



LITIGATION ARISING FROM THE CONSTRUCTION OF WATER & SEWER INFRASTRUCTURE

Matthew A. Dooley

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Part One



Claims between contractors,
engineers, architects and owners

Takeaways

- ➔ Understand when claims are likely to arise, how to effectively prepare to pursue or defend claims, how claims are usually resolved, and how to be proactive

Standard Contract Claims

- AIA Contracts are full of pitfalls
- Negotiate, negotiate, and negotiate some more
- Follow every procedure in the contract
- Watch deadlines

Statute of Repose – 10 Years from When?

- ▶ R.C. 2305.131
- ▶ The Ohio Supreme Court will finally weigh in - *New Riegel Local School District Board of Education and State of Ohio v. The Buehrer Group Architecture & Engineering, Inc., et al.*,
- ▶ Some state courts are already applying 10-year rule to contract claims. *Bd. Of Educ. of Tuslaw Local Sch. Dist. v. CT Tylor Co., Inc.*, Stark County Comm. Pls. Case No. 2018CV000086,

War Story

- ▶ *State of Ohio ex. Rel. Timothy Betton v. My Client*
- ▶ \$78M damage claim related to construction of waterlines
- ▶ Brought under taxpayer statute
- ▶ Pending since 2016 with no end in sight
- ▶ More than 50 witnesses
- ▶ Tens of thousands of pages of documents





Part Two

Sovereign Immunity – Saving Grace for Public Entities


What's Covered?

- Only governmental functions (e.g. claims for negligent construction or design)
- Not proprietary functions (claims for negligent operation, maintenance or repair)
- Courts have held that upgrading or updating a sewer system is a governmental function entitled to immunity.
- No immunity for damage caused by negligent failure to keep roads in repair or remove obstructions



Typical Scenarios

- Failure to maintain storm water system results in residential flooding
- Failure to maintain sewer line leads to a collapse causing raw sewage to infiltrate homes



Distinguishing between Governmental and Proprietary Functions

- Complaints are characterized as OM&R based if the remedying the matter would be a matter of routine maintenance, inspection, repair, removal of obstructions or general repair of deterioration.
- Complaints are rooted in design or construction if remedying the problem would require the city to redesign or reconstruct the sewer system.

War Story

- ▶ *Kukolek, et al. v. City of Lorain*
- ▶ Road leading into PQM plant begin to sag in 2006
- ▶ City employees reported the issue but nothing was done to investigate
- ▶ Just before Christmas, the main concrete line transporting effluent into the main collapsed due to hydrogen sulfide corrosion
- ▶ Many homes impacted displacing residents for months





Tips to Avoid Litigation

- Be proactive with maintenance and repair schedule
- Lack of funds to repair system is no defense
- Document efforts carefully



Other Areas Ripe for Disputes

- Bid Disputes
- Change Orders
- Wetland Mitigation
- Ratemaking
- Sureties
- Appropriations

Questions?

Email Inquiries:
mdooley@omdplaw.com

Call: 440-930-4001

Website:
www.omdplaw.com