

# newsletter

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## Mold Madness?

**“This is not a medical problem. This is a business!”**

A leading national allergist with an extraordinary *curriculum vitae* made that statement at a national conference on “Mold Medicine and Mold Science” in Washington D.C. on May 13-14, 2002. What a statement, indeed!

Mold, the ubiquitous spore-producing members of the fungi kingdom, making up an amazing 25 percent of the total biomass of the planet, have increasingly become the new nemesis of the construction, design and real estate industries as the discovery of the existence of mold in buildings leads to expensive remediation and personal injury litigation. To add insult to this situation, insurance carriers, remembering all too well the losses they suffered in other mass tort litigation (e.g. asbestos and breast implants), and still reeling from the horrific losses of September 11, are excluding or severely limiting the coverage they will afford for mold-related claims as policies are renewed and new policies are issued. Is mold so serious an issue as to warrant all of the claims, litigation and fearful responses?

According to the allergist and other medical and scientific professionals who spoke at the conference, the answer is a resounding “No!” They clearly believe that there is a hysteria developing in the country in response to the discovery of

mold in homes, schools and office buildings, which is wrongly perceived as life-threatening and disease-producing. One stated, “[The public is] missing the mark if they make mold the number one public health issue.” To the contrary, the professionals stated that there is no medical or scientific evidence to support a causal connection between disease and the molds found in buildings.

They will admit that there can be allergic reactions to some molds by some people, particularly those with immune-suppressed systems, and some may develop a reaction to mold, such as a skin rash. However, they hold to the view that there is no reputable study

from which one could conclude that mold will result in cancer, brain damage, pulmonary disease or other illnesses that many in society now fear. The professionals point to examples of people who work in highly concentrated mold environments, (e.g. sawmills and hay farms have spore counts in the millions or billions per square meter of air, as compared with indoor environments considered to be unhealthy, where a few thousand spores per square

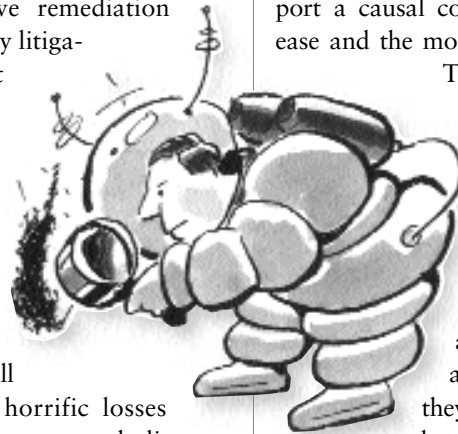


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meter is deemed significant), without complaints of symptomatology as demonstrative of the fact that even complaints of symptomatology that could be ascribed to mold may not constitute a causal relationship. Indeed, the speakers subscribed to the view that the media and some in the personal injury bar have hyped mold into a major societal fear, causing some people to perceive symptomatology because they have been made aware that mold exists, rather than first suffering symptoms followed by a competent diagnosis that the particular symptoms result from exposure to a particular mold in their environment.

Indeed, the medical and scientific data the professionals present is impressive in support of their arguments. For example:

- There are thousands of molds. Among them are molds so benign that we eat them — blue cheese, for example!
- Mold is everywhere. In many instances, the mold spores in the outside air are far higher in concentration than the molds in buildings labeled as “sick.”
- A person gardening has a far greater chance of being exposed to an extremely high volume of mold spores than a person in a building containing mold contamination.
- Less than a dozen species of molds have any potential adverse effect on humans.
- Cockroaches and indoor mites present a far greater risk to health than mold cultures in buildings, and cats and other pets create a higher risk of allergic reactions.
- Of those molds that can affect humans, there is no medical or scientific study that links those molds to particular diseases.
- Once mold is cleaned or removed, whatever symptomatology existed in response to the mold should disappear within a reasonable time.

The listing above is only a very small fraction of the information that supports the view that mold is not nearly so serious a problem as some would contend. Yet the industry is worried — and for good reason. There is the recent and widely reported *Ballard* case where a Texas couple was awarded \$32 million against their

