



# Primerus

*The World's Finest Law Firms*

## Increase your Bottom Line: Avoiding and Minimizing Construction Defect Claims Webinar



Welcome...We will begin shortly!

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# PROJECT PHASES



- Submittal/Plan Review
- Development Planning
- Construction Stage
- Sell Out of Project
- Post Sale
- After Notice of Claim
- Outcomes, Trends and Recent Developments



**SUBMITTAL/PLAN REVIEW**

# SUBMITTAL/PLAN REVIEW

- Make sure you fully understand site conditions – grading, compaction; expansive soil
- Drainage and soil conditions are the most common construction defect issues
- Make sure there is communication regarding soil conditions between architect and engineer
- Don't forget about prevailing winds and wind loads
- Consider having the plan reviewed by an independent third party



# DEVELOPMENT PLANNING

# CONSTRUCTION CONTRACTS AND INSURANCE

- Beware of Boilerplates!



# INDEMNITY CLAUSES

- Contractual Indemnity is the duty to make good any loss, damage, or liability incurred by another
- Boilerplate provisions on everything from car rental agreements to construction contracts
- Three types of indemnification clauses



# BROAD FORM AGREEMENT

- *Subcontractor will indemnify and hold Owner and Contractor harmless from all claims arising from or in connection with (i) the conduct or management of the work, or any work or thing whatsoever done, or any condition created in or about the Premises during the Term; (ii) any act, omission or negligence of Subcontractor or any of Subcontractor's subtenants or licensees or the partners, directors, officers, agents, employees, invitees or contractors of Subcontractor; (iii) any accident, injury or damage whatsoever arising out of the work of the Subcontractor. **Subcontractor hereby expressly indemnifies Owner and Contractor for the consequences of any negligent act or omission of Owner or Contractor, its agents, servants and employees, unless such act or omission constitutes gross negligence or intentional misconduct.***

# INTERMEDIATE FORM AGREEMENT

- *To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against any and all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom and (ii) **is caused in whole or in part by any negligent act or omission of the Contractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. . .***

# LIMITED FORM AGREEMENT

*To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner and Contractor from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including loss of use resulting therefrom, **but only to the extent caused in whole or in part by negligent acts or omissions of Subcontractor.***

# BE AWARE...

- Almost every state regulates what form of indemnity agreement is permissible
- To be enforceable, the indemnity clause in the contract must comply with the regulations in the jurisdiction governing the contract
- Authentic and original signatures should be provided on each contract containing the indemnity clause the parties wish to enforce

