

# Common Mistakes that Add Up to Big Claims

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RLI Design Professionals  
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## Course Description

When asked about large claims, one thing we can often say is that none of us saw them coming at the beginning – not our insureds, their lawyers, their brokers, our underwriters, nor our claim attorneys.

Often, it's more of a situation where small things add up to one big problem. In this course, we'll explore some of those small things and what your firm can do about them preventatively.

## Learning Objectives

### Participants will:

See that even a “simple” request, like the production of documents, can lead to a six-figure claim – and understand why it’s important to handle those requests properly

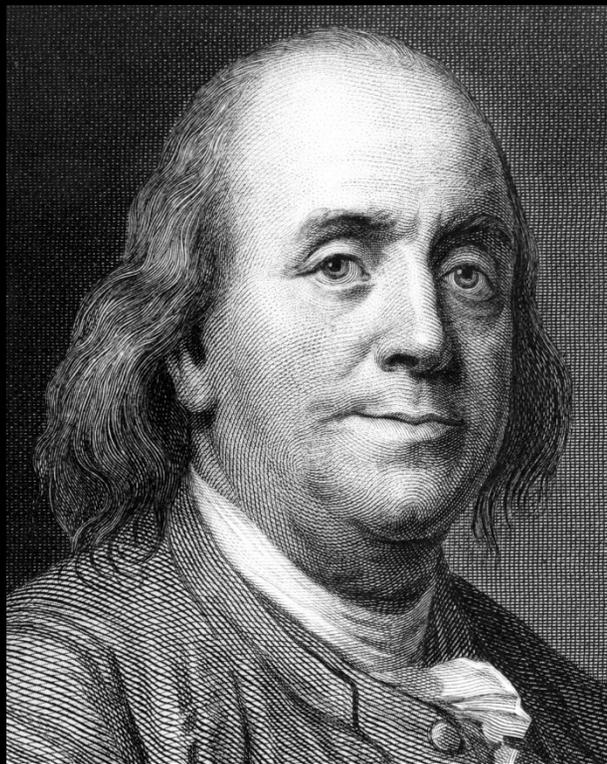
Review the importance of a clear and definitive scope of services

Consider the need to accurately track and manage extra costs as they’re incurred

Refresh understanding of a few key contract provisions including insurance requirements, dispute resolution, project and design coordination, and uninsurable obligations

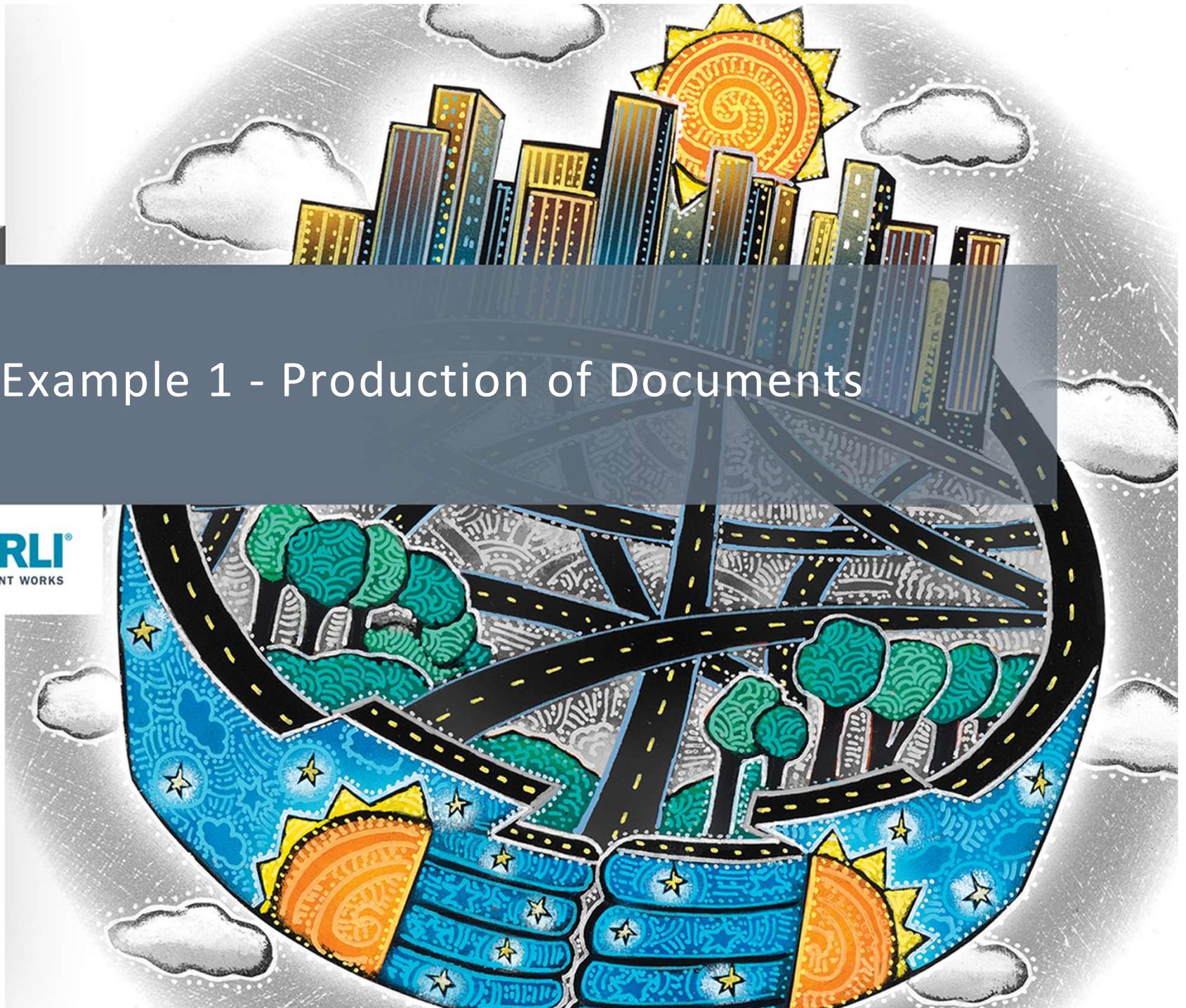
**“An ounce of prevention is worth a pound of cure”**

