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# INTRODUCING *PROFESSIONALLY SPEAKING!*

NEWS & INSIGHTS

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## Wilson Elser's new quarterly newsletter features articles written by the firm's Professional Liability & Services Practice attorneys.

*Professionally Speaking* explores current topics of interest to general counsel, claims professionals and risk managers for various professional liability lines, including accountants, lawyers, design professionals, insurance brokers and others.

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By **Lindsay Powell** and **Matthew Lee**

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# Standards for Attorney-Client Privilege in Dual-Purpose Communications Remain Unchanged After U.S. Supreme Court Dismissal

The question of attorney-client privilege – within the context of legal and general advice – was recently raised by an unnamed law firm that petitioned the U.S. Supreme Court to clarify the bounds of the privilege in the case of In Re Grand Jury. While it is unclear why the Court dismissed this case as improvidently granted, it is clear that the current standard for "dual purpose" communications remains unchanged.

## BACKGROUND

The petitioner, a law firm specializing in tax law, prepared tax filings and provided legal advice to a corporate client that decided to expatriate. A federal grand jury subsequently subpoenaed documents from the law firm in connection with a criminal tax investigation of the corporate client. The law firm produced thousands of records, but withheld some documents based on the attorney-client privilege and work product doctrine. The documents withheld on the basis of the attorney-client privilege involved both legal advice concerning compliance with tax laws and preparation of the client's tax returns, or "dual purpose" communications.

In evaluating the withheld "dual purpose" communications, the U.S. District Court applied the "primary purpose" test. The court held that "the relevant consideration was whether the primary or predominant purpose of the communication was to seek legal advice, or to provide the corresponding legal advice." In applying this test, the court held that 54 of the withheld documents involved communications for which the "primary purpose" concerned the


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procedural aspects of tax return preparation rather than legal advice. Therefore, despite the fact that the documents also contained legal advice, the court ordered that the documents be produced (with court-ordered redactions). The law firm declined, was held in contempt and appealed the court's decision. The District Court's decision was upheld by the Ninth Circuit Court of Appeals. The law firm then appealed to the U.S. Supreme Court, which granted certiorari.

## ARGUMENTS AT THE U.S. SUPREME COURT

The petitioner argued that the D.C. Circuit's approach in the case of *In re Kellogg Brown & Root, Inc.* should be embraced for dual-purpose communications, and contended that a "significant" purpose test should be adopted. In Kellogg, according to the petitioner, the D.C. Circuit embraced a test that assesses whether obtaining or providing legal advice is one of the significant purposes of the communication rather than the "primary purpose." The petitioner argued that this test would preserve the privilege and provide more predictability.

On the other hand, the United States argued that the *Kellogg* approach was distinct from tax preparation cases and emphasized that an accountant's privilege should not be created for advice typically provided by a non-lawyer. The United States further argued that advice about tax preparation is not privileged unless it requires an attorney's legal expertise, and that intertwined communications should be privileged only when the predominant purpose is to provide or receive legal advice. In essence, it argued that the attorney-client privilege should not be expanded.

Several organizations, including the American Bar Association and Chamber of Commerce, submitted amicus briefs in support of the law firm. However, the U.S. Supreme Court declined to weigh in, dismissing the case as improvidently granted. While it is unclear why this case was dismissed as improvidently granted, the one point that is clear is that the current standard for "dual purpose" communications remains unchanged for now.

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# Lawyer Bot Short-Circuited by Class Action Alleging Unauthorized Practice of Law

Many of us are wondering how long it will take for ChatGPT, the revolutionary chatbot by OpenAI, to take our jobs. The answer: perhaps, not as soon as we fear!

On March 3, 2023, Chicago law firm Edelson P.C. filed a **complaint** against DoNotPay, self-described as "the world's first robot lawyer." Edelson may have short-circuited the automated barrister's circuits by filing a lawsuit alleging the unauthorized practice of law.

DoNotPay is marketed as an AI program intended to assist users in need of legal services, but who do not wish to hire a lawyer. The organization was founded in 2015 to assist users in disputing parking tickets. Since then, DoNotPay's services have expanded significantly. The company's website offers to help users fight corporations, overcome bureaucratic obstacles, locate cash and "sue anyone."

In spite of those lofty promises, Edelson's complaint counters by pointing out certain deficiencies, stating, "[u]nfortunately for its customers, DoNotPay is not actually a robot, a lawyer, or a law firm. DoNotPay does not have a law degree, is not barred in any jurisdiction and is not supervised by any lawyer."

The suit was brought by plaintiff Jonathan Faridian, who claims to have used DoNotPay for legal drafting projects, demand letters, one small claims court filing and drafting an employment discrimination complaint. Faridian's complaint explains he was under the impression that he was purchasing legal documents from an attorney, only to later discover that the "substandard" outcomes generated did not comport with his expectations.