# SMART PRACTICE TIPS

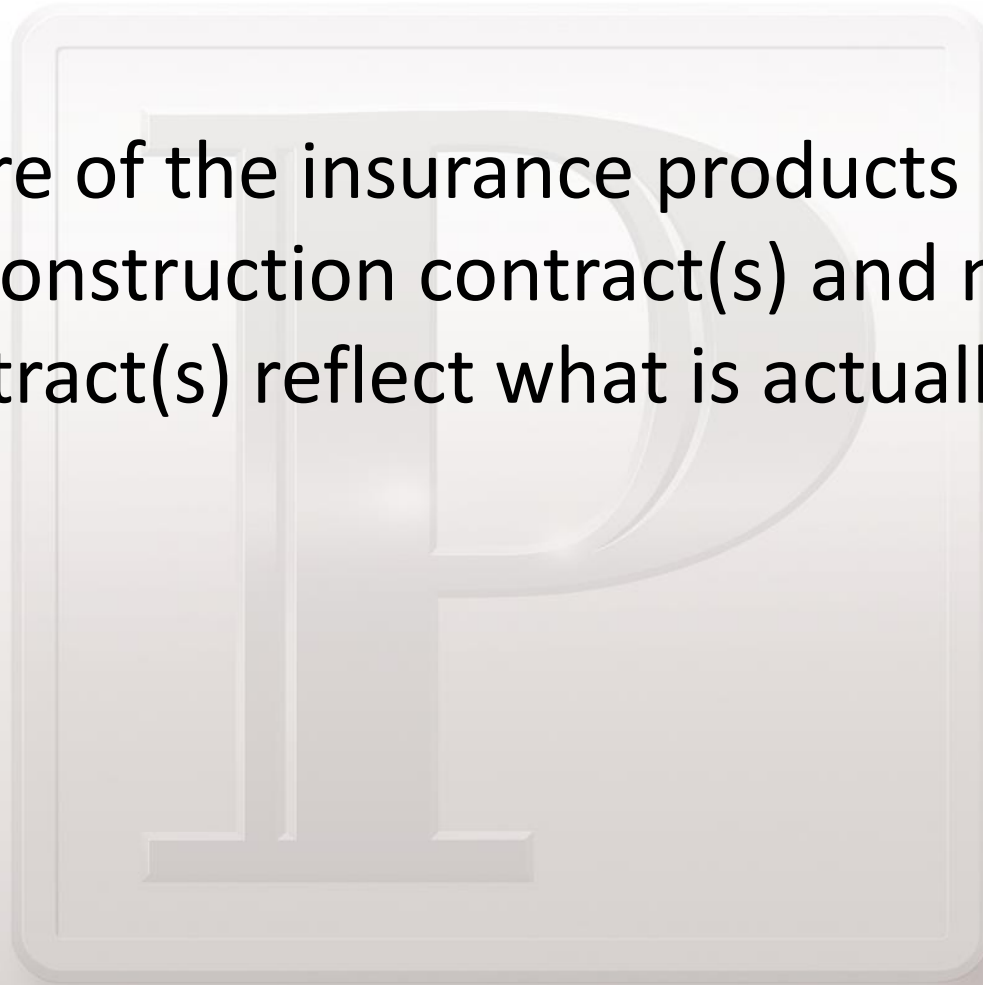
- Have the indemnification provisions of the contract carefully reviewed by an attorney to determine if it is legal under that state's laws.
- Indemnity provisions should not be a “take it or leave it” proposition. Many states require that the terms of these liability shifting provisions be part of a negotiated contract
- Keep it simple! Conflicting indemnification provisions and language can result in nullifying the intended right to indemnification.

# DESIGN PROFESSIONALS

- Indemnification provisions may require indemnification of Owner *and* Architect.
- Be aware of any provisions limiting architects' or engineers' total liability on the project to a set dollar amount.
- If design and construction of a project go to litigation, be aware that many professional liability policies have eroding limits.

# INSURANCE

- Be Aware of the insurance products required by the construction contract(s) and make sure the contract(s) reflect what is actually in place.



# WRAP POLICIES

- In theory, these policies are supposed to eliminate the need for law suits down the contractual chain.
- In reality, you need to look out for:
  - (i) Whether there are sufficient limits for the project to cover all parties insured;
  - (ii) Per occurrence deductibles paid by all parties under the policy;
  - (iii) Whether there are eroding limits on these policies where multiple insureds may require a defense;
  - (iv) Contractual provisions that may still result in lawsuits among insureds.



# ADDITIONAL INSURED PROVISIONS

- “AI” Provisions require one of the contracting parties to name the other as an additional insured on a designated policy.
- Scope of the duty is dictated by the contractual requirements, as well as by the policy itself.
- The insurance policy language will always control over contractual provisions, alone.

# KEY ISSUES IN AI

- What kind of coverage is requested?
- Have you obtained that coverage?
- CGL v. Completed Operations coverage
- Has the contract been amended to reflect the coverage actually obtained?

# INSURANCE PRODUCTS

- Work with you broker to obtain completed operations coverage.
- Get an ENDORSEMENT (not a certificate) on each applicable policy of insurance, and obtain a copy.
- The endorsement should be the primary policy of insurance for the AI.

# TIPS FOR CONTRACTORS/DEVELOPERS

- Make sure the contract and the insurance obtained match up.
- Make sure your state permits AI, and that the required coverage is within the permissible limits.

