

CLIMATE
ACTION
WEBINARS

RESILIENCE AND THE EVOLVING STANDARD OF CARE SERIES PART 3:

Legal Perspectives

Wednesday 02.19.25 | 12:00P - 1:30P | 1.5 LU/HSW (live webinar attendees only)



Learning Objectives



Gain an overview of current projections for future climate conditions.



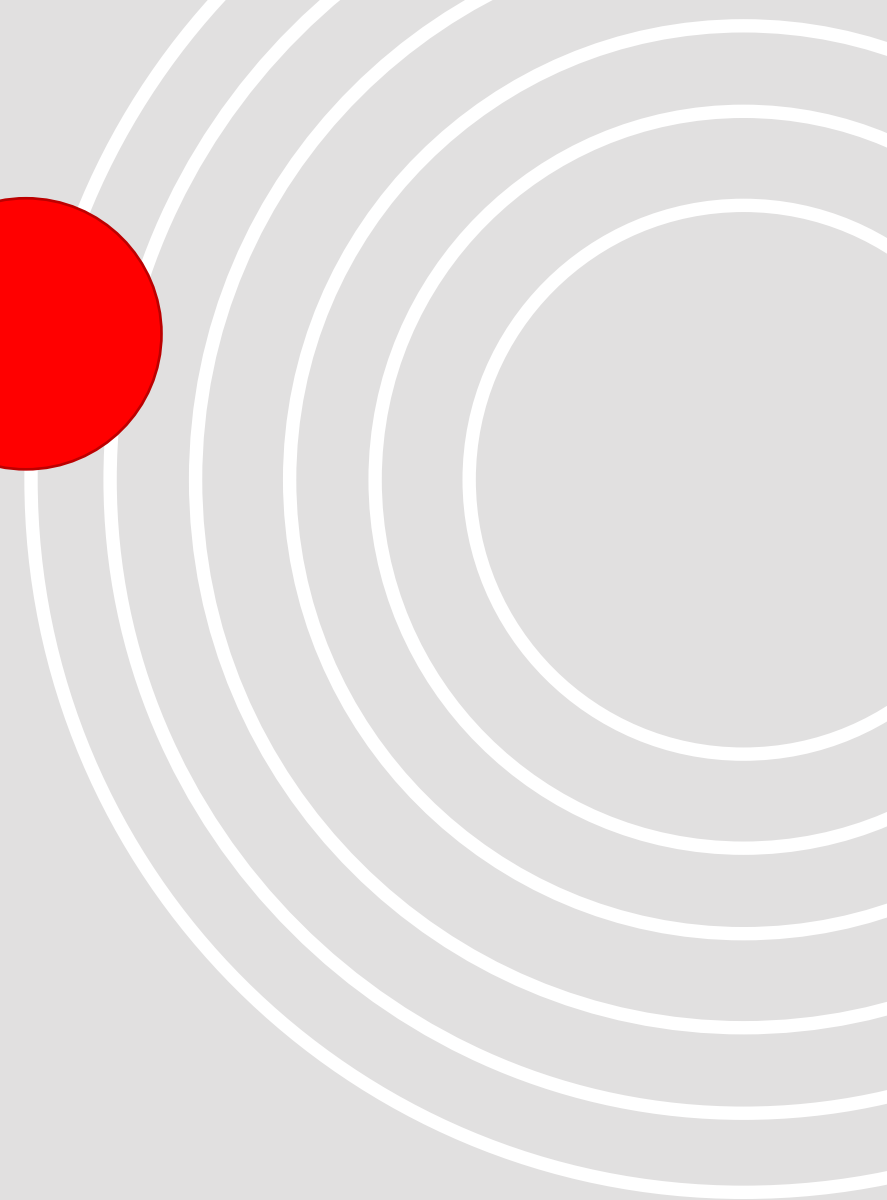
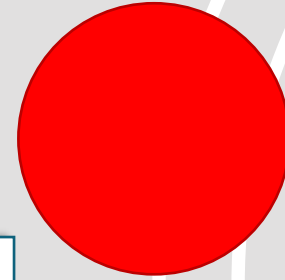
Hear national and California legal cases that have shaped the architect's responsibilities and the standard of care.