**-Benjamin Franklin**



# Example 1 - Production of Documents

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# Production of Documents

8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF COUNTY

10 PLAINTIFF'S NAME ) Case No.: Case Number  
11 Plaintiff(s) ) YOUR PARTY DESIGNATION AND  
12 vs. ) NAME'S REQUEST FOR PRODUCTION  
13 DEFENDANT'S NAME ) OF DOCUMENTS OR THINGS  
14 Defendant(s) ) SET NUMBER

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16 PROPOUNDING PARTY: YOUR NAME.  
17 RESPONDING PARTY: RESPONDING PARTY'S NAME.  
18 SET NUMBER: NUMBER

18 To Responding party's designation and name and to its attorney of record:  
19 Your party designation and name, demands that you produce and permit the inspection and  
20 copying by or on behalf of himself/herself of the documents *and/or* tangible things in the  
21 categories described below.

22

23 **PLACE AND TIME OF PRODUCTION:**

24  Production is to be by production of the original documents or things for inspection and  
25 copying at: Location, date and time of production. Requesting party, or requesting party's agent  
26 will inspect and copy the documents and then return forthwith to the responding party or

# Production of Documents

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA**

<b>PLAINTIFF(S)</b>  <b>v.</b>  <b>DEFENDANT(S)</b>	<b>CIVIL TRIAL DIVISION</b>  <b>Compulsory Arbitration Program</b>  COURT TERM:  NO.
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**PLAINTIFF(S) REQUEST FOR PRODUCTION  
OF DOCUMENTS DIRECTED TO DEFENDANT(S)**

You are requested to produce, in accordance with Pennsylvania Rule of Civil Procedure 4009, the originals or clear, readable copies of the below listed documents and/or items unless protected by attorney-client privilege or work-product doctrine. These documents and/or items will be examined and/or photocopied; photograph negatives will be processed and photographs reproduced, videotapes and audiotapes shall be viewed and/or heard and a copy made. The below listed documents and/or items are to be produced at Plaintiff's counsel's office on or before thirty (30) days from the date of service herein. Such request is continuing up to and at the time of trial.