# INSURERS AND AI

- How is an insurer to deal with a tender by an AI during or post litigation?
- Contribution claims by other insurers



**CONSTRUCTION STAGE**

# CONSTRUCTION STAGE

- Supervision



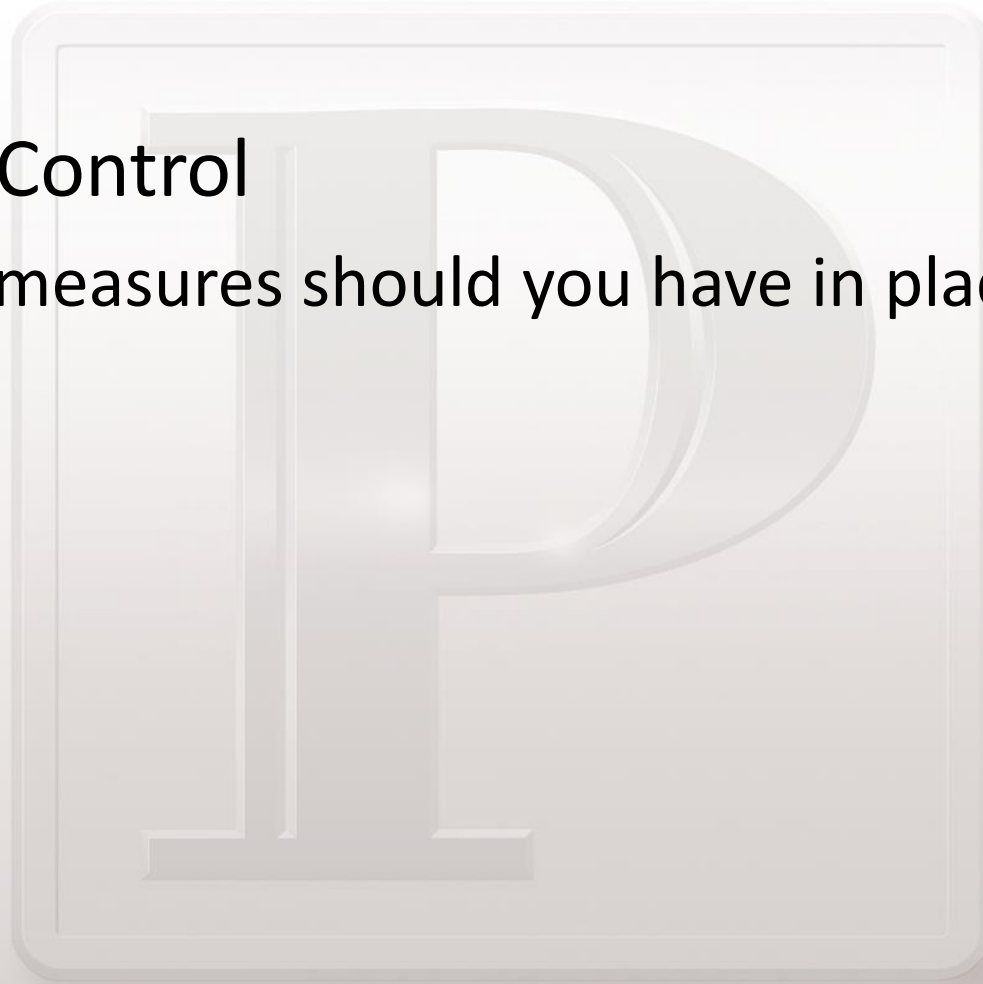
# CONSTRUCTION STAGE

- Inspections during construction
  - Who should conduct the inspections?
  - Multiple stages of construction



