

## CONSTRUCTION LAW AND LITIGATION

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### IN THIS ISSUE

*When disaster strikes a construction project, the fallout can be significant, and the harms incalculable. Quick attention and a re-focus on tried and true project management practices can pull your team through even a major disaster and hopefully get your project back on track.*

## Is Your Construction Project Snakebit? How to Tell and How to Respond

### ABOUT THE AUTHOR



**William S. Thomas** is a co-founder and member of Gausnell, O'Keefe & Thomas, LLC, in St. Louis, Missouri where he focuses his practice on handling matters involving the construction process, from up-front contract reviews, commercial litigation, professional liability defense and trial work. He has represented owners, contractors, subcontractors, architects, engineers, land surveyors and landscape architects in all phases of construction claims. He also handles product liability claims, other general commercial disputes and general liability claims. He is licensed to practice law in Missouri and Illinois, the Federal Court of Claims, and several Federal Courts. He is a past president of the Lawyers Association of St. Louis, the local trial bar. Bill is involved in many professional organizations, including the IADC, and the Missouri Organization of Defense Lawyers, the Defense Research Institute and its Construction Law Committee, Product Liability Committee, and Building Products - Substantive Litigation Group, and Professional Liability Committee, where he served on the Steering Committee, and Design Professional Subcommittee. Bill is an associate member of the ASCE and the AIA and is a Fellow of the Construction Lawyers Society of America. He is recognized by U.S. News - Best Lawyers as a Best Lawyer in Construction Law. He is a frequent lecturer and writer on a number of issues, from product liability to construction. He can be reached at [wthomas@gotlawstl.com](mailto:wthomas@gotlawstl.com).

### ABOUT THE COMMITTEE

The Construction Law and Litigation Committee consists of lawyers who represent general contractors, design/build firms, subcontractors, construction lenders, architects, engineers and owners. The Committee provides an opportunity to keep up to date on the latest developments in construction law, as well as a good networking and referral source for experienced construction litigators throughout the country. Members can also obtain information on liability and damage experts with e-mail inquiries to the Committee. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

*“For all venomous snake bites:*

- *Get everyone away from the snake.*
- *DO NOT try to capture the snake.*
- *Keep the victim quiet.*
- *Immobilize the injured part of the body.*
- *Gently wash the bite with soap and water.*
- *Seek medical care immediately!”*

### **Boy Scouts of America Handbook - Care for Snakebites**

*Likely all of us have been snakebit. Perhaps not literally, but some experience in our lives left us feeling like no matter what we did, nothing went right. For some reason, a file, a project or an assignment seemed ill-fated, unlucky or jinxed. Try as we might, we just could not extract any positive from it. All we could do was hope for a swift end. Unfortunately, the end did not always come swiftly and we were left to endure hardship after hardship. When you feel the fangs sink in, and realize you’ve been bitten, one thing is clear from all the advice on snakebites, do not delay, seek help immediately!*

### **Hard Rock Hotel Project Plagued With Problems**

In late September 2020, a fire broke out amongst the wreckage of the Hard Rock Hotel construction project that partially collapsed in

October of 2019. The blaze was ignited by demolition workers cutting through steel girders, which ignited roofing materials left in place after the collapse. While the fire sent thick plumes of black smoke over the New Orleans business district for several hours, it did not spread beyond the site, and was contained within a few hours. However, news of the fire circulated far and wide, making the national news circuit and serving as a reminder of the serious issues still faced by the City of New Orleans, the developer of the hotel and the construction team over the collapse.

On October 12, 2019, the \$85 million, 18-story high rise hotel under construction in New Orleans suffered a catastrophic structural failure and partially collapsed, killing three people, injuring numerous others and causing serious property damage and disruption to the downtown corridor. Just days before the collapse, a video<sup>1</sup> was apparently recorded where construction workers were heard expressing concern over the integrity of temporary shoring supporting a newly poured concrete slab on one of the upper floors. The video shows the slab sagging so much that temporary shoring jacks, allegedly spaced too far apart, were bent.

The collapse was only the beginning of the problems for the project. Because of the precarious nature of the structure, the bodies of two dead construction workers were unable to be safely recovered. In January 2020, the site took a macabre turn, even for

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<sup>1</sup> See:

<https://www.youtube.com/watch?v=otMpiOhVmxg>

New Orleans, when a tarp that was blocking the view of the remains of one of the worker's bodes blew off. Firefighters had to replace the tarp at great risk to themselves, because a recovery plan had still not been formulated and implemented.

Demolition work did not begin until May 2020 after months of disagreements between the City and developers over how best to bring down the remains of the unstable structure. The two construction cranes used at the site had to be blown up to bring them down and avoid potential further damage from tropical storm events. The owners planned to demolish, and not implode, the building. An implosion would risk damaging buildings and other nearby infrastructure. There were concerns that seasonal rain events could further destabilize the structure and make the demolition work more dangerous. As part of the demolition plan, several adjacent historical buildings would themselves have to be demolished to accomplish taking down the wreckage of the hotel.