## Risks in Responding

Creating insurance coverage issues

- Possible denial of coverage

Oversharing

- New or additional allegations

Not recognizing a threat

- Informal requests
- False sense of comfort

## Benefits of Reporting Pre-Claims

Decrease in  
exposure

Quick  
resolution

Not counted  
in loss  
history

# Reporting a Pre-Claim



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Written notice

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Specifics of what happened

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Description of the services performed

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Names of individuals and entities that may have suffered harm

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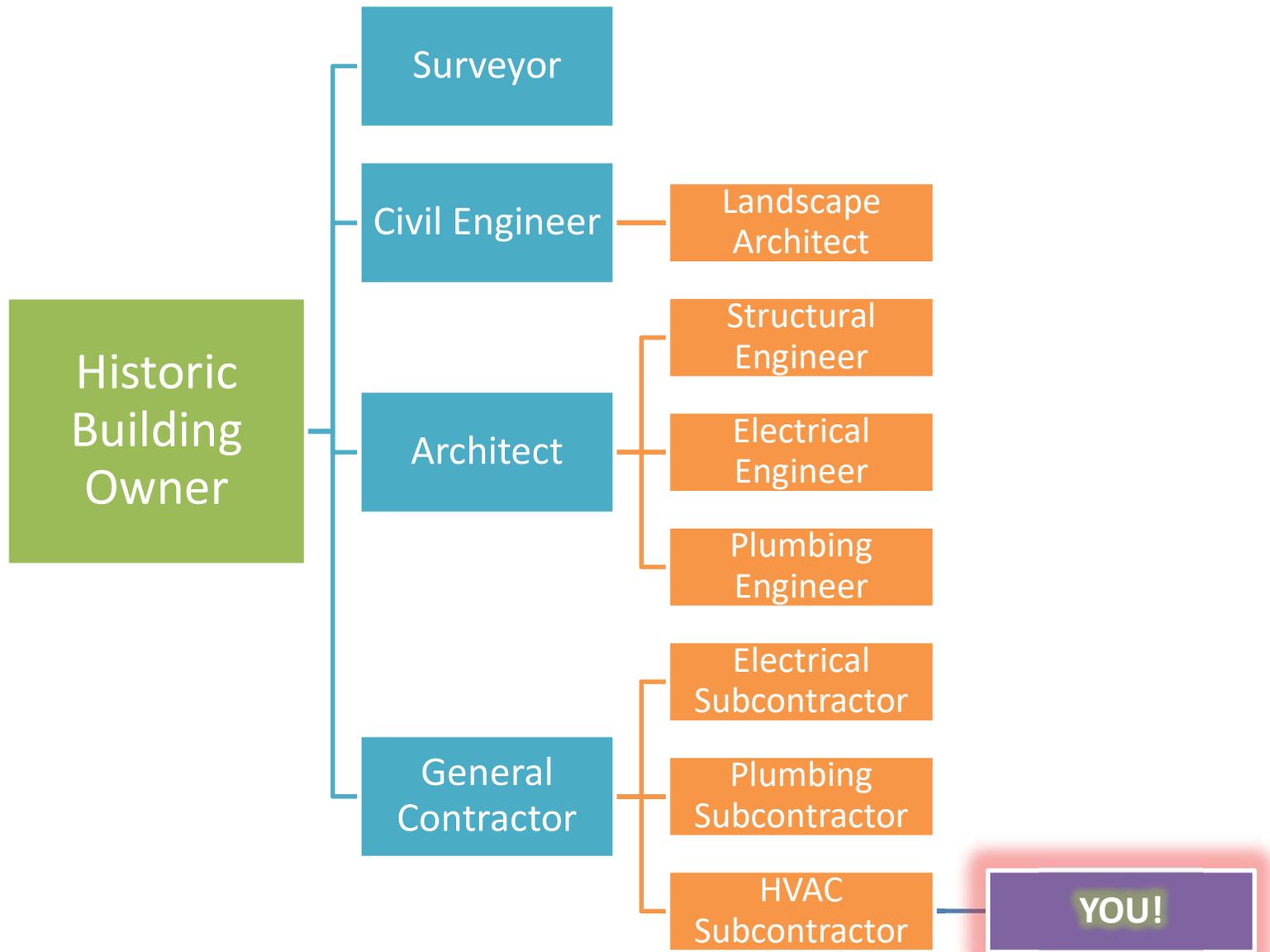
What potential damages or injuries may have occurred

## Example 2 – Defining Your Scope of Services

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# Defining Roles and Scope of Services



## Scope of Services

A formal agreement that specifies all the criteria of a contract between a service provider and the customer

- Deliverables and milestones
- Duties of both parties
- Additional and excluded services