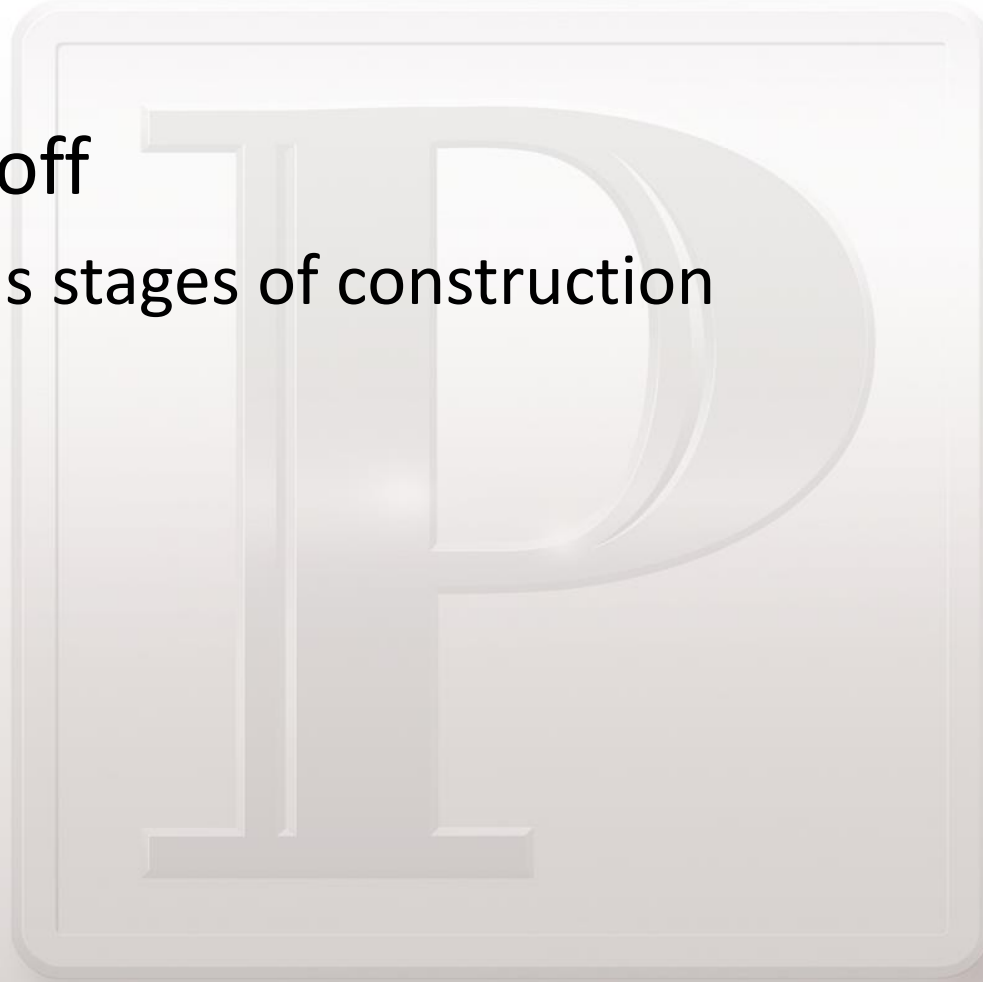
# CONSTRUCTION STAGE

- Quality Control
  - What measures should you have in place?



# CONSTRUCTION STAGE

- Signing off
  - Various stages of construction





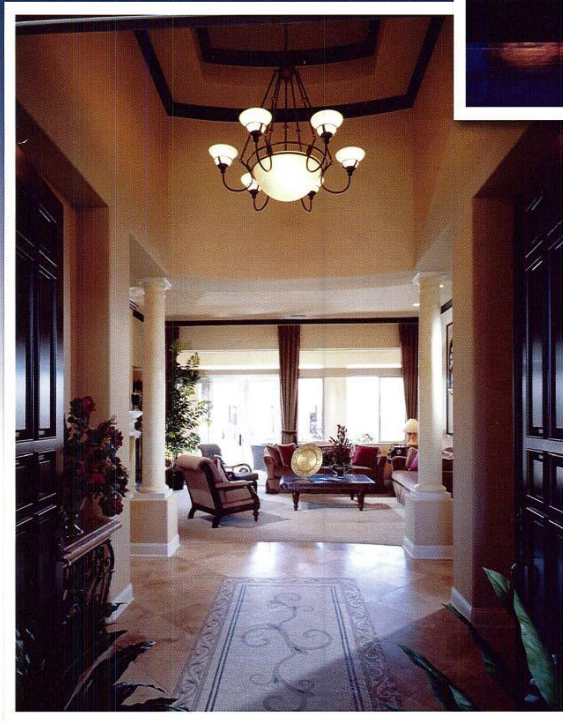
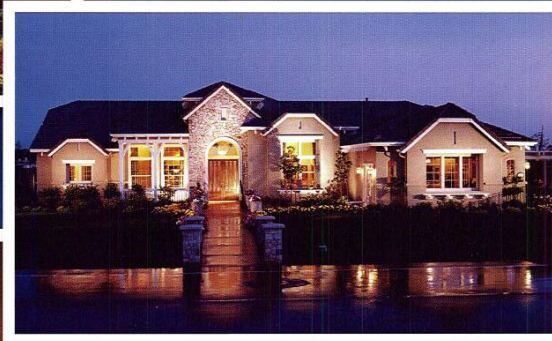
**SELL OUT OF PROJECT**