When asked for comment, DoNotPay's representative denied Faridian's allegations, explaining the organization intends to defend itself "vigorously."

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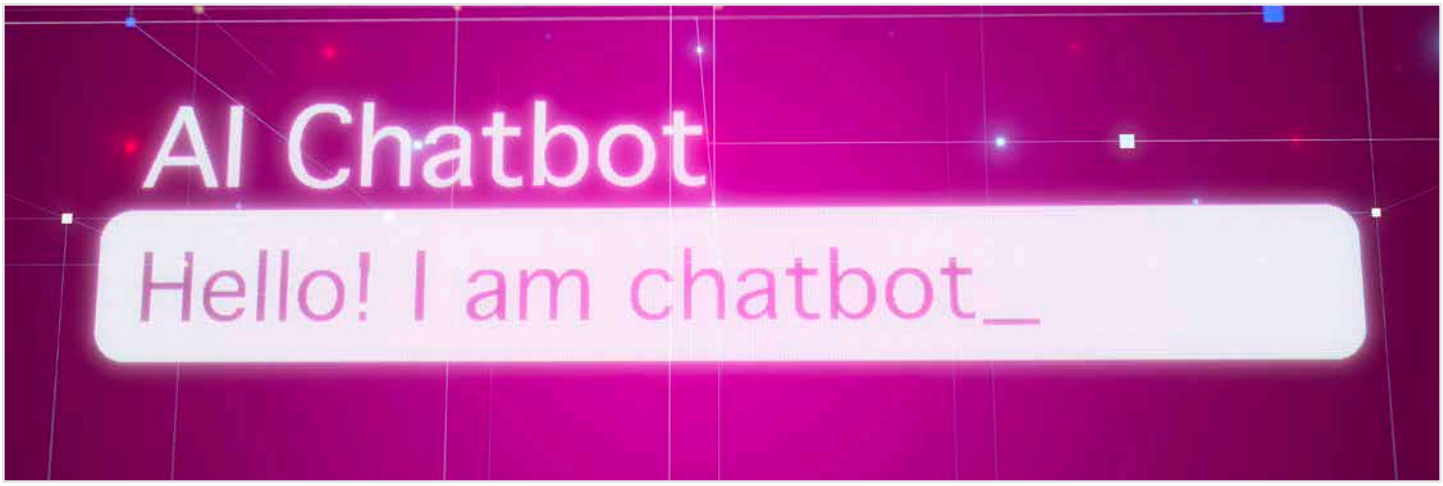

# Slaying the Beasts: Current Best Strategies for the Biggest Challenges in Construction

Successfully managing circumstances that raise red flags before they become "beasts" is the ultimate goal. The problem in the construction industry is that the worrisome circumstances are ever-changing and somewhat unpredictable, which makes it difficult to manage risk and avoid these "beasts." Here we address how to identify current challenges and address them head-on to keep the beasts at bay.

## CURRENT STATE OF CONSTRUCTION LITIGATION

Competition in the marketplace may create incentives for contractors to submit unrealistic bids to secure business. An issue arises when a contractor has bid too low for a project and is awarded the contract. The contractor is then expected to fulfill the terms and conditions of the applicable contract, leaving little to no room for unexpected developments and creating pressure to cut corners. This issue is complicated by escalating costs related to the continuing labor and supply chain shortage.

Other obstacles are projects being abandoned due to financing troubles and restarted projects after long periods of little or no activity.

There has also been a rise in construction and design defect claims resulting from broken promises and attempts to add value in the services or work offered in order to land the job. Specifically, scope creep and "added value" claims have been more fre quent during periods of financial challenges because contractors want to win bids and cultivate relationships with developers who will use them on multiple projects.

Scope creep involves contractors assuming design tasks and design professionals engaging in services that are outside their professional scope. In both scenarios, the professionals expose themselves to increased liability resulting from stepping outside the outlined scope of work or services and giving their clients "added value" for the fee the client is already paying. Additionally, claims related to new and novel project types are created when contractors and design professionals become involved in projects for which they do not have the requisite knowledge or expertise.

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Lastly, claims related to "warranty" statements involve superlative statements made about the quality of work or services. This may create a basis for a breach of warranty claim. Determining which statements rise to the level of a "warranty" statement is jurisdiction-specific and may result from content on a construction professional's website or in marketing materials.

## THE RISE OF THE BEASTS

We are seeing an escalation in the size of claims in terms of damages and liability. Claimants' experts are routinely opining that the building or residence needs replacement of the entire façade, full removal and replacement of fenestration products, and addition of huge contingencies even when there is a demand for full replacement.