# Deliverables

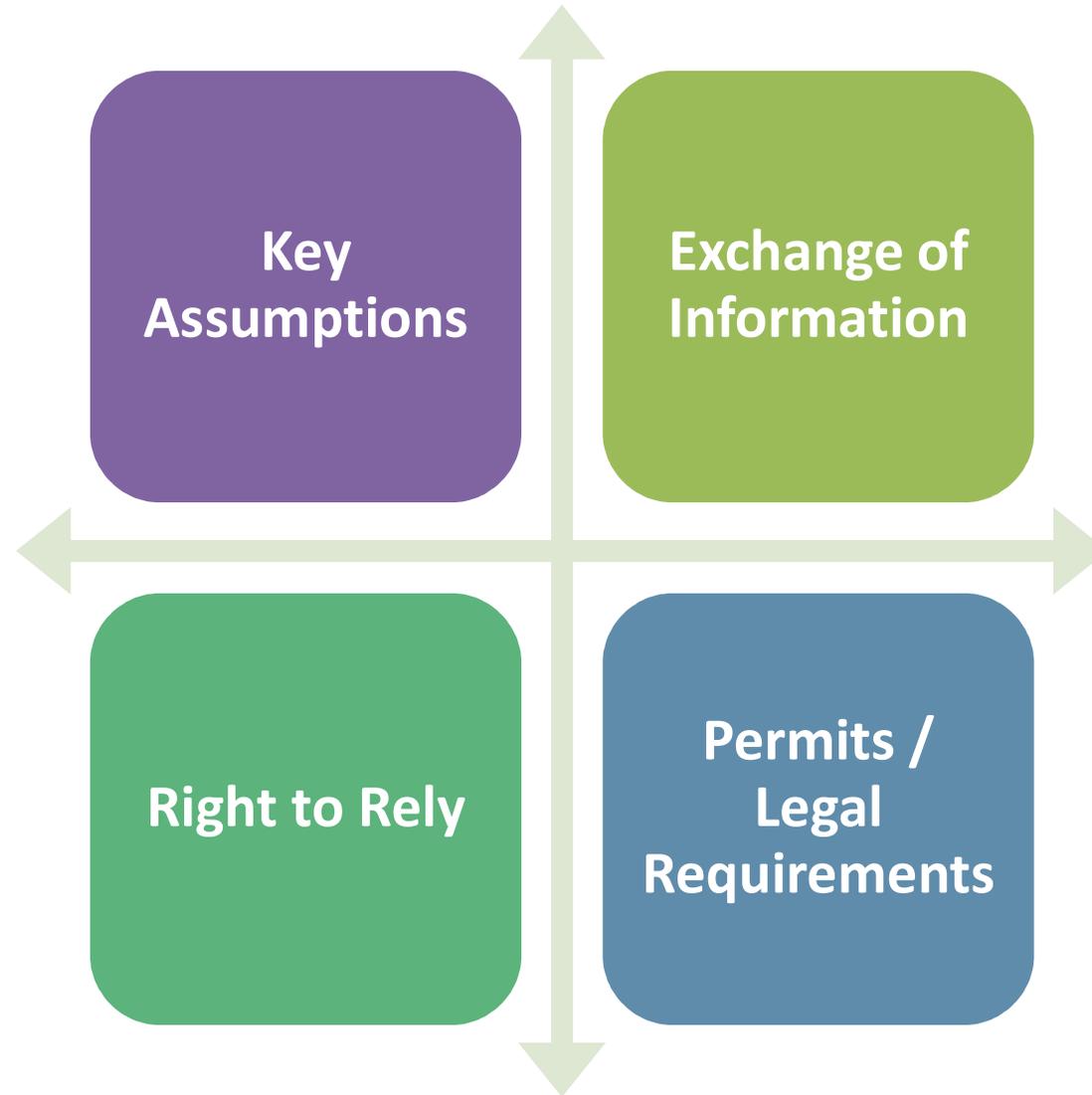
**Tangible, measurable outcome that must be produced to successfully complete the project**