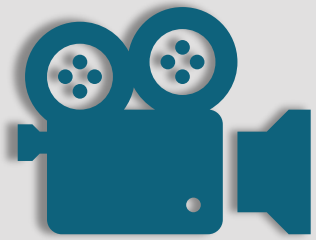
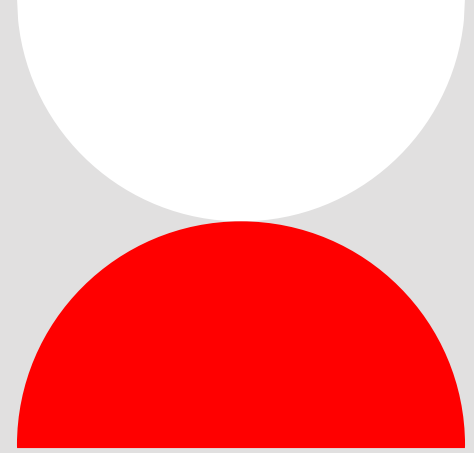
See examples of current best practice contract language around resilience design and managing risk.



See examples from a leading architecture firm on how they practice integrated resilience design.



Housekeeping Reminders



Resources
will be made
available on
our website



Qualifies for
1.5 AIA HSW/LU



Use Q&A to
ask questions
for today's
presenters



Cultivate a
positive
learning
environment

ARUP

Sustainable
Development is
Everything.

This presentation is for general informational purposes only. Nothing presented herein should be interpreted as legal advice of determination of coverage. For advice tailored to your specific situation consult with your attorney. Additionally, only the insurance policy can give actual terms, coverage, amounts, conditions, and exclusions. Program availability and coverage are subject to individual underwriting criteria.

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Moderator



**Sammy Shams, AIA,
NCARB, LEED AP BD+C,
WELL AP, Fitwel Amb.,
LFA**

Resilience, Sustainability & Building
Performance, HKS

2025 Co-chair | AIA Resilience and Disaster
Response (RADR) Committee

Co-author: AIA + HKS Resilience Design
Toolkit

Today's Panel



**Yvonne Castillo,
Esq.**

Senior Vice
President of Risk
Management,
Victor US



Jessica Mead, Esq.

Partner,
Collins + Collins, LLP



**Brian K. Stewart, Esq.,
Hon. AIA CA**

Managing Partner,
Collins + Collins, LLP



Resilience and the Evolving Standard of Care Series: Part III: Legal Perspectives