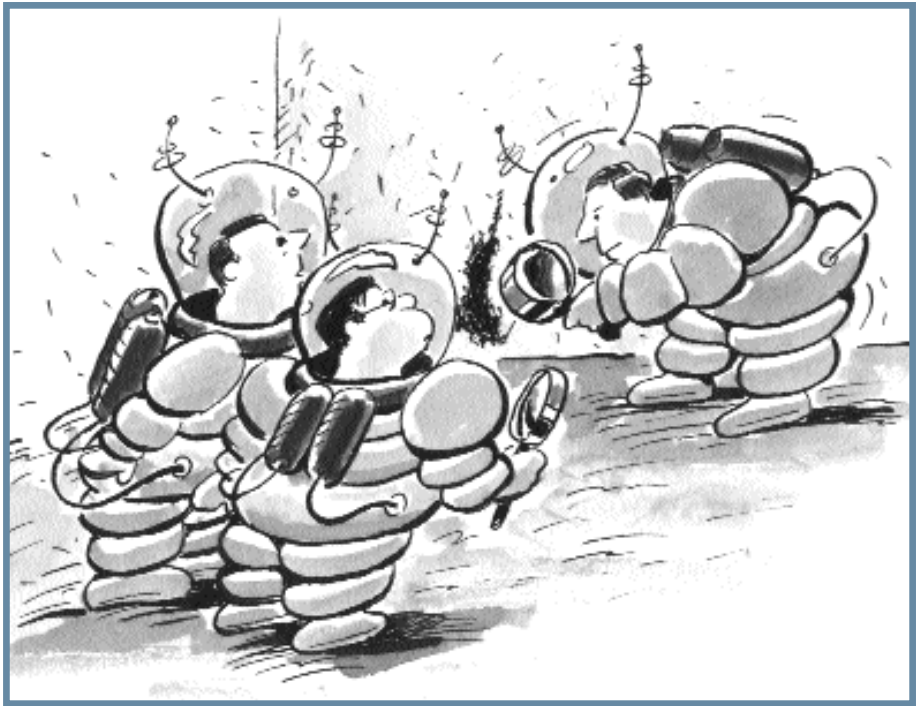


ILLUSTRATION: LIAM ROBERTS

insurance carrier because their house had mold and the carrier did not come in and remediate the problem. Insurance companies in Texas are now buying the homes of complaining insureds rather than placing themselves at risk of another *Ballard* award. The *Tonight Show*'s Ed McMahon is suing his insurance carrier with regard to mold in his California estate. He even moved out until the mold is remediated, adding to the perception and inference that mold presents a danger to human habitation. Suits have been filed in many states on behalf of students in schools and owners of condominium units because mold has been detected. The suits seek huge damages for remediation expense (including the consequential damages of loss of use or income, relocation costs and other such moneys), and some seek huge damages for purported illnesses and maladies claimed to have resulted from the exposure to mold.

#### Protocol for Remediation

The Environmental Protection Agency has already published a pamphlet entitled “Mold Remediation in Schools and Commercial Buildings,” in which a recommended (not mandated) protocol for remediation is set out. Included in this EPA protocol is a suggestion of the use of personal protective equip-

ment (PPA) — the space suits — which only adds to the perception of a horrific risk of serious, if not fatal, disease. The use of a specialized remediation contractor (i.e. expensive!) is also proposed.

Perhaps the courts will soon issue rulings that will distinguish between the folklore and the science, and dismiss cases that are based upon the misguided belief that mold has been proved to cause disease. There are ample scientific and legal reasons for the courts to do so. Absent compelling expert testimony based upon a body of scientific data that proves a correlation between the particular mold, its concentration, its status (airborne or not), its duration in the claimant's environment and the claimed disease, the courts should not accept the expert testimony under a leading United States Supreme Court case. However, until that time, the construction industry has every reason to be concerned about the potential for claims and litigation arising from the presence of mold.

As stated earlier, mold is everywhere. In fact, it probably exists in every building. In those buildings that are located in moist, hot environments, there is little chance that there is not some mold in all of those buildings. Some of that mold may grow

during construction if the atmosphere is conducive, and some may grow after completion and turnover to the end user if indoor humidity levels and temperatures, as well as hygiene and other factors, allow mold to grow indoors. If there was water infiltration into the building (unquestionably the most significant causation of mold growth in buildings), if the air exchange of the HVAC system is not proper, if the HVAC system allows the buildup of moisture in the occupied space or behind walls, mold will grow. It may be of the type that can only cause allergic reactions, or it may be stachybotrys, known as the fungus with the greatest potential to cause harm to humans. But even when it comes to stachybotrys, this fungus tends to exist in a moist, slimy state, resistant to releasing its spores into the air.

The most important reality for the industry to accept is that mold in interiors of buildings should be removed,

on the health of those using the building.

- The company's insurance carrier should be part of the process of developing the protocols, to ensure coverage and eliminate second-guessing at a later time.
- The company's lawyers should be part of the process of developing the protocols and evaluating contractual obligations and rights of the company in the event such a claim is received — so as to ensure that those who may be responsible for the circumstances giving rise to the mold growth fulfill their performance and financial obligations to the company.
- The company should be prepared to deal with the press if the "story" becomes a bigger problem than the mold itself.

A prompt and responsible response to the awareness of mold in a building keeps costs of remediation to a minimum, mitigates or eliminates any possible effect of the mold on occupants, reduces or

## Mold is not nearly so serious a problem as some would contend.

even if the mold is totally benign and presents no danger to humans. But why go to the expense of removing mold and perhaps being involved in an expensive remediation program if mold is really as unimportant as the scientists at the conference contended? Our answer to this logical inquiry is simple: Until the courts adopt the view of these experts, it is responsible and smart to quickly eliminate the problem and, thereby, your exposure to litigation arising out of the presence of the mold.

### A Short-List Approach to Dealing with the Mold Issue

At a minimum, we recommend that:

- Construction industry members should prepare for the inevitable and have a protocol in place to deal with the discovery of mold, the receipt of a claim demanding remediation, the receipt of a claim for personal injury, news reports of the existence of mold and the potential or claimed effect of the mold

eliminates the risk of being sued, and demonstrates to your clients that you are responsive and concerned about their interests. Long debates about who should be doing what, denials of the existence of an issue, if not a problem, and other delays — however justified — will result in expanded exposure to liability and loss. Thus, the simplest response is the obvious response: Clean up the mold!

It would appear that mold madness will have its run through America's judicial system as long as there are scientists who will testify that, in their opinion, mold is dangerous and the source of varied maladies. It would also appear that, just as with other waves of hysteria over perceived toxicity in past years, science will win out, and mold will be put back in its rightful place, namely, on your Cobb salad while you sip a mug of beer. Mmmm, more mold, please.

Until then, let's all be smart and deal with this situation, as we must. ⚙

## Florida Contractors Beware

**U**nder a 1997 decision of the Florida Supreme Court, reliance on verbal assurances of payment for "extra work" will not get a contractor paid. Rather, a contractor on a public works project performing extra work beyond the scope of the contract, even at the express direction of the public owner, is not entitled to compensation for the extra in the absence of a written change order. The court's decision — *County of Brevard v. Miorelli Engineering, Inc.* — is based on the legal doctrine of sovereign immunity, but its lesson to the contracting community is simple: "No change order — no money."

