82	Owner's contract damage measure for contractor's defective or nonconforming workmanship—Damage measures—"Cost to repair" versus "diminution in value"
§ 19:83	Owner's contract damage measure for contractor's defective or nonconforming workmanship—Dual use of both "cost of repair" and "diminution in value" damage measures
§ 19:84	Owner's contract damage measure for contractor's defective or nonconforming workmanship—"Stigma" damages remaining after repair as an element in "diminution of value" damage measure
§ 19:85	Owner's contract damage measure for contractor's defective or nonconforming workmanship—"Cost to repair" reduced for betterment
§ 19:86	Owner's contract damage measure for contractor's delayed completion
§ 19:87	Owner's contract damage measure for contractor's delayed completion—Owner's delay damages for loss of resale profits
§ 19:88	Owner's contract damage measure for contractor's delayed completion—Owner's delay damages for loss of project use
§ 19:89	Owner's contract damage measure for contractor's delayed completion—Owner's delay damages for loss of project use—Extended construction financing costs
§ 19:90	Owner's contract damage measure for contractor's delayed completion—Owner's delay damages for loss of project use—Substitute facilities costs
§ 19:91	Owner's contract damage measure for contractor's delayed completion—Owner's delay damages for loss of project use—Extended project administration

XI. CONTRACTOR'S COMMON-LAW MEASURE FOR OWNER BREACH OF CONTRACT

Generally

Practical damages issues

§ 19:94 Contractor's common-law damage measures for owner's material breach

§ 19:95 Contractor's common-law damage measure where contract is not substantially performed due solely to contractor's material breach

§ 19:96 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions

§ 19:97 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach

§ 19:98 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Direct labor costs

§ 19:99 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Overtime

§ 19:100 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Wage rate escalation

§ 19:101 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Lost labor efficiency

§ 19:102 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Indirect labor burden costs

§ 19:103 Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Direct material costs

§ 19:104	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Equipment costs
§ 19:105	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Small tool costs
§ 19:106	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Job site and "general conditions" overhead
§ 19:107	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Bond and insurance costs
§ 19:108	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Indirect home office overhead costs
§ 19:109	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Financing costs: Interest as damages
§ 19:110	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Profit on claim
§ 19:111	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Lost anticipated profits on contract
§ 19:112	Contractor's common-law compensatory damage measures for contract breaches or

	authorized changes resulting in extra work,
	time impacts, and disruptions—Segregated damage approach—Lost profits on other contracts
§ 19:113	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Impairment of bank credit or bonding capacity and lost future profits
§ 19:114	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Loss of business reputation
§ 19:115	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Segregated damage approach—Building segregated damage claim
§ 19:116	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Unsegregated damage measures: "Total cost," " modified total cost," and "jury verdict"
§ 19:117	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Unsegregated damage measures: "Total cost," " modified total cost," and "jury verdict"—Total cost
§ 19:118	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Unsegregated damage measures: "Total cost," " modified total cost," and "jury verdict"—Modified total cost
§ 19:119	Contractor's common-law compensatory damage measures for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions—Unsegregated damage measures: "Total cost," " modified

total cost," and "jury verdict"—Jury verdict

XII. PREJUDGMENT INTEREST; ATTORNEYS' FEES AND EXPENSES

- § 19:120 Prejudgment interest
- § 19:121 Attorneys' fees and expenses

XIII. FRAUD OR MISREPRESENTATION IN COMPUTATION OF DAMAGE CLAIMS

§ 19:122 Generally

CHAPTER 20. INTERNATIONAL CONSTRUCTION

I. GENERAL CONSIDERATIONS

- § 20:1 Globalization of international construction
- § 20:2 Risks in international construction

II. HARMONIZATION OF INTERNATIONAL LAW

§ 20:3	Trends toward harmonization
§ 20:4	Harmonization influence of a "restatement" of international contract law—UNIDROIT Principles—Generally
§ 20:5	Harmonization influence of a "restatement" of international contract law—UNIDROIT Principles of contract enforcement and excuse
§ 20:6	Harmonization influence of a "restatement" of international contract laws—UNIDROIT Principles of hardship and force majeure
§ 20:7	Harmonization influence of a "restatement" of international contract law—UNIDROIT contract damage principles
§ 20:8	Harmonization influence of public and private construction contract formation model laws—the UNCITRAL model laws and guides
§ 20:9	Harmonization influence of the United Nations Convention on Contracts for the International Sale of Goods (CISG)
§ 20:10	Harmonization influence of standardized international construction contract forms

clxiv

Harmonization influence of commonly accepted
construction dispute adjudication procedures
Harmonization of ethical business practices—
The Foreign Corrupt Practices Act and
international anti-bribery initiatives
Harmonization of international technical
standards