**Standards by which work is deemed acceptable**

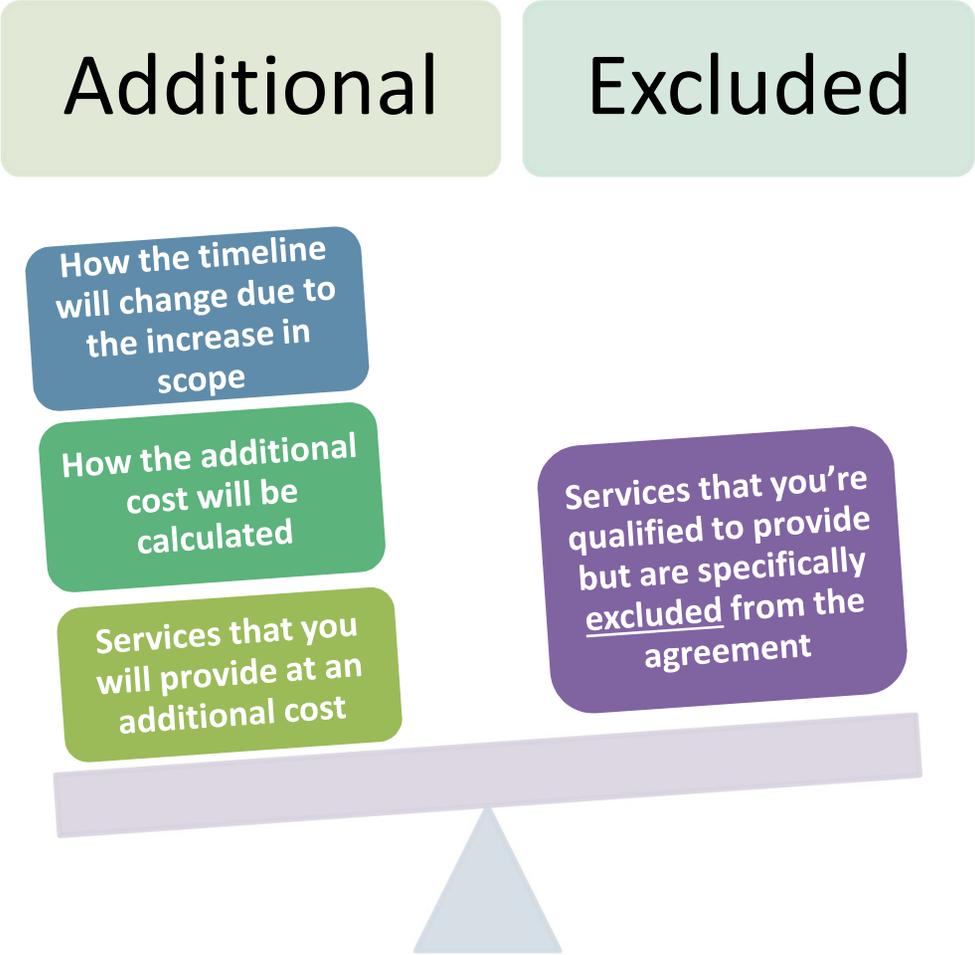
**Clear instructions regarding submission**

