HOT TOPICS IN FIRESTOPPING:
WHAT DO WE KNOW ABOUT POTENTIAL SOURCES OF LIABILITY AND HOW TO PROTECT YOUR BUSINESS FROM BEING BURNED?

• KAREN P. LAYNG, PRESIDENT

• M.A.I.T. CO.
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INTRODUCTION

◆ General primer on the development of legal theories of potential sources of liability over the last two decades

◆ What contractors should know from the construction documentation and bidding phase to final completion

◆ Who is the “engineer of record” or designer of the firestop system? What do the standard contract documents provide?

◆ Document retention policies and the advent of spoliation claims, for failure to maintain electronically stored information or “ESI”

◆ Impact of criminal investigations and asserting the 5th amendment in a civil case
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Fire Statistics:

- U.S. fire departments responded to an estimated 1,319,500 fires in 2017
- These resulted in 3,400 civilian fatalities
- $13 billion in direct property loss (excluding $10 MM in California wildfires)
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“Fire lawyers” to represent victims are only a click away:
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The California wildfires have spawned a fertile new area of legal expertise: fire lawsuits

Four Top California Law Firms Begin Filing Series of Lawsuits On Behalf of Camp Fire Victims And Challenging PG&E’s False and Misleading Ads Touting Their Concern for Customer Safety

“If PG&E had spent their monopolistic profits on infrastructure upgrades instead of promoting a false image of safety, this incident would never have happened.” - Frank M. Pitre of Cotchet, Pitre & McCarthy, LLP

“After the tragedy of October 2017 in wine country, we watched PG&E blanket the airwaves on a daily basis for 14 months advertising that they were interested in the safety of their customers and the prevention of wildfires. All of that money spent on advertising should have been spent on prevention.” - Mike Kelly of Walkup, Melodia, Kelly & Schoenberger

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CHICO, Calif.--(BUSINESS WIRE)--These are the first and only cases filed that directly challenge PG&E for misleading over 16 million customers that safety is its first priority. Two different complaints filed today in Butte County Superior Court seek to compensate victims and recoup monies spent by the utility giant for misleading advertising expenditures. The first of the cases was filed on behalf of Lila Williams (93 years old) and Louise Howell (57 years old), who while fleeing for her life to escape the intense blaze of the Camp Fire on November 8, 2018, was forced to abandon her car and seek refuge underwater in Lake Concow to stay alive. The second case was filed by Chardonnay Tally, who lost her father, Richard Brown, fondly referred to by friends and neighbors as the “Mayor of Concow.”
Legal theories of potential sources of liability over the last two decades:

Contract and Bidding Phase:

◆ What work are you proposing to do (and are you responsible for completing) to prevent fire from passing through fire-resistance and “Other” rated assemblies? (Smoke, Germs, etc.)

◆ Have you brought on design responsibility by failing to exclude it?

◆ Are shop drawings Contract Documents? Failing to construct in compliance with the design constitutes a “construction defect.”
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Legal Theories:

Potential sources of liability over the last two decades:

◆ **Violations of Building Codes or Standards**
  - (may constitute negligence per se)

◆ **Contractual Liability for defective workmanship**
  - See for ex. AIA A 201: Sections 3.3 “Supervision and Construction Procedures” and 6.2 Mutual Responsibility”

◆ **Products Liability** (defective products installed as proximate cause of the injury/damage)

◆ **Criminal liability** (under federal statutes such as O.S.H.A. or criminal negligence)
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What contractors should know from the construction documentation and bidding phase:

✦ Who is the “engineer of record” for the firestop system?
  • If unclear, send an R.F.I.
  • Gap filler provisions under the AIA forms)

✦ What are local governing codes (and what requirements are included in the Project specifications)

✦ What liability / indemnification / defense obligations are you buying into under your contract for firestop liability?
  • (general catch-all provisions that each subcontractor will firestop its own Work; notify of defective work of others)
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Defense of a civil arbitration or litigation claim related to alleged defective firestopping

◆ What are your insurance limits and duties to defend? (Concept of “Horizontal Exhaustion?)

◆ Impact of inspection sign offs (by architects and municipalities)

◆ Does my contract allow my company to obtain the records we need to defend a firestop claim?
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Defense of a criminal investigation or claim related to defective firestopping

- Criminal negligence for ignoring fire code violations
- Impact of asserting 5th Amendment in subsequent civil suit
- Implication of the OSHA General Duty Clause, Section 5(a)(1)
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Document retention policies:  
(no longer document destruction policies)

◆ How long in this industry is long enough to retain records?

◆ What if all the project records are maintained in the Cloud?

◆ How to protect your company?
Spoliation claims, for failure to maintain electronically stored information or ESI

◆ What is spoliation?

◆ What is potential liability for spoliation?
  • (can include monetary sanctions, adverse inferences and entry of default judgment)

◆ In the firestop context, are there any special potential land mines?
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CONCLUSION/ TAKE AWAYS

1. Familiarize yourself with all applicable codes and standards;

2. Follow developments in performance based codes and NFPA, FCIA Code efforts;

3. Keep abreast of legal developments in construction negligence and firestopping cases;

4. Maintain insurance and investigate available coverage and limits; and

5. Read and understand your contract obligations before you sign!
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THANK YOU!

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