Yvonne Castillo

Director, Victor Risk Advisory

February 19, 2025

OVERVIEW: CLIMATE CHANGE CONDITIONS

Current & Future Projections



CURRENT CLIMATE STATE

Climate Impact Context

All Disasters

Drought

Flooding

Freeze

Severe Storm

Tropical Cyclone

Wildfire

Winter Storm

United States

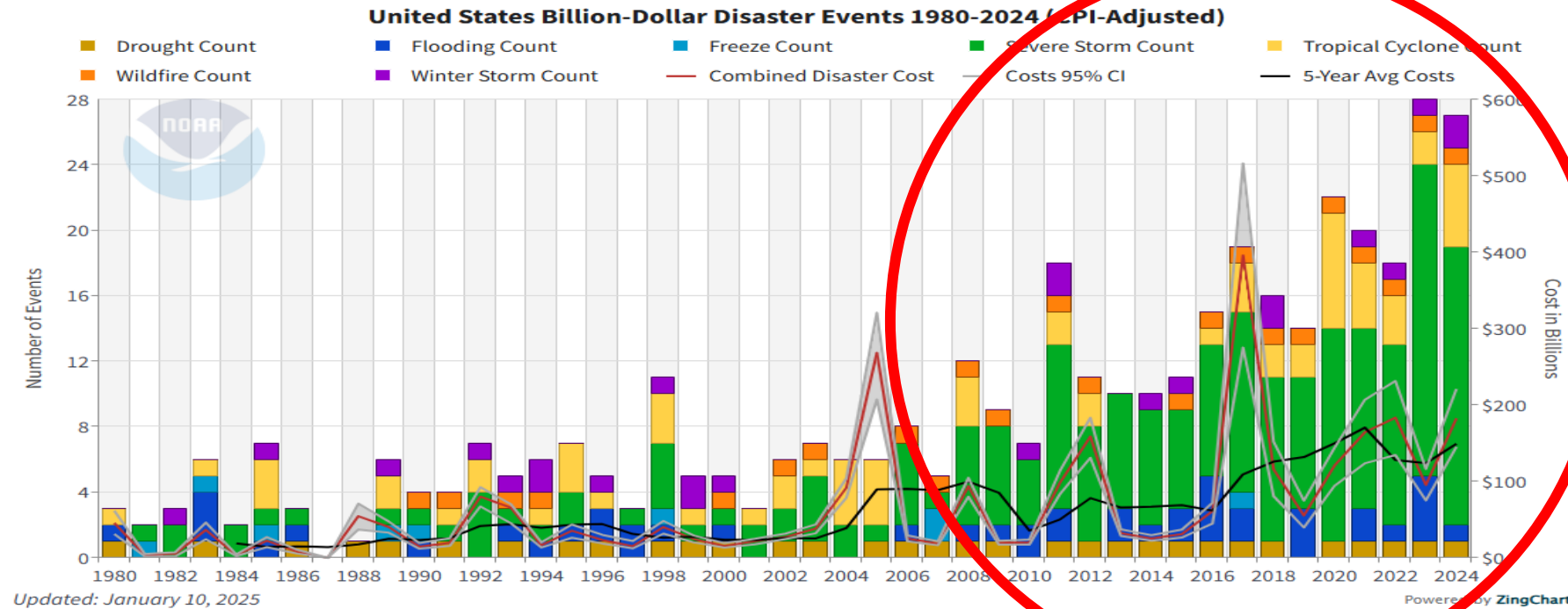
Cost

Update

CPI-Adjusted

Unadjusted

Event Cost Range Filter:



*NOAA National Centers for Environmental Information (NCEI) U.S. Billion-Dollar Weather and Climate Disasters (2025). <https://www.ncei.noaa.gov/access/billions/>, DOI: [10.25921/stkw-7w73](https://doi.org/10.25921/stkw-7w73)

EMISSIONS AND WARMING CAUSAL LINK



“ Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above [pre-industrial levels] in 2011-2020. ”

Quote source: IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II, III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

FUTURE PROJECTIONS FOR WARMING

Best Case Scenario – “Speeding Train” Metaphor



“

Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5° C in the near term in considered scenarios and modelled pathways.

”

Quote source: IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II, III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

FUTURE PROJECTIONS FOR HAZARDS

Best Case Scenario – “Speeding Train” Metaphor



“ Every increment [.1 degrees] of global warming will intensify multiple and concurrent hazards (high confidence).

Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades...”

Quote source: IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II, III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

EVOLVING INDUSTRY STANDARD OF CARE
Industry Practice & Changes Afoot



THE BIG QUESTION

Has the standard of care changed in response to the frequency and severity of climate-driven events?