### **Lawsuits Over Hard Rock Collapse Commence**

It was not until August 2020 that two of the workers' remains were finally recovered. One week after the last body was recovered, and ten months after the collapse, the City of New Orleans initiated a lawsuit<sup>2</sup> against the developer of the hotel, the contractor, the steel fabricator and erector, the architect, and

structural engineer, among other parties, and 16 named insurers. In the suit, the City vaguely alleged that the design of the building was "structurally unsound," contained errors and was inadequate to support the structure. They also allege that the construction means and methods were not suitable for the construction of a structurally fit building and were unreasonably dangerous. The City also alleges that all parties to the project "ignored" and failed "to properly notice signs that the building being constructed at the Construction Site was not structurally sound and was in danger of collapse."

In its lawsuit, the City is seeking to recover losses it sustained dealing with the collapse, including damaged infrastructure and expenditure of public resources, totaling at least \$12.3 million. The intersection of Canal and Rampart Streets sits on the edge of the French Quarter, and neighboring businesses had to close for months (pre-pandemic) because there remained a danger of further collapse. As part of their damages, the City claims delays over demolition of the wreckage will continue to accumulate.

But the City was late to file, as numerous other lawsuits were already on file by families of those killed or injured in the collapse, bystanders, nearby businesses and even by the Hard Rock Hotel against its own design and construction team. The suits all raise similar issues of negligence, and claim the structural design and temporary shoring were

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<sup>2</sup> Full text of the City's lawsuit can be found here: <http://nola.gov/nola/media/Mayor-s-Office/2020-07214-Petition-for-Damages.pdf>

not sufficient to support the structure in its upper floors, that the contractor used unskilled labor, did not allow sufficient time for concrete to cure fully, and submitted incorrect or fraudulent test results to the City. It is also alleged the City's inspectors were a part of the negligent conduct, and either failed to make appropriate on-site inspections or allowed insufficient documentation of inspections to be submitted, or were otherwise complicit in the contractor's conduct of cutting corners.

### **Investigation of Hard Rock Collapse Ongoing**

A complete investigation into the cause of the collapse is still underway and not complete. However, some initial information is coming out which sheds light on potential causes of the failure.

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) cited the structural engineer, contractor, steel fabricator and erector, and eight subcontractors for safety and health violations at the Hard Rock site. OSHA's investigation determined the structural engineer failed to adequately design, review or approve steel bolt connections affecting the structural integrity of the building, and issued one willful violation for this failure. OSHA cited the general contractor, for three serious violations related to inadequate egress from the structure. OSHA cited steel fabricator and erector subcontractor for failing to maintain the structural stability of the building and cited other subcontractors for serious violations related to emergency

egress training, inadequate egress, fall hazard training and safety hazards. Collectively, the companies face \$315,536 in penalties.

In its citation against the structural engineer, it noted the following design deficiencies:

- Floor beams on the 16th floor were under-designed in load capacity;
- The western side exterior bay was not tied into a rigid portion of the structure for floors 9 through 15 between column lines 1 and 9;
- Cantilevers on the 17th and 18th floors exceeded the manufacturer's guidance for maximum spans;
- Structural steel connections were inadequately designed, reviewed or approved, affecting the structural integrity of the connections.

The contractor and subcontractors were cited for failing to connect beams to columns on the upper floors, among other violations. Also, it has been reported that the concrete decking used to form up the concrete was changed to 2-inch Versa-Dek, while all directions in the plans and specifications called for 3-inch standard metal decking. The investigation is ongoing, but sounds reminiscent of allegations made in the Kansas City Hyatt Regency collapse, where delegated design issues led to a failure to catch serious mistakes in the structural calculations on the capacity of box beams which led to collapse of the hotel's three skywalks, and the deaths of 114 people. As in the Hyatt Regency accident, there were likely "warning signs" long before

the collapse which were simply not heeded, for one reason or another.

### **“If You Play With Snakes...”**

Construction is one of the most dangerous industries, accounting for more than 20 percent of all private-sector worker fatalities in a recent study. 5,250 workers died on the job in 2018, on average, more than 100 a week or more than 14 deaths every day.<sup>3</sup> The problem is only exacerbated by the nature of the modern worksite, referred to by some critics as a “fissured workplace.”<sup>4</sup> Contractors have always subcontracted work to smaller, more specialized companies, who, in turn, often sub-subcontract those services to other independent contractors. Fissuring, it is claimed, results in further degraded profit margins, a less experienced labor force and ultimately, incentive to cut corners. Further compounding the fissured workplace problem is the nature of the modern contracting framework set up to protect owners and developers from claims of worker injury and site safety. While multi-contractor sites are addressed by OSHA and state common law, often responsibility for “site safety” gets delegated or shifted to smaller contractors and subcontractors, who are unable to bear the significant financial burden when things go wrong. In those cases, litigants look to deeper pockets and a way to blame them for things they are often not responsible for.