**Specific task and end product**

## Duties of Both Parties

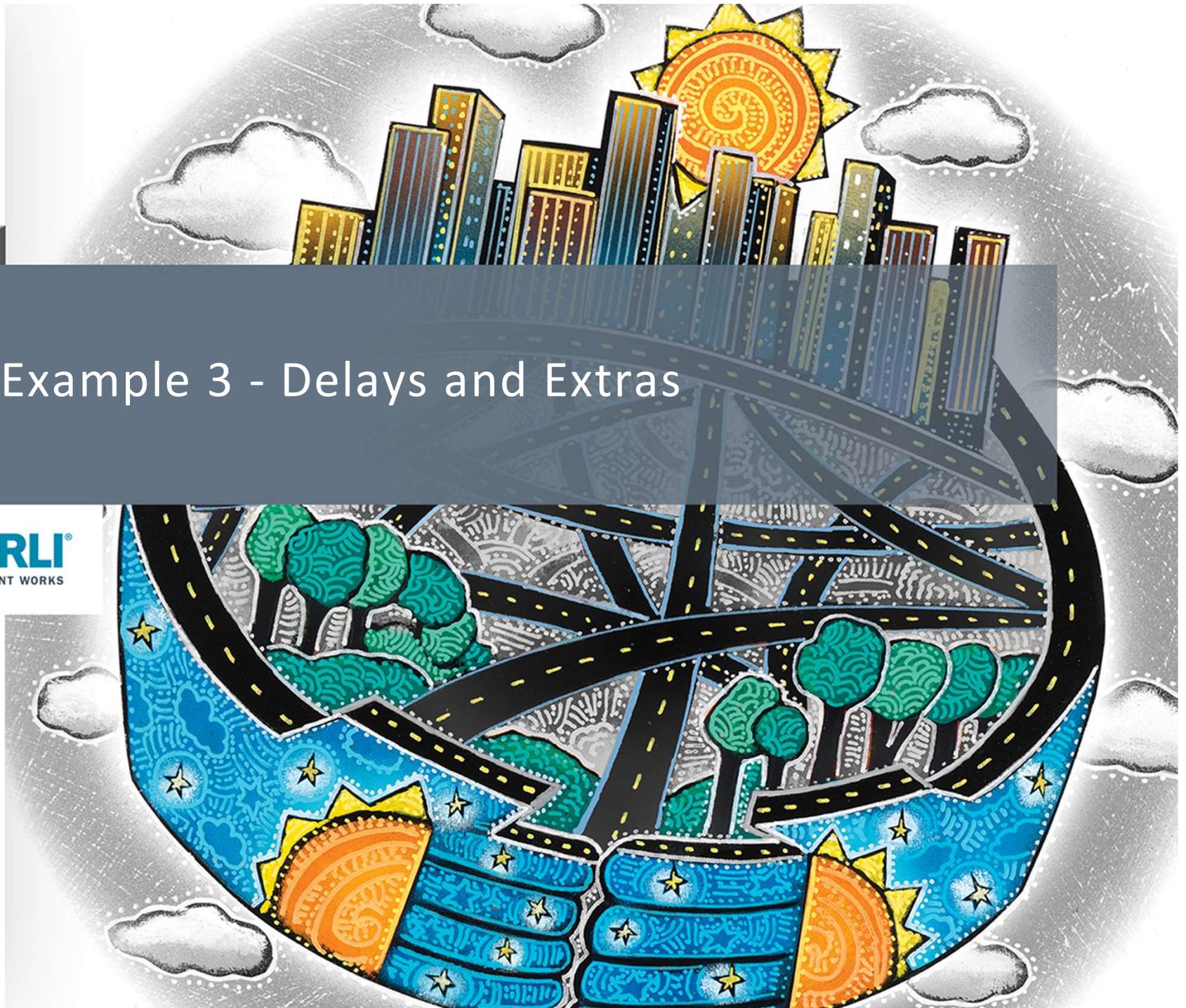


# Additional & Excluded Services



# Example 3 - Delays and Extras

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# “Blackboarding” Damages

Direct Damages	Indirect Damages	Consequential Damages	Punitive/Exemplary Damages	Liquidated Damages
<ul style="list-style-type: none"><li>• Additional Labor Costs</li><li>• Added Equipment Expenses</li><li>• Material Escalation Costs</li></ul>	<ul style="list-style-type: none"><li>• Lost Productivity</li><li>• Additional Site Utilities and Support</li><li>• Increased Overhead Expenses</li></ul>	<ul style="list-style-type: none"><li>• Loss of Use</li><li>• Lost Revenue</li><li>• Financing and Interest Costs</li></ul>	<ul style="list-style-type: none"><li>• Recklessness</li><li>• Bad Faith</li><li>• Fraud</li><li>• Gross Negligence</li><li>• Willful Misconduct</li></ul>	<ul style="list-style-type: none"><li>• Contractually-stipulated Amount</li><li>• Uncertain or Difficult to Prove Actual Damages</li></ul>

Diminution in Value	Attorneys and Experts Fees	Loss of Bonding Capacity	Loss of Reputation
<ul style="list-style-type: none"><li>• May be used when:<ul style="list-style-type: none"><li>• Repair isn't Feasible</li><li>• Cost of Repair is Out of Proportion</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Prevailing Party Contract Provisions</li><li>• Arbitration Agreements</li><li>• Consumer Protection</li></ul>	<ul style="list-style-type: none"><li>• Wrongful Termination</li><li>• Consequences were Contemplated</li><li>• Reasonable Calculation of Damages</li></ul>	<ul style="list-style-type: none"><li>• Lost Business Opportunities</li><li>• Defamation</li><li>• Other Inconveniences</li></ul>

## Delays in Performance

### Excusable

- Due to circumstances beyond the control of the design professional
- Design professional is entitled to a time extension to complete the contract

### Inexcusable

- Fault of the design professional or subcontractor
- Owner may demand design professional accelerate performance – or recover actual or liquidated damages