The *Brevard* decision has important practical consequences and creates a dilemma for contractors performing public work. Virtually no project is built without extras or changes, and a contractor who follows the verbal instructions of the owner's representative to perform extra or changed work risks not being paid. On the other hand, a contractor who insists on formal change orders before performing extra work is likely to end up in an adversarial relationship with the owner and with a seriously disrupted job.

Court decisions after *Brevard* have taken a liberal approach in defining extra work as within the scope of the original contract, as opposed to outside the scope of the contract. Nevertheless, contractors should avoid being put in the position of having to engage in a debate or worse — even litigation — over whether work is within or outside the scope of the contract. The way to stay out of this debate is to insist on a written change order before performing extra work. Absent that document, do not perform the extra work. ⚙

# New Jersey Supreme Court Opens Door to Equitable Adjustment Claims

*M.J. Paquet, Inc. v. New Jersey Department of Transportation (2002)*

Contractors performing work on federal government construction projects have enjoyed for some time the right to seek an “equitable adjustment” of the contract price in situations where the government has modified the contract, increasing the cost of the work to be performed. The purpose of an equitable adjustment is to keep the contractor whole by adjusting the contract to reflect the difference between the cost to complete the contract as originally specified and the cost as modified by the public entity. However, but for a handful of states, among them Florida, Louisiana, Maryland, New York, Ohio, Oregon and Texas, this concept generally has not been accepted in state public construction contracts. Nevertheless, in a recent landmark decision, the New Jersey Supreme Court has added New Jersey to the list of states recognizing a contractor’s right to seek such an equitable adjustment of its contract price. (See “Editor’s Note.”)

In this case, Paquet was one of several bidders for a New Jersey Department of Transportation (“DOT”) contract to rehabilitate a number of highways and bridges. Shortly before the bid submission deadline, Paquet received a subcontractor quote in the amount of \$450,414 for the bridge painting work. This was significantly less than the \$826,473 estimate that Paquet had originally used in the calculation of its bid. Rather than recalculating the bid estimate for the painting work, which Paquet claimed would have been “impracticable” and “highly risky,” Paquet elected to lower the price of some of the “common” items, such as mobilization, to offset the now inflated price for the bridge painting work. As a result, Paquet’s bid was unbalanced, since its line item

estimate price for the painting work actually represented the full cost of the painting work plus the cost of other nonbridge painting line items that were understated elsewhere in its bid.

Paquet was awarded the contract as the lowest responsible bidder. Almost a year into the contract, the Occupational Safety and Health Administration (“OSHA”) issued revised regulations concerning the cleaning and painting of existing bridges containing lead-based paint. This substantially affected Paquet’s

bridge painting work was a modification of its contract that would entitle it to compensation and that even if the painting work could be eliminated, the DOT was only entitled to a deduction for the actual cost of the painting work (i.e., \$450,414), not the unit prices set forth in the bid, which included other nonpainting-related work. Paquet then commenced this action seeking equitable and legal relief.

The trial court held that the DOT properly deleted the bridge painting work from the contract because the new OSHA regulations had “significantly altered” the circumstances surrounding the parties’ contract, making the contract impossible to perform. The court further held that the entire unit price for the bridge painting work should not have been deleted, and that Paquet was enti-

**The primary purpose of granting the remedy of equitable adjustment is to keep the contractor whole when the government modifies a contract.**

ability to perform the bridge painting work. Paquet informed the DOT that compliance with OSHA’s new regulations would cause it to incur substantial unanticipated costs, in effect tripling the cost of this work. Paquet, therefore, made several requests to the DOT to increase the contract price, but Paquet and the DOT could not agree on an increased amount for the bridge painting work, and the DOT deleted the work from the contract.

Accordingly, the DOT issued Paquet a deductive change order for the bridge painting work in the amount of \$826,473, the line item amount set forth in Paquet’s bid for this work. Paquet argued that the removal of the

tled to an equitable adjustment. The appellate division affirmed the trial court’s decision with respect to the DOT’s right to delete the bridge painting work from the contract, but ruled that Paquet was not entitled to an equitable adjustment award because a DOT specification prohibited contractors from receiving additional compensation based on inaccuracies reflected in individual pay items. The specification was intended to discourage contractors from submitting unbalanced bids.

The Supreme Court affirmed the trial court and appellate division’s decision that the bridge painting work was properly deleted from the contract due. However, the court ruled

that Paquet was entitled to an equitable adjustment of its contract, reversing that portion of the appellate division's decision. The Supreme Court held that application of the principle of equitable adjustment is not dependent upon the existence of a specific contractual provision allowing for it, and that the absence of such a clause in a public contract is not dispositive of whether it should be granted in a particular case. Recognizing that the primary purpose of granting the remedy of equitable adjustment is to keep the contractor whole when the government modifies a contract, the court held that Paquet was entitled to an adjustment of its contract for the portion of the \$826,473 that the DOT deleted. This would represent Paquet's compensation for the non bridge painting items that it had understated and performed, and for which the DOT was otherwise contractually obligated to pay. The Supreme Court remanded the case to the trial court for a determination of the amount of the equitable adjustment. ❁

#### EDITOR'S NOTE:

The New Jersey Supreme Court was careful to limit its ruling to the unique facts presented in *Paquet*, stating that equitable adjustment was permitted only because unforeseen government regulations changed the amount of work to be completed and because the contractor harbored no improper motives in submitting its unbalanced bid. Nevertheless, it is important to look at the appellate court's decision, part of which the Supreme Court affirmed. The appellate court stated that even though the remedy of equitable adjustment was not provided for in the contract, the principle of allowing an equitable adjustment fell within the purview of the parties' implied covenant of good faith and fair dealing, citing a series of cases, among them *W.V. Pangborne & Co. v. New Jersey Department of Transportation*, in which the court imposed upon state entities dealing with public contractors the obligation to avoid sharp practices and to turn square corners. That concept has been reinforced and reinvigorated by the principles set forth in *Paquet*.

