

DPRCG 2024 CONVOCATION

Two Times the Trouble: Negotiating Related ADA Claims

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TRUST

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- Isabelle S. Felix, Esq. has been with the Design Professional team at AXA XL for over one decade, resolving professional liability claims for architects and engineers. Prior to joining AXA XL, Isabelle worked as an insurance defense counsel representing retailers, truckers and contractors. She is a licensed attorney in New York and New Jersey. She is a graduate of Fordham School of Law and earned her CPCU designation in 2017.

Learning Objectives:

- Examine how to deal with simultaneous claims, with the same client, similar projects, and similar issues
- Formulate a plan to settle different causes of action in a manner to prevent further delay and mitigate liability exposure
- Better understand the liability risks associated with ADA claims
- Explore how the existence of a first claim impacted the second through study of an actual claim scenario

The Projects (1 & 2)

Owner had two similar projects in two counties in the same state

- Mixed use retail and apartments
- Owner retained same Design-Builder
- Design builder retained same Architect
- Project 1 completed, occupied, and pending sale
- Project 2 in early construction

Project 2

- Multi-phase, mixed-use project
- Covers 4 corners on a very busy road in a high-end neighborhood
- 4 stories, 116 units
- 1st Floor: Retail Space / Lobby



Multiple Phases

- **Phase 1** - Insured brought in during Phase 1C
- **Phase 2** - Owner hired another architect to provide schematic design and zoning assistance; Insured picked up design from there to finish DDs, CDs, permitting and CA



The Contract

- Owner had fully executed contract with the Design-Builder
- Architect had fully-executed AIA contract in place with the Design-Builder
- Contract required mediation before arbitration for Disputes Not Involving Owner

The Contract: Consequential Damages

Contract contained Waiver of Consequential Damages Clause *but with a carve-out*

11.7 CONSEQUENTIAL DAMAGES.

11.7.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 11.7.2 BELOW), NEITHER DESIGN-BUILDER NOR DESIGN CONSULTANT SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

11.7.2 Notwithstanding Section 11.7.1 above, Design-Builder shall be entitled to recover against Design Consultant (i) any liquidated damages that Owner may assess against Design-Builder which are attributable to Design Consultant, even though both parties recognize that such liquidated damages may include some damages that might otherwise be deemed to be consequential and (ii) consequential damages that may be imposed upon Design-Builder by the Design-Build Agreement.

The Contract: Prevailing Party

Contract contained a prevailing party provision:

11.5.4 The prevailing party in any arbitration, or any other final, binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party reasonable attorneys' fees and expenses incurred by the prevailing party.