Claimants are also pinning liability on trades that were previously minor players. Often, it is not the homeowner or condominium association that initiates the suit against these minor players. An owner's expert may point out a list of items or warranty work that could be initiated, but the owner will not sue the trade directly. Consequently, general contractors pick up on this and sue the trades mentioned regardless of how slight the issue is. General contractors then trigger additional insured coverage from the carrier, or contractual defense and indemnity against the subcontractor. It can be very difficult to get any traction with the owner to carve out these small issues for settlement once contingency-paid counsel is involved.

One example is the rise in framing claims rather than stucco. In Florida, stucco has always been the "beast" trade of the claimants. Stucco trades often exhaust their coverage through numerous claims. To supplement the shortfall in funds for the stucco trade, framers have become the new stucco. There has been a serious uptick in allegations against framers claiming poor framing caused movement of the building and affected the stucco, leading to water infiltration. Among the frustrations for defendants are the failures of plaintiffs' experts to apportion the damages among the trades. Plaintiffs often sue general contractors, allege they are liable for all defects, and leave the issue of trades to the contractor.

## CHALLENGES TO SLAYING THE BEASTS

When it comes to resolving these situations, obstacles include:

***Where is the money to resolve beast claims?*** Construction claims face many hurdles to resolution. Often, there is simply not enough money to resolve the plaintiff's overinflated claims. Plaintiffs have recently begun making claims with little evidence of pervasive defects. They often wait until litigation begins to do additional testing to prove defects exist. Then, regardless of liability, carriers are not required to pay many claims due to exclusions. In addition, construction clients are not vetting their business partners' financial viability and/or ensuring they have appropriate insurance overages to defend and indemnify them in the event of a claim where liability should be able to be shifted or shared.

Often, the client has been subject to so many lawsuits that its policies are exhausted, and no more coverage exists. Some- times risk transfer is ineffective because it is not pursued quickly or the provisions are underwritten so that carriers or their insureds do not require the defense to be picked up off the tendering party. Where covered damages are slim, the settlement may be affected if the insured is expected to contribute. Lastly, coverage analysis can hold up the settlement process.

***Eroding limits.*** Although policy limits generally constitute the boundaries of the insurer's indemnity obligations, most liability policies do not limit the amount an insurer must pay in defense of claims. One way an insurer may limit defense costs and its overall exposure

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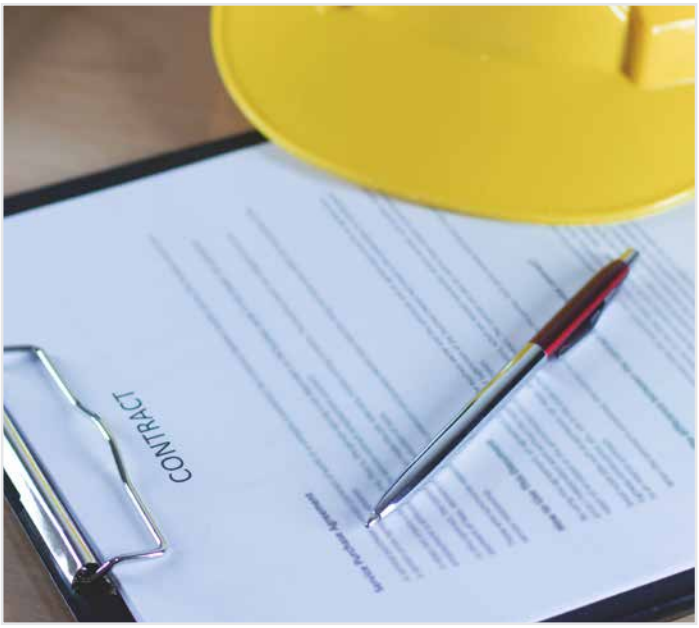
is through the use of “eroding” or “burning” limits commonly found in professional liability policies. In this type of policy, defense costs erode indemnity limits. In other words, every dollar spent on defense reduces by one dollar the amount available to settle or otherwise resolve the claim.




Defense counsel must advise the insured of the benefits of a suggested litigation activity and its potential effect on both the defense of the case and the available indemnity limits. In dealing with plaintiff’s counsel, the best course of action and strategy is to be candid about the fact that the policy limits may be reduced by defense costs.

Another issue on the rise with the eroding policy limits is selection of defense counsel and the potential for adversarial dealings between the insured and the carrier (claims professional) related to choice of counsel and defense strategy. Many duty-to-defend policies now contain choice-of-counsel endorsements whereby the insurance contract provides for the defense of claims by a pre-selected firm designated by the insured. These endorsements complicate control of the defense component of duty-to-defend policies for insurance carriers.