## Interview with the Honorable

# William C. Thompson, Jr.

## Comptroller of the City of New York

On January 1, 2002, the Honorable William C. Thompson, Jr., was sworn in as comptroller of the city of New York. As comptroller, Bill C. Thompson is the city's chief financial officer administering and enforcing many of the laws and regulations that directly impact construction contractors pursuing and performing public work in New York City.

During the mid-1980s, P&A Partner Charles E. Williams, III and Comptroller Thompson served together on the board of the New York City Employees Retirement System as representatives of the borough presidents of their respective boroughs, Manhattan and Brooklyn. After last fall's election, Charles served on the Comptroller's transition committee.

On May 17, Charles interviewed Comptroller Thompson for our newsletter, focusing on issues of special interest to the construction industry. Before discussing these matters, the comptroller was asked to give a thumbnail sketch of his background for the information of our readers.

**Comptroller Thompson:** I am a product of the New York City public schools and a graduate of Tufts University in Massachusetts. From 1975 through 1982, I served first as a special assistant and then chief of staff for a congressman from Brooklyn. Next, I was deputy borough president of Brooklyn, leaving to become an investment banker. Finally, I served as president of the New York City Board of Education.

*As president of the New York City Board of Education, Comptroller Thompson had dealings with the New York City School Construction Authority ("SCA"). Charles asked about*



Comptroller of the City of New York,  
William C. Thompson, Jr.

*the comptroller's experiences working with the SCA.*

**Comptroller Thompson:** It was a bit of a roller-coaster ride. The School Construction Authority has gone through ups and downs and I still don't know that it fulfills its mandate. It was just pointed out in a couple of studies that the SCA spends more on administration than most other government agencies, and that is a concern. The current head of the School Construction Authority, Ronald Gottlieb, is working hard to cure the situation and Mike Reverso, the former head of the SCA, took a bad situation and improved it a bit. But it always comes back to accountability — the need to have it centralized in one place. I think three board members — two of whom are elected officials plus the chancellor — leaves none of them being really responsible. I am not sure that it has

resulted in any real accountability for the School Construction Authority. (Editor's Note: The recent reorganization of the New York City school system that has given the Mayor control includes an amendment to the law that governs the SCA that gives the mayor the power to appoint two of the three members of the SCA's board, and the third member is the chancellor, who is also selected by the mayor.)

*The comptroller expressed concern that the recently passed New York State budget does not have funds specifically targeted for construction.*

**Comptroller Thompson:** It is important for New York City to continue grow. New York City needs to continue to build and to continue to add and replenish. I don't believe that the state budget expressly provides funds for construction projects in New York City. Although to the degree that it helps strengthen the city's financial position, it makes more public works possible.

*Comptroller Thompson chooses two of the five members of the city's Procurement Policy Board that sets contracting policies and procedures. The comptroller was asked about his philosophy concerning public contracting.*

**Comptroller Thompson:** We need to see that we move projects along, not slow them down. We need to find ways to expedite and move the contract process along to make sure that people get paid in a rapid fashion. I don't think we do that right now. It impacts construction, nonprofits, everyone who does business with the city. I don't think we do a good enough job of getting them paid. We need to do more.

*For many in the construction industry, the most important power and responsibility of the comptroller is to establish and enforce prevailing wages for labor performing work on public projects. The comptroller was asked about his approach to the implementation of prevailing wages laws.*

**Comptroller Thompson:** I look at enforcing prevailing wages as something that is important, and I place a real emphasis on this.

My predecessor also emphasized enforcing prevailing wages. I think we have added to what he did and made some changes that have taken enforcement to the next level. We have initiated our own in field enforcement. Before, people didn't go out in the field. We have started to send inspectors out in the field to do inspections — that's important. So we are not waiting until a job is over to take action.

My office registers all construction contracts. If we see low bids coming in at 10 to 20 percent or more below the other bids, then that is a red flag to investigate possible prevailing wages violations.

Last but not least, we are training our people and some of the other city agencies so that they will also know what

to look for. Unions and others have volunteered to assist us in prevailing wages enforcement. We should be able to double our capacity in the field; we will take those volunteers and have them buddy up with one of our people to assist in enforcement.

**Williams:** If you were to summarize the message you're sending to the industry about prevailing wages in a sentence or two, what would that be?

**Comptroller Thompson:** We have heard from people in the unions and from the contractors. They tell us how serious they are about enforcing prevailing wages. My response is that this office is serious, too. It is a priority



**We want to settle claims quicker than in the past because it saves money as well as being the right thing to do. This applies to contract claims as well as to personal injury matters.**

for this office, and we will continue to improve our capacity to enforce the law.

The power of the comptroller that is comparable in importance for the construction industry to enforcing prevailing wages is in settling construction claims.

**Williams:** One reality of construction is construction claims. Pursuant to the city charter, the comptroller has the power to settle claims against the City. How do you plan to exercise this power?

**Comptroller Thompson:** Well, that is another area we are attempting to get better at. Where appropriate, we want to settle claims quicker than in the past because it saves money as well as being the right thing to do. This applies to contract claims as well as to personal injury matters. One of the things you want is for those who do good work to continue to want to do business with New York City. So it is important to act on a legitimate claim and act quickly. We are trying to do just that.

**Williams:** Mr. Comptroller, do you plan to use your power as the official responsible for asset management to encourage additional construction activities?