Volume 7

CHAPTER 21. ARBITRATION

I. HISTORY AND CURRENT CHALLENGES

§ 21:1	Genesis of construction arbitration
§ 21:2	Historical development of arbitration—From pariah to prince
§ 21:3	Arbitration contrasted with other forms of alternative dispute resolution
§ 21:4	Problems with arbitration and new "rapid resolution" alternative dispute resolution initiatives
§ 21:5	A re-evaluation of arbitration—The AIA backs away from mandatory arbitration
§ 21:6	Scrutiny of arbitration as a forum for consumer and employment disputes
§ 21:7	Restrictions on federal contractors to require arbitration of employment-related disputes— Franken amendment
§ 21:8	False Claims Act implications from prohibition on use of arbitration for resolving employment disputes when working on certain federal projects
§ 21:9	Supreme court arbitration law: an edifice of its own making

II. WHAT IS ARBITRATION?

§ 21:10	Confidentiality and arbitration
§ 21:11	Is mediation a form of arbitration governed by
	the FAA?
§ 21:12	Is the insurance appraisal process arbitration?
§ 21:13	Jury waiver provisions vs. arbitration
	agreements

clxv

III. FEDERAL ARBITRATION ACT

- $\$ 21:14 FAA evolution from "procedural" to "substantive" law
- § 21:15 Divided Supreme Court solidifies the federal "substantive" law of arbitration
- § 21:16 Triggering FAA jurisdiction—Interstate commerce
- § 21:17 When do construction contracts involve "interstate commerce"?
- § 21:18 Must the transaction subject to arbitration "substantially affect" interstate commerce to be captured by the FAA?
- § 21:19 Consenting to FAA jurisdiction

IV. FEDERAL POLICY FAVORING ARBITRATION

- § 21:20 Federal policy favoring arbitration
- § 21:21 Application of the federal policy favoring arbitration to questions regarding which parties are subject to an arbitration agreement
- § 21:22 Impact of federal policy favoring arbitration on question of whether parties agreed to arbitrate
- § 21:23 Reversing the presumption favoring arbitration where the question is who decides whether arbitration is mandated

V. JUDICIAL JURISDICTIONAL MATTERS

A. FEDERAL COURT JURISDICTION

- § 21:24 FAA and federal question jurisdiction
- § 21:25 Federal district court jurisdiction and jurisdictional amount

B. JUDICIAL AUTHORITY TO ISSUE INJUNCTIVE RELIEF RESPECTING ARBITRATION

- § 21:26 Authority of courts to issue injunctions respecting arbitration
- § 21:27 Court jurisdiction over requests for preliminary injunctive relief in aid of arbitration

C. MISCELLANEOUS JURISDICTIONAL

clxvi

ISSU	ES
------	---------------------

§ 21:28	Bankruptcy code invalidation of arbitration
	agreements—Core vs. noncore proceedings
§ 21:29	Arbitration and the law-of-the-case doctrine

VI. FAA PREEMPTION

§ 21:30	FAA preemption of state law
§ 21:30.10	FAA preemption and state construction disputes venue laws
§ 21:31	FAA preemption of state procedural laws
§ 21:32	Applicability of state law to FAA arbitrability disputes
§ 21:33	FAA preemption of inconsistent state arbitrability law
§ 21:34	FAA preemption of inconsistent state general contract law
§ 21:35	FAA preemption of state arbitration vacatur law
§ 21:36	FAA preemption of state judicial decision law
§ 21:37	FAA preemption after <i>Preston v. Ferrer</i> —The rise of <i>Mastrobuono</i> and fall of <i>Volt</i>
§ 21:38	Judicial interpretive models preempted by the FAA—"Express and unequivocal" standard for arbitration agreements inconsistent with FAA

VII. ARBITRATION AND FORUM SELECTION

- § 21:39 Arbitration agreements as specialized forum selection provisions
- § 21:39.50 Effect of forum-selection clauses on the right to remove an action in federal court for purposes of compelling arbitration