Answer: It's Changing



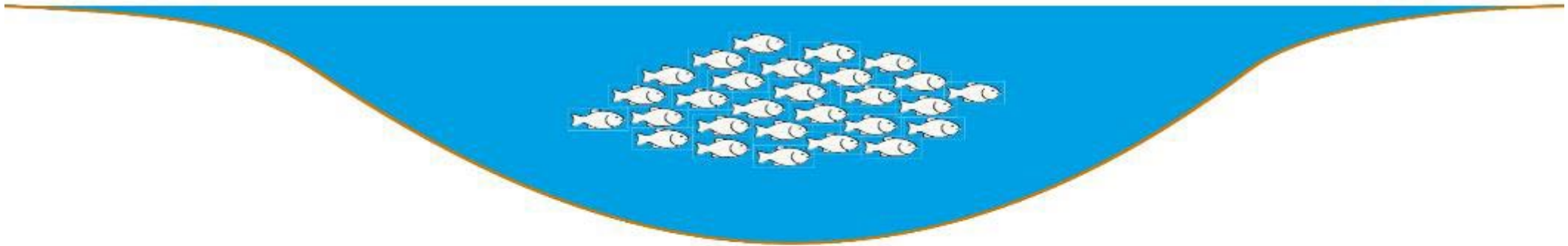
LEGAL STANDARD OF CARE

...Is Based On Industry Standard Practice



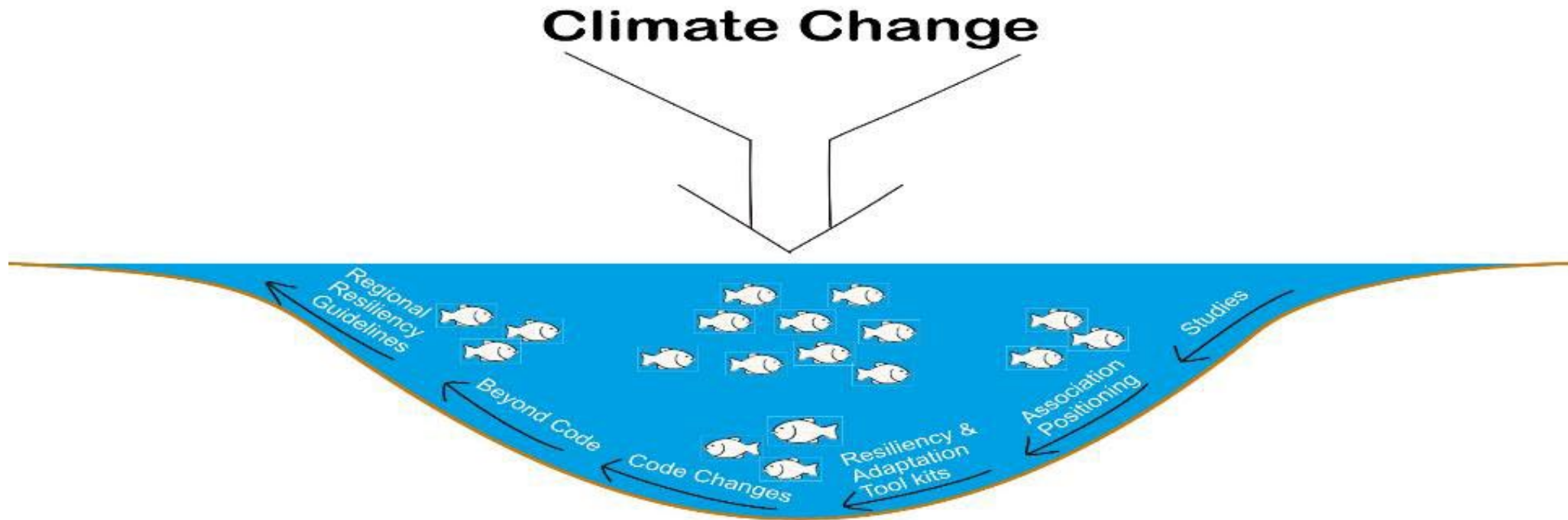
INDUSTRY PRACTICE

School Of Fish Metaphor



CHANGES IN INDUSTRY PRACTICE

Beware of the “undercurrents”



AIA RESILIENCY STUDIES (2022)

Resiliency in the Built Environment Research Report

- Vast majority of architect-respondents believe code does NOT make a building resilient enough for its location and will not enable buildings to withstand all likely hazards in their locations
- Interesting contrast, vast majority of clients and contractors believe the exact opposite (above)
- Architects reported that site exposure to natural hazards/climate impacts was ranked as one of the more important considerations, ranking it 3rd out of 13 resiliency considerations
- 37% of architects reported that they are relying on climate projection data
- ¼ of projects reported going beyond code

Source: [Resiliency in the Built Environment Research Report](#), by The American Institute of Architects (AIA) and Owens Corning

RESILIENCY STUDIES (2022)

Climate Forward? How Climate Projections Are(n't) Used to Inform Design

- 36% respondents offer climate resilience/adaptation planning and design services
- 93% noted some familiarity with climate-future projection data (34% use this data to inform design/planning)
- Majority of respondents are using future-forward data from publications (IPCC and regional fact sheets), not raw scientific data
- Biggest use case for climate projection data: to inform conversations with client, climate risk assessments and site/building design strategies (slightly less so for system sizing)
- Biggest barrier in using future-forward climate data is that clients aren't asking for it

Source: [Climate Forward? How Climate Projections Are\(n't\) Used to Inform Design](#), by HGA and the University of Minnesota Climate Adaptation Project