**Comptroller Thompson:** Well, right now, I think it is important that we invest in New York City, and invest in housing and invest in economic development. What we are trying to do is identify different models that will allow us to invest in organizations and/or equity funds that will do business, including construction activity, in the city of New York. 🌀

#### EDITOR'S NOTE:

**Peckar & Abramson looks forward to working with Comptroller Thompson in implementing the initiatives he is developing to streamline the construction process and expedite the procedures for payment and settlement of claims. We will monitor this process and provide future newsletter articles concerning these and other issues of interest and concern to contractors dealing with New York City.**

# Unexpected Subsurface Conditions:

## What Recourse Does a Contractor Have?

**W**hat combination of elements God placed under the surface of the earth and what man-made objects have found their way beneath the surface have often been the subject of great controversy on construction projects. Owners, both governmental and private, would prefer to have their contractors assume the risks of cost in dealing with subsurface conditions, and contractors, limited in their ability to predict what lies beneath the surface, reject that concept. Even where owners provide boring information and other data, they typically try to wiggle free of the responsibility for the accuracy and implications of that information by requiring that the contractor make its own independent analysis of the information, make itself aware of other available information and otherwise be limited in whatever relief it can obtain, should the conditions be different than those suggested by the subsurface information provided pre-bid. Furthermore, in public contracts where the contractor must accept the contract as advertised without reservations, it is virtually impossible to state limitations or conditions on the bid, and, therefore, the contractor assumes the risks that the contract documents impose.

Of course, a prudent contractor will review the information and make judgments as well as take risks. However, the contractor must include some contingency for the unknown or accept a greater level of risk that the contractor's "bet" as to what will be found was a good bet, indeed.

For quite some time, federal agencies have adopted the most enlightened approach in government contracts to this situation. Federal contracts allow the contractor to receive an equitable adjustment to the contract price when the conditions encountered substantially and materially differ from the

conditions reasonably understood from the available pre-bid information. With a well-developed body of case law and rather clearly delineated legal concepts applicable to these circumstances, there is predictability and fairness in the federal scheme. Some states and local governments have adopted a similar approach. Yet many states and certainly many local governments continue to attempt to unfairly shift the entire risk

**Even where owners provide boring information and other data, they typically try to wiggle free of the responsibility for their accuracy**

of the underground conditions to the contractor, with unconscionable clauses supported by factorable court decisions upholding the application of those clauses — even when the result is clearly not fair.

We believe that the federal approach, while not perfect, is certainly preferred over those contracts that simply seek to make contractors insurers of an owner's choice of land upon which to build. Thus, in this article, we will review the federal government's differing site conditions clause and its utilization by contractors on federal projects to obtain relief for unanticipated underground conditions. In addition, this article will survey state court cases from New York, New Jersey, California and Florida to

illustrate how these states handle similar situations with and without the clause in the contract.

### Federal Government Construction Contracts

Under the federal standard differing site conditions clause, there are two types of differing site conditions for which a contractor may seek to recover damages. These are commonly known as Type I and Type II clauses. A Type I differing site condition exists where the site conditions encountered differ materially from those indicated in the contract documents. With Type I claims, the actual conditions discovered need not be contrary to express representations in the contract documents. It is enough that

there are "indications" in the documents that would lead a contractor to reasonably infer that it would not encounter the conditions that were in fact encountered. A Type II differing site condition is one in which the site conditions encountered amount to unanticipated physical conditions of an unusual nature, differing materially from those normally expected in the area.

To recover for Type I differing site conditions, a contractor generally must demonstrate six things: (i) that the contract documents affirmatively indicated or represented the subsurface conditions; (ii) that the contractor acted as a reasonably prudent contractor in interpreting the contract documents; (iii) that the contractor reasonably relied on the indications of the subsurface conditions

in the contract documents; (iv) that the actual conditions encountered differed materially from the conditions indicated for that area; (v) that timely written notice was provided to the contracting officer; and (vi) that the contractor was damaged by the differing site conditions.

The most difficult element for the contractor to demonstrate is usually the requirement that the referenced differing site conditions were indicated in the contract documents. If the contract is silent regarding such conditions, there can be no recovery because there is no affirmative representation, or indication made by the contract documents. Although there is no requirement that the contract indications be explicit or specific, they must be sufficient enough to lead a reasonable bidder not to expect to encounter the adverse conditions. However, indications may be inferred from reading the contract documents as a whole, where the design or construction procedures specified in the contract reasonably imply that a certain type of a condition, in effect, is indicated. This is true even though the contract documents do not expressly say that condition X will be encountered.

#### Type I and Type II Conditions

An example of a Type I claim is found in the case of *Foster Construction v. United States* (1976), a United States Court of Claims decision, in which the court ruled in favor of a contractor on the basis that the implied indications in the contract's design specifications could have led a reasonable bidder to conclude that it would not find the type of subsurface conditions that it actually encountered. Specifically, the design specifications comported with the assumption that concrete foundations would be "placed in the dry." Instead, the contractor actually encountered wet, soft, unstable conditions requiring additional time and expense.

For claims for Type II differing site conditions, the contractor must prove two of the three following elements: (i) the physical condition at the site was unknown; or, (ii) the condition was unusual and could not have been reasonably anticipated by the contractor's studying of the contract documents, its

inspection of the site and its general experience, if any, in the contract area; and (iii) the condition encountered was materially different from those ordinarily encountered and generally recognized in similar work. In order to recover, it is not necessary that the underground condition be completely out of character with the nature of the known geological conditions at the site, only that the conditions could not have been reasonably anticipated. *Lathan Co. v. United States* (1990).

Federal cases discussing claims for Type I and Type II conditions are legion and, for the most part, favor the application of the differing site conditions clause over any disclaimers made by the public entity regarding the indications in the bid documents. Nevertheless, each case is extremely fact-sensitive, and the presence of the differing site conditions clause is not a ticket to recovery in all situations.