VIII. LAW GOVERNING THE ARBITRATION AGREEMENT

- § 21:40 Determining whether parties have agreed to apply non-FAA law to their arbitration agreement
- § 21:41 Determining which state's law governs the enforceability of arbitration agreements
- § 21:42 Consequences of choosing to arbitrate pursuant to a state's arbitration statute

clxvii

§ 21:43 Extent to which choice-of-law provisions influence law governing arbitration agreements
§ 21:44 Choice-of-law in international arbitration agreements

IX. ARBITRATION PREREQUISITES

$\S 21:45$	Valid written agreement to arbitrate
§ 21:46	Role of signatures in the enforcement of
	arbitration agreements
$\S 21:47$	Searching for assent to arbitrate
§ 21:48	Valid written agreement to arbitrate—
	Assessing whether language is sufficient to
	mandate arbitration
$\S 21:48.50$	Enforceability of incomplete arbitration provisions
§ 21:49	Electronic writings and the FAA
§ 21:50	Searching for the assent to arbitrate in the
	electronic age
§ 21:51	Oral agreements and the duty to arbitrate

X. CONTRACTUAL PRECONDITIONS TO ARBITRATION

§ 21:52 Matters of procedural arbitrability for arbitrators to decide
 § 21:53 Compliance with arbitral time limitations—Who decides?
 § 21:54 Mediation as condition precedent to arbitration
 § 21:55 Licensing as condition precedent to arbitration
 § 21:56 Claim submission to design professional as condition precedent to arbitration

XI. ARBITRABILITY

A. WHAT IS ARBITRABILITY?

§ 21:57	Arbitrability—An introduction
§ 21:58	When is a dispute properly characterized as one over arbitrability rather than merits?
§ 21:58.50	Arbitrability: Distinguishing the whether from the what
§ 21:59	Many faces of arbitrability—Broad characterizations vs. narrower approaches of the concept
§ 21:60	U.S. Supreme Court precedent suggests a

clxviii

Ī)	E.	FΔ	١T	TT	7	١

§ 21:61	constrained view of arbitrability Contrasting arbitrability with challenges to the validity of arbitration agreements
В.	WHO DECIDES ARBITRABILITY MATTERS?
§ 21:62	Who decides arbitrability—Rent-a-Center and Granite Rock
§ 21:63	Clearly and unmistakably evidencing an intent to arbitrate arbitrability
§ 21:64	Effect of incorporating rules in arbitration agreement that grant arbitrability authority to arbitrator
§ 21:65	Arbitrability of claims for rescission—For court or arbitrator?
§ 21:66	Arbitrability of claims of illegality—Who decides?
C.	STANDARD OF REVIEW
§ 21:67	Standard of review for arbitrator's arbitrability determinations
§ 21:68	Standard of review of arbitral arbitrability determinations based on whether party has preserved an objection to arbitrator's jurisdiction
D.	MISCELLANEOUS ARBITRABILITY ISSUES
§ 21:69 § 21:70	Choosing state arbitrability law Arbitrability of claims after termination or repudiation of entire contract
§ 21:71	Arbitrability in cases of multiple contracts only some of which contain an arbitration clause
XII. S	SEPARABILITY DOCTRINE
§ 21:72	Challenges to evading the separability doctrine
§ 21:73	Broad vs. narrow applications of the separability or severability doctrine—The ultimate reach of <i>Prima Paint</i>
§ 21:74	Criticisms of the separability doctrine and a different path under state arbitration law
§ 21:75	Separability and choice-of-law provisions
§ 21:76	Claims of fraud in inducement of contract
	clyiv

\$ 21:77 Claims of fraud in execution of contract as an attempt to evade application of Separability Doctrine
 \$ 21:78 Authority to contract and the separability doctrine
 \$ 21:79 Application of separability doctrine to questions of contract formation

XIII. ASSENT TO ARBITRATE

A. ESTABLISHING ASSENT

§ 21:80 Enforceability of arbitration agreement— Incomplete negotiations § 21:81 Determining whether an agreement to arbitrate exists—Authority to contract challenges § 21:82 Application of presumption favoring arbitration to questions over whether parties assented to arbitrate § 21:83 Application of state law in determining assent to arbitrate § 21:84 When is it appropriate for a court to permit discovery on the question of whether an agreement to arbitrate exists? § 21:84.50 Who decides whether an agreement to arbitrate exists?

