

AUGUST 2016

Wednesday, August 10, 2016

Workshop - 3:30 to 4:30 pm (1.0 PDH - ethics)

Presentation - 5:00 to 6:30 P.M. (1.0 PDH)

TECHNICAL PROGRAM

Killer Contract Clauses

Speaker: [Ben Westcott](#), Co-Managing Shareholder with [Andrews Myers PC](#). Tel: (713) 850-4200

Ben Westcott is the Co-Managing Shareholder with Andrews Myers PC, a Texas-based corporate law firm, and is based in their Houston office. Ben Westcott's practice focuses on both transactional and dispute resolution aspects of construction law. He represents general contractors, subcontractors, suppliers and owners on substantial construction projects, including schools, public infrastructure, sports facilities, airports, petrochemical and industrial plants, highway projects, wastewater treatment facilities, multi-family projects, retail centers, hotels, hospitals and office buildings. His experience includes the prosecution and defense of a variety of construction-related issues before state and federal courts, as well as the American Arbitration Association, including matters related to mechanic's liens; performance and payment bonds; differing site conditions; breach of contract; construction defect claims; delay and acceleration claims; and termination of contracts. Ben also drafts and reviews construction contract documents.

Ben is a graduate of Rice University and received his J.D. from the University of Houston Law Center, where he is an Adjunct Professor in the Basic Construction Law course.

The prestigious legal directory, Chambers USA, America's Leading Lawyers for Business, has recognized Ben as a leading construction lawyer for seven consecutive years.

PRESENTATION SUMMARY

To an audience of 71, Ben Westcott presented much information on contract law as it relates to construction. Ben discussed many of the following topics related to Liability including:

Design Defects:

- Unless otherwise stated, Contractor takes responsibility for sufficiency of design
- Limit liability by exclusions
- No liability for sufficiency of design
- Only responsible to call to attention of owner known design defects.

Concealed Conditions: Typical language says:

- Contractor has visited the site and assured itself that conditions are sufficient for construction; Waiver of responsibility for accuracy of owner supplied information
- This language makes Subcontractor generally responsible for concealed conditions. Changes you can make:
 - Only responsible for items actually noted as a result of visual observations
 - No independent testing required
 - Entitled to rely on owner supplied information



- Assuming owner disclosed all known adverse conditions

Schedule:

- Generally includes no damage for delay, extension of time is sole remedy for delay
- Daily rate for liquidated damages
- Need agreed upon schedule, with input from major subcontractors
- Need copies of schedules
- Need compensation for material or unreasonable schedule changes
- Need corresponding agreed to rate for contractor's daily overhead

Indemnity:

- Try to limit to what you cause if not, then try to cap to insurance or value of contract
- Look out for indemnity of Owners/Lenders/Architects/Others

Payment Terms:

- 30 days, not 30 days after GC paid or lender approval
- Need fixed period
- Need right to stop if not paid within 60 days.

Ben also made several key points during the question and answer period including:

- Unless otherwise stated, the contractor is responsible for the sufficiency of the design.
- Arbitration clauses should always be included in the contract to avoid costly lawsuits
- The standard payment clause of the contract should always be tied to the Property Code Chapter 28. This is a powerful tool in private contract work.

To download a copy of Ben Westcott's presentation slides, [click here](#)