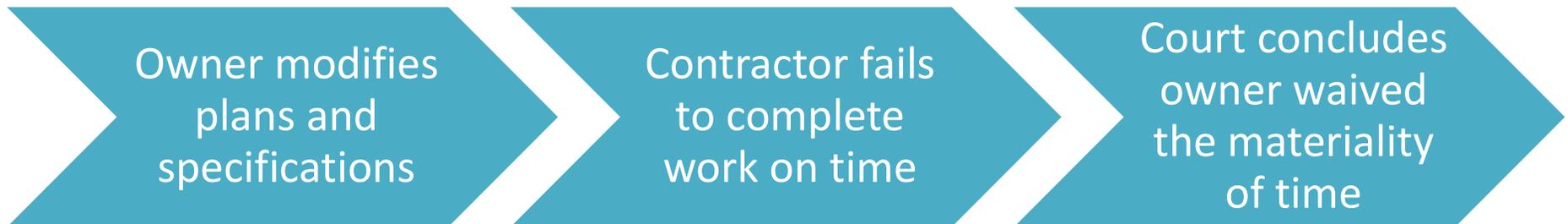
# Delays in Performance – Case Law

## Inexcusable



DeSombre v. Bickle, 18 Wis. 2d 390

## Excusable

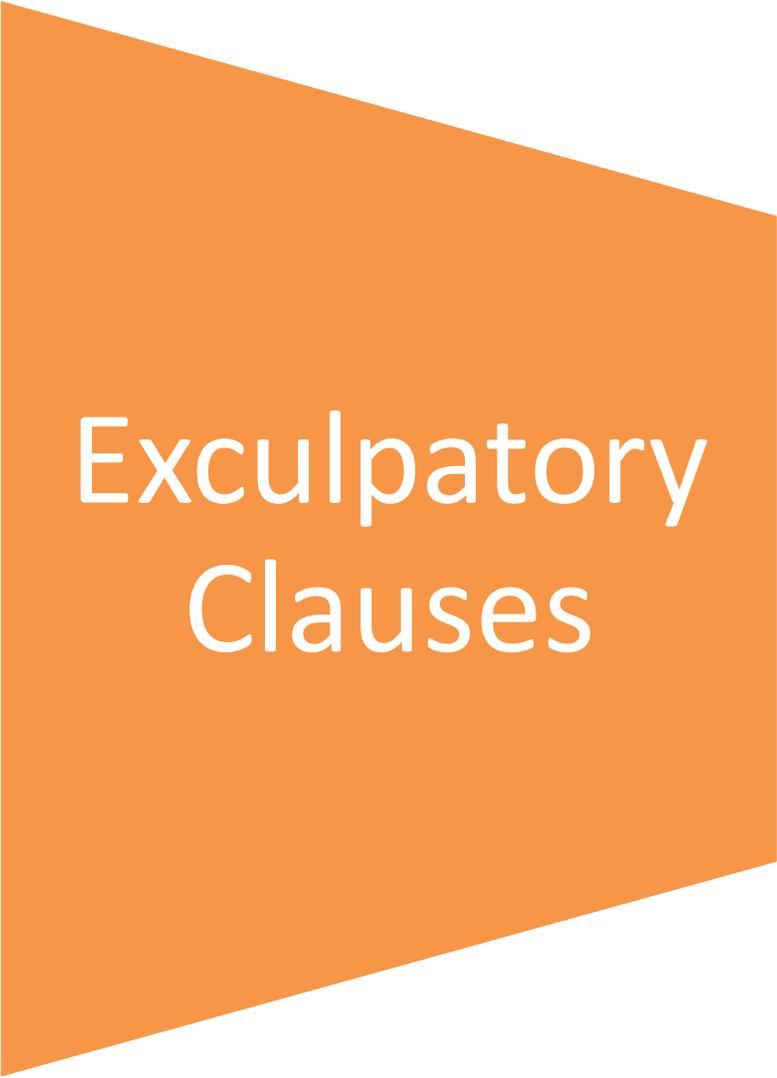


Kaltoft v. Nielsen, 106 N.W.2d 597

## Delays in Performance - Defenses



Waiver



Exculpatory  
Clauses

## No-Damages-for-Delay Case Law

Plato General Construction v. Dormitory Authority of New York

- “No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner for any delay...should the Contractor sustain any damage through any act or omission of any other contractor...the Contractor shall have no claim against the Owner for said damage.”