B. EFFECTS OF CONTRACT MODIFICATIONS ON ASSENT

- § 21:85 Modifications to agreements containing arbitration provisions—Consequences for the right to arbitrate
- § 21:86 Modification of standard form agreements—Care required to avoid confusion over assent
- § 21:87 Partial deletion of arbitration language in standard form agreements—Challenges for assent
- § 21:88 Effect of subsequent amendments and agreements containing arbitration provisions on prior non-arbitrable understandings
- § 21:89 Effect of merger doctrine on prior understandings containing an arbitration agreement

C. PARTICULAR ASSENT ISSUES

§ 21:90	Arbitration agreements contained in home or product warranty documents—Issues with assent
§ 21:90.50	Arbitrating disputes arising out of goods or services secured through online commerce
§ 21:90.60	Enforcing arbitration agreements in written warranties—Constructive or inquiry notice as a substitute for actual assent
§ 21:90.70	Assent to arbitrate by remote purchasers
§ 21:91	Arbitrating disputes arising in connection with the bidding, solicitation and contract award process
§ 21:92	Achieving assent through incorporation doctrine—Arbitrating claims against sureties

XIV. ARBITRATION AND NON-SIGNATORIES

A. GENERAL PRINCIPLES

- § 21:93 Rights and obligations of non-signatories to arbitrate
- § 21:94 Exceptions to the general rule that nonsignatories are not bound to arbitration agreements

B. BASES FOR BINDING OR ENABLING NON-SIGNATORIES TO ARBITRATE

§ 21:95 Non-signatory arbitral status under agency principles § 21:96 Non-signatory arbitral status under alter ego theory § 21:97 Non-signatory arbitral status under partnership or joint venture law § 21:98 Third-party beneficiaries as non-signatories § 21:99 Assignees, subrogees, and successors as non-signatories § 21:100 A non-signatory's assumption of the obligation to arbitrate § 21:101 Non-signatories bound by equitable estoppel § 21:102 Equitable estoppel as a means to compel arbitration among non-privity construction participants Doctrine of intertwining or alternative estoppel § 21:103

theory as a basis for binding non-signatories

C. WHO DECIDES NON-SIGNATORY CHALLENGES?

- § 21:104 Who decides a non-signatory's rights or burdens under an arbitration agreement?
- § 21:105 Non-signatory's right to seek review of a denial to stay litigation

D. SPECIFIC NON-SIGNATORY SITUATIONS

- § 21:106 Corporate officers and directors as nonsignatories to corporation's arbitration agreement
- § 21:107 Binding corporate directors and officers to an arbitration award rendered against their company
- § 21:108 Sureties as non-signatories

XV. ARBITRATION AND THE UNIFORM COMMERCIAL CODE

- § 21:109 Arbitration agreements subject to the Uniform Commercial Code
- § 21:110 Arbitration agreements subject to the Uniform Commercial Code Statute of Frauds
- § 21:111 Importance of properly characterizing parties' communications—U.C.C. § 2-207
- § 21:112 Arbitration provisions as "supplementary terms" or U.C.C. "gap-filler" terms
- § 21:113 When arbitration provisions in acceptances become part of the agreement—The "material alteration" rule
- § 21:114 Relevance of course of dealing and trade usage in determining whether arbitration clause constitutes a material alteration

XVI. INTERPRETING ARBITRATION AGREEMENTS

- § 21:115 Permissive vs. mandatory language
- § 21:116 Addressing ambiguity
- § 21:117 Multiple arbitration clauses in contract documents
- § 21:118 Incorporation of obligation to arbitrate by reference to other writings
- § 21:119 Role of extrinsic evidence in determining the

clxxii

scope of an arbitration agreement
§ 21:120 Conflicts between general remedies provisions
and arbitration provisions

XVII. SCOPE OF ARBITRATION AGREEMENT: BROAD VS. NARROW CLAUSES

Δ	GENERAL.	PRINCIPLES
$\overline{}$	(TI)////////////////////////////////////	

§ 21:121	Scope of arbitration agreement—Basic tenets
§ 21:122	Scope of arbitration agreement—Broad vs.
	narrow arbitration agreements

- § 21:123 Federal policy favoring arbitration influences determinations over the scope of arbitration agreements
- § 21:124 Demise of "intertwining" doctrine