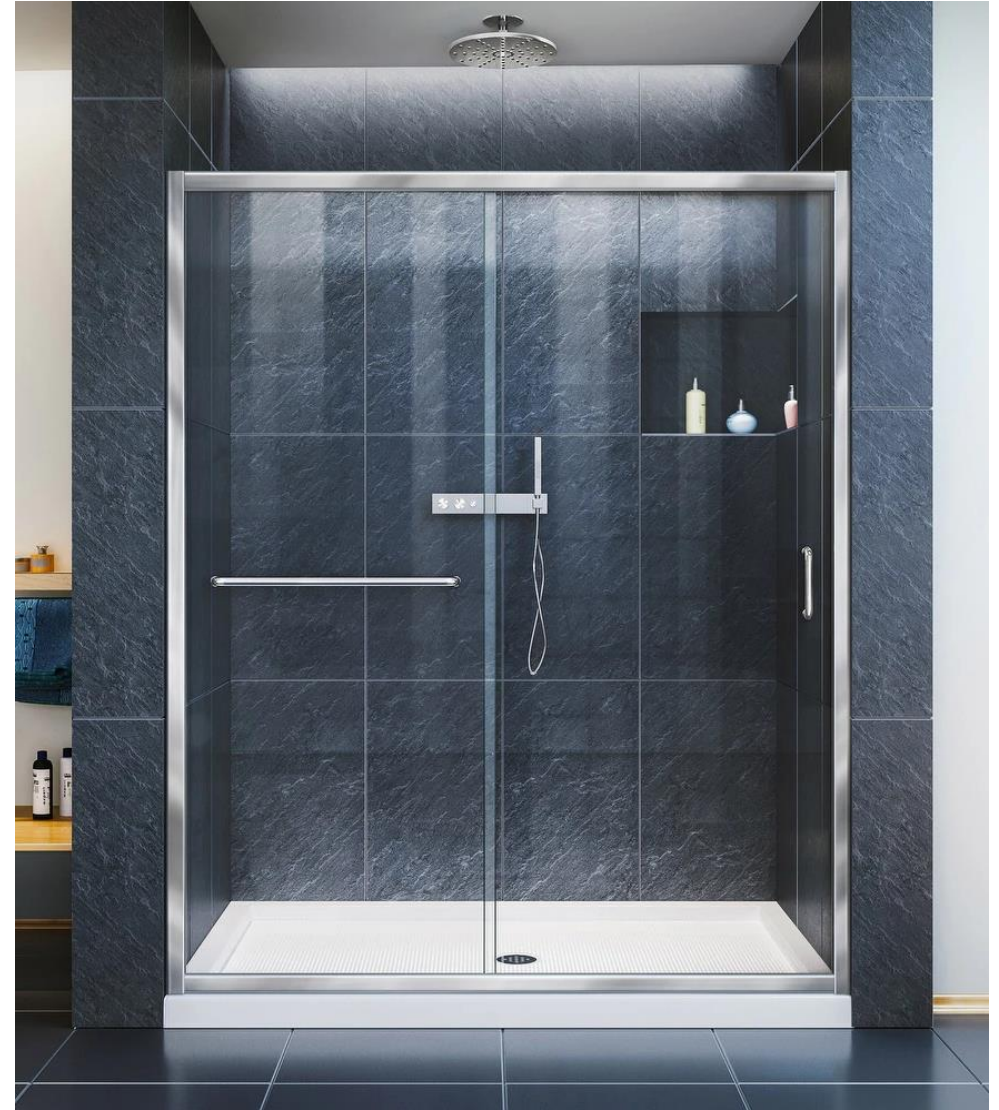
The Design: Bathtubs vs Showers

- Initial apartment design included 30" X 60" bathtubs
- Owner requested showers of the same size in lieu of bathtubs



The Error: Clearance

- Insured proceeded with substitution without being aware of the shower clearance issues
- Drawings were permitted with showers in lieu of tubs
- Drawings did not provide the required ADA accessibility clearances in front the showers



Discovering the Issues: Project 1

- Project 1 buyer commissioned an accessibility inspection
- This raised red flags regarding bathroom showers, among other things
- Design-Builder agreed to make necessary repairs at no cost to Owner or Buyer
- Design-Builder made a claim against Architect for cost associated with addressing these issues

Discovering the Issues: Project 2

- In early stages of construction when Architect became aware of ADA issues in Project 1
- Architect reviewed drawings and noted same ADA clearance issues in Project 2
- Insured notified Owner and Design-Builder, hoping to lessen the necessary corrections

Two Pre-Claim Reports

- Architect reported both pre-claim matters upon learning of issues
- Both fall under same policy period
- Both claims were made within a few months of each other

What's Next (Project 2)

- Need to retrofit certain portions of the project
- Framing and plumbing rough ins were complete and fixtures ordered
- All 116 units had to be redone = project delay
- Design-Builder agreed to do retrofit at no cost to Owner

Early Negotiations (Project 2)

- During Project 1 negotiations
- Design-Builder submitted Change Orders totaling \$1.1M
- Owner demanded immediate payment in full, no release
- We offered to:
 - Pay \$677k to retrofit with a limited release
 - Negotiate \$5,300/day delay claims
- Offer was rejected



Design-Builder Pressures Insured

- Threatens to pull subs off job if not given explicit directions on how to proceed
- Communicating with insured directly instead of through lawyers



Owner Pressures Insured

- Threatened to terminate contract on a new project
- Future work at risk
- Questioned Insured's insurability
- Demanded insured obtain higher insurance limits for future projects



Settlement

- Design-Builder hires legal counsel
- Design Builder offers a settlement of \$951k
 - **Repairs:** \$687k +15%
 - **Liquidated damages:** 63 days at \$2,500/day
 - Release for the ADA issues incorporating Owner's



Lessons Learned

- 1. QA/QC** – Have procedures to determine how Owner changes implicate ADA requirements and confirm addressed
- 2. Contracts** – Avoid Prevailing Party and Consequential Damages contract terms
- 3. Documentation** – Update Plans
- 4. Claims Communications** – Let counsel navigate pressure tactics
- 5. Simultaneous Claims** – Negotiating separately helped maintain leverage and boundaries

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