In certain instances, pre-selected counsel may be non-responsive to the insurance carrier as they feel loyal only to the policyholder who selected them. This can sometimes lead to negative impacts on the case itself that are often to the detriment of the policyholder as well as the insurance carrier. However, most pre- selected counsel endorsements do contain several requirements for pre-selected counsel, such as compliance with the carrier’s litigation guidelines.

***Smart contracting.*** The contract is the one constant that is the key to risk management. It can be a sword or a shield in strategizing defense to or risk transfer of claims. Developers, design professionals, and contractors need to be savvy about reviewing complete contract documents for every project. Requesting and reviewing all contract documents that may affect them before the project starts will ensure that all contract documents are consistent and there should be no surprises.

Typical problems include:

- Construction clients are often not securing all applicable project contracts, or they are unable to do so before being pressured to start a job; they think “one size fits all” and that the contract they use for one project is good for most; they do not have a good risk management process in place to have contracts regularly reviewed and train employees what the significance of the contract is to ultimately defending claims.
- High premiums as an impediment to doing business. Premiums, self-insured retentions, and deductibles have increased rapidly recently. There are certain factors to consider related to risk management in this area. First, the services offered impact premiums—higher exposure means higher potential dam- ages, resulting in a higher premium. The type

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of client is another factor. Evaluating their financial stability, experience, and litigating history may help reduce risk.

- The number of employees may increase rights as well. The location of a business and claim history are other factors that impact an insured's premium.

## STRATEGIES FOR RESOLUTION

Strong contract language is the best way to avoid disputes, mitigate damages, transfer risk, and control costs as well as scheduling and liability exposure.

Therefore, reviewing and restructuring contract documents regularly and ensuring that insurance coverages are in sync with the promises made in a contract is a fundamental and significantly effective risk management tool.

Avoiding pitfalls from the revival of a suspended project. When managing risks related to the resumption of old or lingering projects, contractors and design professionals must ensure that the resumption of design services and work on the project is accompanied by appropriate contractual protections that reflect new conditions.

The best practices to engage in when getting involved in a project that is resuming are: ensuring accounts to all parties involved on the project prior to suspension are brought current before commencing work; resolving issues that arose prior to the project being halted; re-establishing new budgets and schedules with the new owner; visiting the project site to review and document visible changes from how it was prior to suspension.

***Scope of work—live by it.*** In order to provide "added value" services, be competitive, and keep up with emerging project delivery methods, contractors and design professionals increasingly blur the lines of tasks that would normally fall into the categories of professional services or nonprofessional services. Construction management and contract administration duties are riddled with overlap.

The scope of work that is actually being conducted on the project should be detailed and job specific, clarifying what everyone is responsible for. Appropriate coverages should be sought, including general liability and errors and omissions for both contractors and design professionals.

***Effective risk transfer requires persistence.*** The best way to drive down your client's exposure is to pursue all available risk transfer. First, one should look for all available coverage written for the client directly in terms of general liability, excess, and errors and omissions policies. Then, one should look toward any party for whom the client may be liable for, such as subcontractors, sub-specialty engineers, envelope consultants, and material suppliers.

***Persistence to carve out settlements of minor trades.*** As discussed above, sub-trades are not often sued by plaintiffs. They are key to issue release. Sometimes it is hard to get traction with them to obtain a number for settlement because they are focused on the larger players, such as envelope defendants or the general con- tractor and developer. Counsel may have to approach them numerous times. One should also press the weaknesses of the liability claims or very limited damages attributable to the client.

***Utilizing and challenging experts wisely.*** Retaining an expert who will assess exposure early is important. If liability and damages are prepared early, counsel should report to the carrier and seek early resolution of the case. Cases will either not improve during discovery, or will prove to be costly. Engaging in expert meetings early can provide the lawyer and carriers with the information necessary to timely resolve a dispute that is in the brewing phase to become a "beast."

If the parties are forced to litigate, challenges to expert reports and testimony on liability and damages should always be carefully examined before trial. This will provide adequate time to file motions in limine or summary judgment on key areas of opinion that could significantly impair opposing counsel's game plan.

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Due to the rise in construction and design claims, risk managers, claims professionals, and defense counsel should reflect on matters that became “beasts” and determine what could have be done on future claims to cut the legs off the beast or to tame it, at least, to a manageable state.

It is important to learn from the past to employ future strategies. Understanding the financial burdens and labor and material shortages the construction industry is facing can help us employ strategies from the underwriting and contracting phases through trial. The “smart” contract will limit the contractor’s or design professional’s exposure when these situations arise. Recognizing limited coverage and eroding limits of your client and opposition early will shape settlement and litigation strategies.

Finally, the proper use of experts can help with early resolution of claims and knock out punches to your opposition that can beat those beasts when you are forced to litigate. No matter what strategy you employ, the earlier you recognize the red flags of a potential beast, the better the chance is that the strategy will be successful.

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