# Liquidated Damages

**Damages whose amount the parties designate during the formation of a contract**



## Must Be:

Reasonable in light of anticipated or actual harm

Intended to compensate rather than punish

Used only in the event obtaining an otherwise adequate remedy is inconvenient or loss is difficult to prove

# Example 4 - Contractual Obligations

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# Uninsurable Obligations—Reservation of Rights

[Insurance Company]  
[Company Address & Phone Number]

[Date]

[Name & Address]

RE: Our Insured:  
**Policy Number:**  
Date of Loss:  
Claim Number:

Dear [Insured]:

We have received notice of a claim, which took place in [City, State] on [Date of Loss]. As a result of this claim, coverage has been requested under [Policy Number] which was issued to [Named Insured] by [Insurance Company]. There is a question whether coverage under this policy applies to this claim. The nature of this coverage question is as follows:

**WE DON'T WANT THIS ANY MORE THAN YOU DO!**

## Uninsurable Obligations



# Read the fine print!

Duty to defend

Broad indemnification

Express warranties/guarantees

# Payment



Fixed fee vs hourly rate

Reimbursable expenses

Timing of application for payment

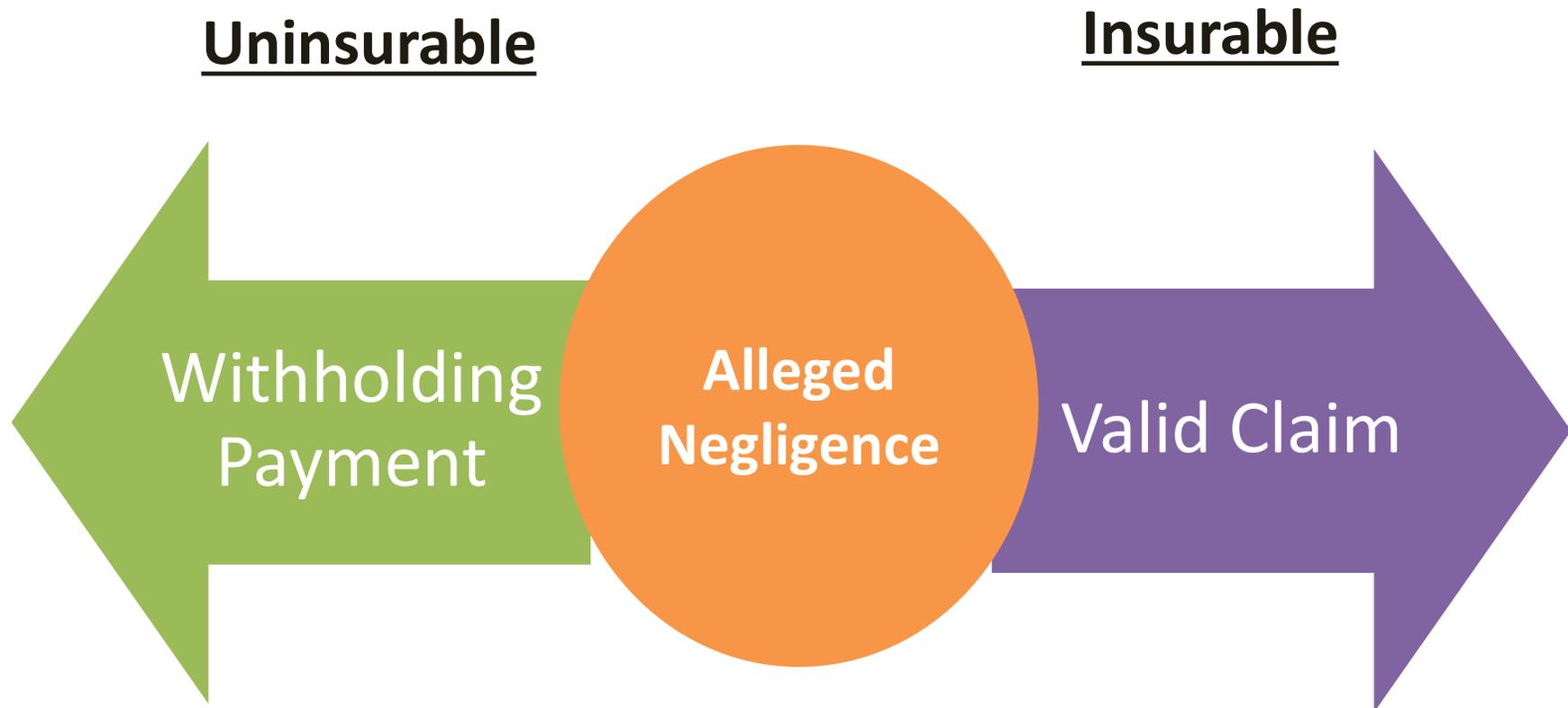
Criteria to determine percentage of work completed

Payment due date

Interest on unpaid work

Right to suspend work or terminate agreement for nonpayment

# Payment – Withholding and Back Charging



**Thank you for your time!**

**QUESTIONS??**

**This concludes The American Institute of Architects  
Continuing Education Systems Program**

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