B. BROAD ARBITRATION LANGUAGE

- § 21:125 Hallmark of a broad arbitration clause— "Arising out of or related to" language
- § 21:126 Agreeing to arbitrate "any" or "all" claims— Language of inclusion and incorporation
- § 21:127 Arbitration of pre-agreement disputes—Broad arbitration agreement's ability to reach back in time

C. NARROWING THE SCOPE OF THE ARBITRATION AGREEMENT

- § 21:128 Narrow arbitration clauses and the presumption favoring arbitration
- § 21:129 Determining the scope of narrow arbitration agreements

D. SPECIFIC EXAMPLES OF TAILORING SCOPE OF ARBITRATION

- § 21:130 American Institute of Architects' (AIA) arbitration clause's exception for disputes relating to aesthetic effect
- § 21:131 Restricting arbitration to claims over or under a specified threshold
- § 21:132 Eliminating specific types of damages from scope of arbitration agreement—AIA arbitration clause and its kind

clxxiii

\$ 21:133 Carving out mechanics' lien actions from the scope of the arbitration agreement
 \$ 21:134 Limiting arbitration to change order or pricing disputes

Volume 8

XVIII. ENFORCEMENT OF ARBITRATION AGREEMENTS

- § 21:135 Challenges to enforcement of arbitration agreements under federal common law
- § 21:136 Challenges to enforcement of arbitration agreements based on public policy

XIX. STATE LAW DEFENSES TO ENFORCEMENT OF ARBITRATION AGREEMENTS

A. UNCONSCIONABILITY

§ 21:137	Defense of unconscionability
§ 21:138	Unconscionability challenges to
	arbitration—General trends
§ 21:139	Applying the concept of procedural
	unconscionability to arbitration agreements
§ 21:140	Analyzing arbitration agreements through
ÿ 21.140	the lens of substantive unconscionability
§ 21:141	Recurring unconscionability challenges
§ 21:142	Variations in state unconscionability law
§ 21:143	Appellate review of unconscionability
	determinations—Standards and sufficiency of the record
§ 21:144	Severing unconscionable language
§ 21:145	Who decides unconscionability challenges to the underlying agreement as a whole?
§ 21:145.50	Who decides unconscionability challenges to the agreement to arbitrate?
§ 21:146	Effective-vindication exception to enforcement of arbitration agreements

B. CONSIDERATION

§ 21:147 Defense of lack of mutuality of obligation

clxxiv

(consideration)

C.	DURESS OR COERCION
§ 21:148	Duress or coercion as a defense to arbitrability
D.	OTHER DEFENSES
§ 21:149	Unilateral power to amend or terminate arbitration agreement
§ 21:150	Provisions giving one of the parties unilateral or sole discretion to elect arbitration
§ 21:151	Challenges to enforcement of arbitration agreements based on non-compliance with state licensing law
XX. C	COMPELLING ARBITRATION
§ 21:152	Compelling arbitration—FAA § 4
§ 21:153	Federal court jurisdiction over § 4 petitions to compel arbitration
§ 21:154	Federal subject matter jurisdiction over petitions to compel arbitration—The well-pleaded complaint rule
§ 21:155	May a magistrate judge compel arbitration?
§ 21:156	Federal court jurisdiction to compel arbitration in a specific locale—Limitations based on arbitrator's authority over hearing location
§ 21:157	Recovery of attorneys' fees for successfully prosecuting a motion to compel arbitration or defending against a motion to vacate an arbitration award
§ 21:158	Burdens of proof respecting § 4 petitions to compel arbitration
§ 21:159	Statutes of limitation applicable to actions compelling arbitration under the FAA
XXI.	STAYING ARBITRATION
§ 21:160 § 21:161	Standards and jurisdiction Motions to stay arbitration