Worker safety is not always the victim of these fractured, multi-employer worksites. More often than not, the consequence is delays, change orders, and cost overruns. According to another study of mega-projects, 98% come in over-budget, the average cost increase is 80% of original value, and 77% of them suffer significant delays, with an average slippage of 20 months behind original schedule.<sup>5</sup> The root cause of these project problems can be any number of things, alone or in combination, but are most often traced to inadequate risk management, a lack of proper project management structure, poor communication or documentation, unrealistic expectations or bad estimating, and personnel inadequacies. The owner or developer can contribute to these problems through their own indifference, lack of goals, unrealistic expectations or by changing project scope.

### **What to Do When Your Project Gets Bit**

First things first, you want to make sure all appropriate entities, governmental agencies, OSHA, local municipal inspectors or building departments, or other safety personnel are fully apprised of the situation. Put that fire out first. Next, immediately notify all appropriate insurers of the issue, including appropriate tenders to any subcontractors or consultants, and get legal counsel involved in order to render any necessary advice or to guide the project participants through the snarl that will likely begin to develop over responsibility, financial and otherwise. Do not

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<sup>3</sup> See: <https://www.osha.gov/data/commonstats>

<sup>4</sup> See: <http://www.fissuredworkplace.net/>

<sup>5</sup> See: <https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/the-construction-productivity-imperative#>

wait on either of these fronts, or else you can get yourself down a path you cannot walk back out of.

As with most things in life, the core solution to a snakebit project is accountability. Rarely do problems get resolved when project participants begin to point fingers places other than themselves. If a mistake was made, accept responsibility and be a part of the team to fashion a solution. In a world where time and money are acutely impacted by even small disruptions, it is usually best to get to a solution now and figure out a way to work out financial or other responsibility later. Use tools like tolling agreements or cooperation and subsequent arbitration or mediation agreements to allow project participants to implement immediate solutions and let the executives or lawyers to wrangle over the dollars sometime down the road.

Hopefully, the parties to the project keep impeccable paperwork, but more often because of the press of the job, this does not occur, either for the whole team, or individual participants. However, it is imperative that the players understand project data should be protected, and all sources of information, electronic, paper or otherwise, should be preserved in some fashion. Once there is an issue, send a preservation email to all team participants and explain they need to keep everything, no matter how seemingly insignificant, as it could play a big role later. This includes all sources of information, including "social media," or other modes of communicating in our digital world.

In addition to preserving existing documentation, it is critical that the causes or details of any problems or failures be properly and thoroughly recorded. Find out why this happened. The contemporaneous project documents about a specific issue in the field will become critical months down the road when there is a claim or dispute, so it is very important that all available information be captured, written down and maintained. This includes details about witnesses, products involved, evaluations of designs and all changes made, whether the construction complied with the design, photographs, and all other "evidence" collected along the way. If the issue is significant, get an independent subject matter expert to the site as soon as possible to provide peer review and consultation, if necessary.

Communication is always a critical part of any project, and that should not change when problems arise. In fact, that is the most important time to increase the amount and content of communications so the entire project team is aware of every issue so they can properly plan and participate in the recovery effort. Nothing good comes from keeping some perceived problem to yourself when the risk is a potentially catastrophic event down the road. And, it is always best to fully appraise project participants of all of the potential fall-out, do not sugar coat, and set yourself up for another problem down the road if expectations are unrealistically reestablished, and impossible to achieve. It may become necessary to revisit the entire project schedule, budget or scope in order to

achieve the client's most critical objectives, or to allow them to readjust accordingly.

The schedule may need to be totally revisited. While some critical path activities may not be able to be adjusted, because of significant lead times or durations, perhaps dependencies can be reassessed, and sequences adjusted to achieve the best outcome. Perhaps overtime, weekend or shift work could aid in the goal of keeping as much of the schedule intact as possible.

More often than not, problems arise when there is a change in personnel. Do not let this common occurrence exacerbate problems. Try as much as possible to maintain original resource allocation when issues arise as they will have the historical project perspective and relationships to work to a solution and also will be able to keep and maintain accountability, guiding the players to a solution faster than a new team could. Make sure the "remediation team" is fully apprised of their roles, responsibilities, deliverables and deadlines. Make it easy for this group to collaborate and share information because collectively, hopefully, a solution can be reached more efficiently and quickly.

The recovery team must quickly develop a recovery plan. Understanding that it will be

subject to extraordinary scrutiny, buy in from everyone is essential. Since there will be cost, schedule and personnel commitments, and will require greater frequency of communication and reporting, all impacted parties should be invested in the solution. Hopefully, with a consensus solution, the job will once again be able to achieve a state of balance, and begin once again to move forward. This may require "micromanagement" by project leads, daily check-ins and more frequent and involved team meetings, but it will be absolutely necessary to achieve the shared objective of a project with no more problems.

### **Conclusion**

The goal of achieving a project no longer in crisis is attainable, with a little "first aid." After the recovery is underway, make sure the project participants continue to perform proper risk assessment to make sure the next snake in the road does not bite.

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