# SELL OUT OF PROJECT

- Review your sales/promotional materials carefully



# The finest homes in the best communities



We invite you to visit each of our new communities and tour our impressive collection of homes. No matter which [redacted] home and community you find to be your favorite, you'll have made a wise decision. Each of our homes is a product of the company's collaborative work policy of hiring the finest talents and allowing them to fully exercise their expertise to create homes of lasting quality and value, backed-up by a commitment to provide the best customer service in the homebuilding industry.

When you purchase a new home from [redacted] Homes, you buy with the confidence that you are investing in master craftsmanship and the best value for your family.

[redacted] Homes

# SELL OUT OF PROJECT

- Make sure your sales force is adequately trained to avoid making representations that can come back to haunt you
- Include favorable clauses in your purchase agreements
- Avoid attorney fee clauses

# SELL OUT OF PROJECT

- Warranty Issues
- Maintenance Instructions/Disclosures
- Right to Repair Statutes/Alternative Pre-Litigation Procedures
- Alternative Dispute Resolution Options

# HOMEOWNER USE AND MAINTENANCE GUIDELINES

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## Grounds

Proper care of the grounds around your house cannot only add to the beauty of your home, but it can also protect the structure of your home.

- **Grading** - Your lot and surrounding lot grades were established by professional engineers in accordance with local municipality approved grading and/or water retention, to provide positive drainage away from the building in all directions. Should you wish to change the drainage pattern, be sure that a proper drainage slope is maintained. Each homeowner is responsible to insure that landscaping and other improvements placed on the lot after close of escrow independent of [REDACTED] Homes (i.e., pools, retaining walls, patios, etc.) continue to facilitate drainage in the proper direction and at outlets provided. Erroneous homeowner adjustment of planned design stipulations as to grading/drainage may void other warranties with respect to water damage to the interior of the home. Do not fill above the top of the foundation and always allow an 8 inch minimum between the earth and the siding. Small depressions in the lawn should also be filled.
- **Lawn and Plants** - Water your new lawn and shrubs often. Reset your irrigation timer after landscape is established to avoid overwatering. In the Fall of the first year, rake the lawn thoroughly, reseed it with the appropriate mixture, and add an organic fertilizer or manure. Give special attention to any bare spots in it. If you plan to have flower beds near the house, make sure they are high so that water drains away from the house. Change irrigation timer seasonally.
- **Care of Landscaping** - After installation of plantings, it is up to the owner to provide care and attention for establishment and growth of plants and trees. Trees should be watered at least once per week regularly, especially during Spring and Summer when expiration of moisture through the leaves must be replaced at roots for continuity of circulation. Shrubs should also be watered at least once per week for the first six months and if installation is made in the Spring or Summer, should be watered every other day for three to four weeks. Fertilizing of trees and shrubs during the initial rooting period from two to six months is not recommended. Yellowing of lawn or plants can indicate nitrogen or other fertilizer deficiencies and require correct application of appropriate nutrients.





**POST SALE**

# POST SALE

- How you handle warranty claims will influence your claims future
- Good customer relations is vital
- Should warranty/customer relations be outsourced?
  - Some states require



**AFTER NOTICE OF CLAIM**

# AFTER NOTICE OF CLAIM

- Single Home
- Mass Claims





**OUTCOMES, TRENDS AND RECENT  
DEVELOPMENTS**



**QUESTIONS?**

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