XXII. STAYING LITIGATION IN FAVOR OF ARBITRATION

§ 21:162 Staying court actions in favor of arbitration

§ 21:163	Stay of litigation upon appeal of order denying motion to compel arbitration—A split of authority
§ 21:164	Right of non-signatories to seek stay of litigation in favor of arbitration
XXIII.	ARBITRATING PARTICULAR CLAIMS
§ 21:165	Arbitrating tort claims
§ 21:166	Arbitrating third-party claims—Contribution and indemnity actions
§ 21:167	Arbitrating subrogation actions
§ 21:168	Arbitrating Miller Act bond claims
§ 21:169	Arbitrating mechanics' liens claims
§ 21:170	Arbitrating statutory Magnuson-Moss warranty claims
§ 21:171	Arbitrating state consumer protection act claims
§ 21:172	Arbitrating statutory false claim disputes
§ 21:173	Arbitration disputes under design-build contracts
XXIV.	ARBITRATION AND STATUTES OF LIMITATION
§ 21:174	Arbitrating statutes of limitation defenses
§ 21:175	Is arbitration an "action" for purposes of statutory bars?
§ 21:176	Arbitrating statutes of limitation defenses— Contractual attempts to preserve statute of limitations defenses for judicial consideration
§ 21:177	What is "initiating arbitration" sufficient to stop the running of a contractual limitations period?
XXV.	WAIVING THE RIGHT TO ARBITRATE
A.	WAIVER GENERALLY
§ 21:178	Waiver of right to arbitrate—Standards in flux
§ 21:179	Standard of review
§ 21:180	Revival of the right to arbitrate after initially waiving the right
§ 21:181	A sea change to the right to arbitrate in the Lone Star state—Texas high court rewrites the law of waiver

clxxvi

D	D.	$F\Delta$	т	TT	п

§ 21:182	Who decides questions of waiver?
C.	WHAT LAW TO APPLY TO WAIVER CHALLENGES?
§ 21:183	Determining proper law to apply to questions of waiver
D.	FACTORS TO CONSIDER WHEN EVALUATING WAIVER CHALLENGES
§ 21:184 § 21:185 § 21:186 § 21:187	Many factors relevant to establishing waiver Knowledge of right to arbitrate Inconsistent acts Prejudice
E.	EFFECT OF "NO-WAIVER" PROVISIONS ON WAIVER CHALLENGES
§ 21:188	Effect of general no-waiver clauses on right to arbitrate
§ 21:189	Effect of "no-waiver" language in arbitration agreement
F.	SPECIFIC WAIVER SITUATIONS
§ 21:190	Prosecuting mechanics' liens and waiving the right to arbitrate
§ 21:191	Waiver and injunctive relief where one of the parties refuses to pay its share of arbitration costs
§ 21:192	Waiver of the right to arbitrate based on exceeding contractual time limitation to demand arbitration
XXVI.	DISCOVERY IN ARBITRATION
§ 21:193 § 21:194 § 21:195	Arbitrator's authority to issue subpoenas Judicial enforcement of arbitrators' subpoenas Court-ordered discovery in aid of international arbitration
XXVII.	ARBITRATOR SELECTION
§ 21:196	Challenges to party-arbitrator appointments

B. WHO DECIDES WAIVER CHALLENGES?

clxxvii

§ 21:197	Arbitrator disqualification
§ 21:198	Court intervention in the arbitrator selection process
	•
XXVIII.	AUTHORITY OF ARBITRATORS
§ 21:199	Arbitrator authority to issue sanctions
§ 21:200	Arbitrator authority to disqualify counsel
§ 21:201	Arbitrator authority to award rescission of contract
§ 21:202	Limitations on the parties' delegation of authority to the arbitrator
§ 21:203	Arbitral immunity
XXIX.	ARBITRATION AND CLASS ACTIONS
§ 21:204	Arbitration agreements as class action waivers
$\S 21:205$	Arbitrating class actions—Recurring themes
§ 21:206	Class arbitration as a matter of arbitrability
§ 21:207	Judicial authority to review interim awards respecting class arbitration
§ 21:208	Drafting arbitration agreements with class action waivers
XXX. (CONFIRMING ARBITRATION AWARDS
§ 21:209	Confirming arbitration awards—Deferential standard of review
§ 21:210	Time requirements for confirming arbitration awards
§ 21:211	Confirming arbitration awards—Language authorizing the court to confirm award
XXXI.	MODIFICATION AND CORRECTION OF
747471 ,	ARBITRATION AWARDS
§ 21:212	Grounds for modifying awards under the FAA
§ 21:213	Evident material miscalculations or misdescriptions
§ 21:214	Matters not submitted to arbitrators but upon which an award was nevertheless entered
§ 21:215	Awards imperfect in form not affecting the merits
§ 21:216	Resubmission of matters to arbitrator for clarification