#### New York Cases

While there are not a significant number of New York cases construing contractor claims for differing site conditions, the existing cases indicate that New York courts have adapted the federal nomenclature and requirements for Type I and Type II differing site conditions, engaging in a similar analysis of the facts of each case. Nevertheless, New York courts often uphold disclaimers of responsibility

by the public entity for the underground conditions, and enforce a contractor's pre-bid duty to investigate.

In *Andrew Catapano Co. v. City of New York* (1980), the court denied New York City's motion for summary judgment based on its finding that a contract clause charging the contractor with knowledge of the work site did not preempt the changed conditions clause. The court concluded that the contractor could recover additional compensation under a sewer project contract if at trial the court determined that the severe slope of a rock formation could not have been anticipated. The city argued that a pre-bidding investigation clause in the contract required the contractor to make its own assessment of the site. Therefore, the city argued that the contractor assumed the risk of any subsurface conditions encountered because it bid on the basis of its own assessment. The court noted that while the contract contained a provision requiring bidders to examine the site of the proposed sewer project, which charged the contractor with full knowledge of any and all conditions "on, about or above the site," there was no reference to conditions "below the site."

On the other hand, in *Fruin-Colnon Corp. v. Niagara Frontier Transportation Authority* (1992), the contractor filed a claim under the differing site conditions clause upon discovery of poor-quality rock in a tunnel, which resulted in the



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contractor incurring additional costs for increased steel ribbing. In denying the contractor's claim, the court, after examining the bid and contract documents in their entirety, concluded that the documents accurately represented the subsurface conditions actually encountered. The court found that both

needed to prove that the additional work resulted directly from the authority's concealment or nondisclosure of material facts either known to it or within its possession. The contractor argued that in preparing its bid, it had assumed that the bid documents were based on the authority's active field

**Each case is extremely fact-sensitive, and the presence of the differing site conditions clause is not a ticket to recovery**

the Transportation Authority's Tunnel Interpretive Report and Engineering Design Rationale gave the contractor clear warnings that additional steel ribbing might be required in certain subsurface areas due to poor rock quality. This, coupled with the contractor's testimony that it gave the authority's estimate for necessary steel ribs no consideration in its bid, were primary considerations for its rejection of the claim.

**Disclaimers Strictly Enforced**

In a more recent case, *D.A. Elia Const. Corp. v. New York State Thruway Authority (2001)*, the authority advertised a contract to repair four concrete piers supporting a bridge. The authority estimated the number of cubic yards of concrete that would be required to perform the work, but the contract documents advised the bidders to conduct their own inspections. The contract was awarded to D.A. Elia Const. Corp., which admitted later that it chose not to conduct a pre-bid inspection. After the performance of the work, the contractor filed a claim as a result of having to repair smaller but more areas of the pier than were identified in the bid documents. The court of claims denied the contractor's claim for relief, and the contractor appealed.

In appeals court, the contractor contended that the authority misrepresented the extent of the repairs that caused it to incur additional costs. In considering the claim, the appellate court stated that in order to make a case for fraudulent misrepresentation against a public entity, a contractor

inspection of the piers by means of recent hammer soundings. However, the appellate court found that the bid documents did not make this representation but only warned where major repair areas were indicated and that they were approximations, subject to actual field conditions. Also, the court found that because the contract advised bidders to conduct their own inspections, the contractor could not reasonably rely on the bid documents for anything more than an approximation of the repair areas. In addition, the court rejected the contractor's contention that it did not have enough time to thoroughly inspect the piers because there was no evidence that a sufficiently thorough inspection could not have been made before the bid. As such, the contractor's appeal was denied.

The cases indicate that New York courts will strictly enforce disclaimers in public construction contracts, where protecting the public purse seems to be seen as outweighing considerations of fundamental fairness to the contractor. Still, it is well recognized in New York that where a construction contract contains representations as to existing conditions affecting the work, and also contains an exculpatory clause relieving the public entity of liability and requiring personal inspection of the contract site, liability may attach to the public entity, if said conditions are not as represented, and (i) inspection would have been unavailing to reveal the incorrectness of the representations or, (ii) the representations were made in bad faith.

**New Jersey Cases**

In New Jersey, the standard state contract historically did not contain a differing site conditions clause. Notwithstanding, the general principles of law applicable to Type I and Type II differing site conditions under federal construction laws were often referred to for instruction as to how a contractor's claim for unknown or differing site conditions should be resolved.

In *Golomore Associates v. New Jersey State Highway Authority (1980)*, the contract drawings depicted inaccurate site elevations, leaving less fill material available on the job site than anticipated. The contractor sought additional costs, which the state denied. A claim was filed, and the trial court granted summary judgment in favor of the state, based on the State's general disclaimer of liability for the accuracy of drawings. However, the appellate court reversed, holding that the general disclaimer could not exonerate the state for specific inaccurate representations, stating:

If the contract contains a positive statement of the conditions to be encountered, which is actually in error, then a contractor who relies thereon may recover for breach of implied warranty.

However, in *Sasso Contracting Co. v. State (1980)*, the opposite result was reached. There, the contract drawings represented the existing layer of asphalt as two inches deep when in fact it was an average of three inches deep. The court, however, called the state's representations of the job site conditions "merely gratuitous," and held that the contractor, who was obliged to remove the excess material, relied on the information at its own peril.

A few years later, the appellate court had the opportunity to reconcile these two seemingly conflicting decisions in the case of *Ell-Dorer Contracting Co. v. State (1984)*:

Golomore and Sasso stand for the proposition that when the State makes false representations, it will be liable for damages resulting from them despite a general disclaimer of liability for inaccurate representations. However, if

the disclaimer is sufficiently specific or if the statements only purport to be the results of tests rather than being actual conditions or descriptions of actual conditions, then the contractor cannot recover.

The rationale of *Golomere, Sasso* and *Ell-Dorer* was followed by the New Jersey Supreme Court in *P.T. & L. Construction v. New Jersey Department of Transportation* (1987). This case involved the construction of a stretch of interstate highway in which the project was delayed by unusually wet soil conditions. The trial court found that the Department of Transportation materially misrepresented the nature of the soil conditions. On appeal, the department of transportation defended itself based on a general disclaimer of liability for differing site conditions. However, the New Jersey Supreme Court rejected the argument, ruling:

[W]hen the State actually makes false representations in its contract documents that are more than gratuitous and amount to positive

about to begin work, it discovered a “scour hole” approximately nine feet deep, which was much deeper than the bed of the river shown on the authority’s plans. The contractor advised the authority’s representatives that the position of the scour hole prevented construction of the cofferdams where indicated on the plans, and that additional work and expense would be required to solve the problem. The authority rejected the contractor’s claim for an additional \$190,000 for this work. The trial court also rejected the claim, holding that the authority made no affirmative misrepresentations regarding existing conditions. On appeal, the appellate court affirmed, in part, the trial court’s ruling, stating:

[A]lthough the drawings did not show the scour hole in the streambed, a note on the drawings advised the contractor that ‘information shown on the existing conditions of the culvert and adjacent areas is based on field inspections performed during March and April 1992, and other information avail-

ation of contractors’ claims. However, recovery is far from a cakewalk for the contractor. Note that in the cases discussed, the contractor did not ultimately obtain relief until adverse lower court decisions were appealed and overruled. Also, there appears to be a very fine line between what the courts will consider to be a public entity’s “positive averments” versus “merely gratuitous” comments.

### Florida Cases

Florida courts have held that a governmental entity has an affirmative duty to provide bidders with information that will not mislead them. Where a contractor is misled by relying on inaccurate representations, a disclaimer clause requiring inspection of the site will not prevent the contractor from recovering additional costs. However, a differing site conditions claim will be triggered only where there has been an inaccurate representation upon which the contractor has relied. The public entity will not be liable for differing site conditions where there has been no representation or if the contractor relies on its own inadequate investigation.

In *Hendry Corporation v. Metropolitan Dade County* (1995), a marine contractor submitted the lowest bid to Dade County to demolish and remove the old Rickenbacker Causeway drawbridge. The original plans for the bridge were made available to the contractor before the bid deadline, and the contractor based its bid price on its belief that the pilings supporting the old bridge were made of concrete rather than wood, the latter being substantially more difficult to demolish and remove. During demolition and excavation, the contractor discovered wooden rather than concrete pilings. In addition, the contractor discovered extensive construction debris from the original bascule bridge project. As a result, Hendry incurred substantial delays and costs in its completion of the project, and filed a claim against the county. The court ruled that the county made no representations in the bid documents regarding the condition of the bay bottom, finding that Dade County did not withhold or provide

## The general principles of law applicable to Type I and Type II differing site conditions under federal law are often referred to for instruction

averments of site conditions, it will remain liable to the public contractor despite a general exculpatory clause in the contract.

### Positive Averments versus Gratuitous Comments

The most recent New Jersey case dealing with this situation was *SMC Corporation, Inc. v. New Jersey Water Supply Authority* (2000). This case involved a contract to reconstruct a culvert in a creek leading to the Delaware River. The work had to be done in a streambed, and water had to be removed from the work area during construction. The contractor was responsible for de-watering the site, and the specifications called for the use of cofferdams. As the contractor was

able at the time. Actual field conditions may vary from that shown on the contract drawings.’

However, the appellate court disagreed with the trial court’s determination that the contractor had “assumed the risk” contained in the contract and found that the contractor was not ultimately responsible for the subsurface condition. The appellate court found that the clause that required the contractor to obtain all “reasonably obtainable” information, and inspect all areas of the site “reasonably ascertainable,” was ambiguous. Based on this ambiguity, the court held that the authority was responsible to pay for the unknown condition.

The reported cases in New Jersey show a trend to a more liberal consider-



## Recovery is far from a cakewalk. Contractors often do not ultimately obtain relief until adverse lower court decisions are appealed and overruled.

inaccurate information on which Hendry relied. As a result, recovery was denied to the contractor.

In *Miami Dade Water and Sewer Authority v. Inman, Inc.* (1981), a plumbing contractor contracted with the Miami Dade Sewer and Water Authority to install wastewater force mains. After encountering substantial delays and extra costs on the project, Inman filed an action against the authority, alleging that the project drawings were inaccurate and contained many errors. In finding for the authority, the court stated that Dade County was not responsible for plans that it did not know were inaccurate, and that disclaimer clauses that require the contractor to examine the site, check the plans and assume responsibility for the work will not be allowed to defeat a contractor's justifiable reliance on an express or implied warranty or representation made by the contracting authority. The contractor is only relieved from the impact of such clauses where the contractor is actively misled.

In *Jacksonville Port Authority v. Parkhill-Goodloe, Co., Inc.* (1978), a dredging contractor contacted with the Jacksonville Port Authority to dredge a channel to a depth of between 36 and 40 feet. The contract contained a disclaimer requiring the contractor to familiarize itself with the local conditions and the

drawings and specifications for the project. In addition to reviewing the soil borings furnished by the authority, the contractor also conducted its own (less intensive) soil borings, all of which indicated loose sand, silt and limestone up to 37 feet. When dredging commenced, the contractor encountered solid and heavy rock as shallow as 33 feet. As this contractor did not engage in the business of dredging rock and would not have a bid on projects where rock was involved, the contractor suffered delays and substantial damage to its equipment. The contractor later found out the Port Authority had engaged in prior dredging operations with another contractor in a nearby location, in which that contractor had also encountered solid rock at a much shallower depth.