clxxviii

 $\S 21:233$

 $\$ 21:217 Modification of arbitration awards under FRCP Rule 60

XXXII. VACATING ARBITRATION AWARDS

A.	JURISDICTION AND VENUE
§ 21:218	Federal court jurisdiction over motions to vacate arbitration awards
§ 21:219	Federal court jurisdiction over petitions to compel vs. vacate arbitration awards
§ 21:220	Federal district court authority to compel arbitration—Limitations based on hearing locale in foreign districts
§ 21:221	Arbitration and abstention—Limiting the exercise of federal court jurisdiction
§ 21:222	Federal court jurisdiction to entertain arbitration motions after state court rulings— <i>Rooker-Feldman</i> doctrine
§ 21:223	Venue for motions to confirm or vacate arbitration awards
§ 21:224	Time within which motion to vacate or confirm must be brought
§ 21:225	When does time period to vacate begin to run?
§ 21:226	Interim awards—Significance of the lack of finality
§ 21:227	Service of notice to vacate—Foreign corporations
В.	GOVERNING LAW
§ 21:228	Differences between FAA and state arbitration law—Vacating awards
C.	STANDARD OF REVIEW
§ 21:229	Judicial expressions of the deference paid to arbitration awards
§ 21:230	Restricted judicial review for vacating awards—Heavy burden borne by those seeking to overturn awards
§ 21:231	Challenges for vacatur where decision and record do not provide basis for award
§ 21:232	FAA provides exclusive grounds for review of arbitration awards

Judicial grounds for vacatur after Hall

clxxix

	Street
§ 21:234	Seeking broader judicial review of arbitral awards than permitted under FAA
§ 21:234.	
D.	WAIVING RIGHT TO SEEK VACATUR
§ 21:235	Waiving the right to seek vacatur of an
§ 21:236	arbitration award Waiving the right to object to arbitrator partiality
E.	CORRUPTION AND FRAUD
§ 21:237	Corruption as a basis for vacatur
§ 21:238	Fraud as a basis for vacatur
§ 21:239	Fraud and undue means: Indistinct concepts as grounds to vacate arbitration awards
F.	ARBITRATOR DISCLOSURE OBLIGATIONS: UNDUE MEANS AND EVIDENT PARTIALITY
§ 21:240	Failure to disclose information suggesting potential bias
§ 21:241	Disclosure and the lawyer-arbitrator
§ 21:242	Nondisclosure of prior relationships
§ 21:243	Duty to investigate existence of material facts for disclosure purposes
§ 21:244	Vacatur based on inadequate or untimely arbitrator disclosure
G.	EVIDENT PARTIALITY
§ 21:245	A standard in flux
§ 21:246	Behavior unrelated to disclosure
H.	MISCONDUCT
§ 21:247	Misconduct as the refusing to postpone hearing or to hear evidence
§ 21:248	Ex parte communications as misconduct
I.	EXCEEDING POWERS
§ 21:249	General principles

clxxx

DEFAULT	
§ 21:250	Defining what it means to "exceed" one's powers
§ 21:251	Attorneys' fees
§ 21:252	Awarding interest
§ 21:253	Punitive damages
§ 21:254	Award affecting rights of third parties
§ 21:255	Interim relief
§ 21:256	Reasoned awards
§ 21:256.	What is a reasoned award?
§ 21:256.	20 Proper remedy for failing to issue a reasoned award
§ 21:257	Reformation relief as exceeding one's powers
§ 21:258	Arbitrator's obligation to explain reasoning or basis of award
§ 21:259	Awarding equitable or injunctive relief as exceeding one's powers
J.	MANIFEST DISREGARD OF THE LAW
§ 21:260	A history
§ 21:261	Defining the standard
§ 21:262	A difficult standard to establish
§ 21:263	Manifest disregard of law as a vacatur ground after <i>Hall Street</i>
K.	PUBLIC POLICY
§ 21:264	Vacating arbitration awards on public policy grounds
L.	POST-AWARD DISCOVERY
§ 21:265	Post-award discovery in aid of a motion to vacate
XXXIII	. PRECLUSIVE EFFECTS OF ARBITRATION AWARDS
A.	COMMON ISSUES
§ 21:266	Preclusion generally—Res judicata and collateral estoppel
§ 21:267	Lack of clear or complete record
§ 21:268	Determining which jurisdiction's preclusion law applies
§ 21:269	Who decides the preclusive effect of an