When the present contractor filed suit, the Jacksonville Port Authority sought to invoke the disclaimer in the contract. However, the court found in favor of the contractor, stating that the Jacksonville Port Authority had a duty to furnish bidders with information which would not mislead the bidders and had a duty to not withhold the very pertinent information that another dredging contractor had encountered differing conditions in an adjacent area.

Florida, like New Jersey, will find in favor of a contractor's claim for differing

site conditions in those situations where a public entity fails to disclose superior knowledge of the site, but it appears that Florida's standard is much higher. The contractor must prove that the public entity actively misled the contractor in the face of a provision exculpating the public entity from liability.

### California Cases

California allows claims by contractors for unforeseen site conditions in situations where a public owner has made material and affirmative misrepresentations of fact regarding the conditions that are likely to be encountered on the job site. *Tonkin Const. Co. v. Humboldt County* (1987). Liability of a public entity may also be founded based on a failure to disclose information reasonably available to that entity and relevant to the conditions likely to be encountered at the project site. *Welch v. State* (1983). However, there must be an affirmative misrepresentation or concealment of material facts in the plans and specifications in order for the contractor to recover. Public entities are not burdened with liability simply because a contractor underbids due to lack of diligence in examining specifications and plans that are themselves accurate.

In *E.H. Morrill Co. v. State of California* (1967), the Supreme Court of California set forth the governing law for misrepresentation and implied warranty of public entities in the context of public works. E.H. Morrill Co., general contractor for the construction of the Mono-Inyo Conservation Facility for the State of California, appealed from a dismissal of its claim for damages attributable to unforeseen and additional subsurface rock excavation required to complete the work. Morrill alleged that its damages resulted from the State's misrepresentation and implied warranty as to the subsurface conditions at the site, charged the state with making affirmatively false and misleading statements in the contract's special conditions and to the size and concentration of granite boulders beneath the surface.

The Supreme Court held that liability of a governmental agency for affirmative and demonstrably false statements in project plans and specifications is

not overcome by general clauses requiring the contractor to examine the site, check the plans, and/or assume respon-

of proof, amounting to actual fraud or concealment of site conditions before a contractor may recover.

## The contractor must prove that the public entity actively misled the contractor in the face of a provision exculpating the public entity from liability.

sibility for the work or risk of unanticipated subsurface conditions:

The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications is not overcome by the general clauses requiring the contractor to examine the site, to check up on the plans and to assume responsibility for the work. Accordingly, the language ... requiring the bidder to satisfy himself as to the character of surface and subsurface materials or obstacles to be encountered cannot be relied upon to overcome those representations as to materials and obstacles which the state positively affirms ... not to exist, and plaintiff was entitled to rely and act thereon.

California has taken some pains to draw a distinction between contractual language addressing differing site conditions, and misrepresentation and implied warranty causes of action. It appears, though, that California is similar to Florida in demanding a high standard

### Conclusion

None of the states surveyed have fully embraced the federal government's differing site conditions clause nor the philosophy emanating from the case law interpreting the clause. New Jersey state public contracts law seems to be the closest, evolving on parallel lines, but without a differing site conditions clause. Although California was among the first states to imply a warranty of correctness in contract plans and specifications furnished by public bodies, it limits that warranty to situations in which the state makes positive and material representations as to conditions within the knowledge of the public body, the facts about which the bidder is not reasonably able to discover for itself. Florida law is similar. New York law, while seeming to tilt toward the public entity for purposes of protecting the public treasury, will, in certain cases, recognize the practical difficulties confronting a bidder in making its own independent analysis of subsurface site conditions in a limited amount of time. In such situations, contractors

will be permitted to recover for differing site conditions claims where their own investigation of physical conditions would be impractical.

In sum, a differing site conditions clause is not a cure-all for all unknown subsurface conditions, and bidders should make every effort to ascertain as much about the site as is practical prior to bid. The collective wisdom drawn from the cases that have allowed contractors relief shows that a contractor must prove that it was not feasible for it to do anything more than it did with respect to the pre-bid site investigations, and/or the public entity had some knowledge that it either misrepresented or failed to disclose. ❁

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*Charles F. Kemmy, Esq., Editor*

#### **Peckar & Abramson, P.C.**

Attorneys at Law

##### **New Jersey**

70 Grand Avenue  
River Edge, NJ 07661  
Telephone: (201) 343-3434  
Facsimile: (201) 343-6306

##### **New York**

1185 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 382-0909  
Facsimile: (212) 382-3456

##### **San Francisco**

250 Montgomery Street, 16th Floor  
San Francisco, CA 94104  
Telephone: (415) 837-1968  
Facsimile: (415) 837-1320

##### **Los Angeles**

555 West Fifth Street, Suite 3000  
Los Angeles, CA 90013  
Telephone: (213) 489-9220  
Facsimile: (213) 489-9215

##### **Miami**

Peckar & Abramson, Rosenberg,  
Reisman & Stein, LLP  
One Southeast Third Avenue, Suite 3050  
Miami, FL 33131  
Telephone: (305) 358-2600  
Facsimile: (305) 375-0328

##### **Fort Lauderdale**

Telephone: (954) 969-0101  
Facsimile: (954) 696-0328

E-mail: [mail@pecklaw.com](mailto:mail@pecklaw.com)  
Web site: [www.pecklaw.com](http://www.pecklaw.com)

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## Peckar & Abramson

is pleased to announce the relocation of our San Francisco office to larger facilities at:

**250 Montgomery Street**  
**16th Floor**  
**San Francisco, CA 94104**  
**Telephone: (415) 837-1968**  
**Facsimile: (415) 837-1320**



Peckar & Abramson