§ 21:270	arbitration award on a subsequent arbitration? Public policy considerations affecting the preclusive effect of arbitration awards
В.	RES JUDICATA
§ 21:271	Application of res judicata to give preclusive effect to arbitral awards
C.	COLLATERAL ESTOPPEL
§ 21:272	Application of collateral estoppel to arbitration awards
§ 21:273	Offensive versus defensive collateral estoppel
D.	PARTICULAR PRECLUSION SITUATIONS
§ 21:274	Preclusion and the design professional
§ 21:275 § 21:276	Preclusion and the surety Preclusive effects of arbitration awards on mechanics' lien actions
XXXIV.	CONSOLIDATION AND JOINDER OF ARBITRATION PROCEEDINGS
§ 21:277	General principles
§ 21:278	Evolution of the AIA's approach to arbitration and joinder
§ 21:279	State arbitration law and consolidation of arbitrations
§ 21:280	Judicial attitudes toward consolidation and joinder
§ 21:281	Is consolidation or joinder a matter for the court or arbitrator to decide?
XXXV.	HEARING LOCALE
§ 21:282	Enforceability of arbitration hearing locale designations
§ 21:283	State laws regulating arbitration forum locale in construction contracting
§ 21:284	Who decides challenges to locale of arbitration hearings?
XXXVI.	ARBITRATING WITH SOVEREIGNS

clxxxii

DEFAU.	ĽI

DEFAULI	
§ 21:285	Arbitrating with public authorities
$\S 21:286$	Arbitrating with tribal entities
§ 21:287	Role of sovereign immunity in arbitration
XXXVII.	APPEALS FROM DISTRICT COURT ORDERS RESPECTING ARBITRATION
§ 21:288	Appealability of trial court orders pertaining to arbitration
§ 21:289	Appealability of denials to compel arbitration— Generally
§ 21:290	Appealability of denials to compel arbitration— Stay of litigation
§ 21:291	Appealability of orders granting motion to compel arbitration
§ 21:292	Appeal issues involving orders relating to a stay of litigation under Section 3 of the FAA
§ 21:293	Appealability of trial court orders pertaining to arbitration—FAA § 16 and the ambiguity of finality
§ 21:294	Use of mandamus to review orders to compel arbitration
§ 21:295	Sanctions for frivolous appeals
§ 21:296	United States Supreme Court rejects the "embedded/independent" doctrine and adopts traditional "final decision" approach for appealing orders respecting arbitration
XXXVIII	I. ARBITRATION AND THE UNAUTHORIZED PRACTICE OF LAW
§ 21:297	Arbitration and the unauthorized practice of law
§ 21:298	Effect of a finding of unauthorized practice of law on arbitration award
§ 21:299	Vacatur challenges based on unlicensed out-of- state lawyers' participation in arbitration
XXXIX.	ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
§ 21:300	Enforcement of foreign arbitral awards— Generally
§ 21:301	Enforceability of arbitral awards under New York Convention—Enforcement prerequisites

clxxxiii

§ 21:302	Defenses to enforcement of foreign arbitral awards
§ 21:303	Enforcement of foreign arbitral awards in United States—New York Convention and U.S. law
§ 21:304	Requirement of a written arbitral agreement
§ 21:305	Location of arbitration in a signatory country
§ 21:306	Domesticity of award
§ 21:307	U.S. enforcement of awards under New York Convention—U.S. pro-enforcement policy
§ 21:308	U.S. interpretation of New York Convention "refusal" provisions
§ 21:309	U.S. enforcement of international agreements that expand "refusal" provisions or limit judicial review
§ 21:310	U.S. enforcement of arbitral awards nullified in foreign country
§ 21:311	Enforcement of international arbitral awards by foreign jurisdictions

XL. MEDIATION

$\S~21:312$	General principles of mediation
§ 21:313	Uniform Mediation Act
$\S~21:314$	Confidentiality of mediation communications
$\S~21:315$	Failure to mediate in good faith
§ 21:316	Mediation disclosure requirements
$\S~21:317$	Critical issues in the preparation of mediated
	settlement agreements

XLI. APPELLATE ARBITRATION

§ 21:318	Introduction
§ 21:319	Modern concerns about narrow grounds for award
	vacatur and judicial standards of award review
§ 21:320	Proposed approaches to overcoming concerns about
	arbitration's narrow vacatur grounds and limited
	judicial standard of review
§ 21:321	Differences in institutional appellate arbitration rules
§ 21:322	Appellate arbitration as a viable approach

Volume 9

APPENDICES

clxxxiv

DEFAULT

Appendix A-1. Construction Defects

Appendix A-2. Enforcement Mechanics & Materialmens Liens