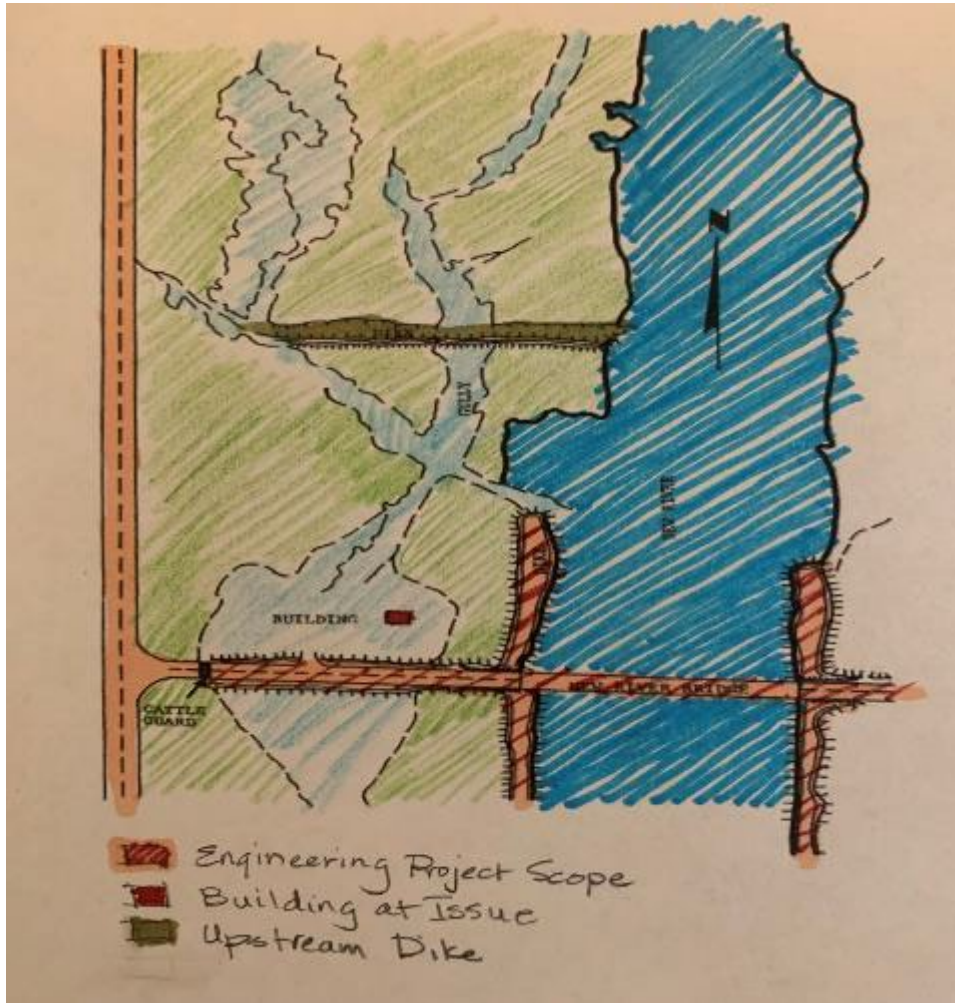
U.S. JURISPRUDENCE

Case Law and Insights into the Future



FORESEEABILITY: CASE STUDY #1

L.H. Bell Case



1967

50-year flood
occurred at building
location

1969-70

County hires
engineer to design
bridge to 25 year
flood

Sept 1970

“unusually heavy
rainfall” occurs at
location; 100-year
flood

LH BELL COURT OPINION TAKEAWAYS

-
- (1) In a negligence-based claim by a 3rd party, Court said: *“Evidence that a flood is a 25 year flood or a 100 year flood is certainly admissible as to the question of foreseeability **but is not conclusive.**”*
-
- (2) An engineer (or other design professional) *“does not warrant his service or the tangible evidence of his skill to be ‘merchantable’ or ‘fit for an intended use.’”*
-
- (3) Standard of care includes thinking and designing *“reasonably and without neglect.”* Court stated: *“it was foreseeable that without culverts under the approaches to the road there was a reasonable probability that plaintiffs’ property would be flooded.”*

FORESEEABILITY: CASE STUDY #2

Barnett Case



1956-59

Architect is hired
and school is
constructed

1964-67

Publications
emerge re:
dangers of
asbestos

1967-70

Decedent attends
school

70s-early 80's

Federal and state
regulation of
asbestos

1982

School closes
because of
asbestos

1986

Decedent dies of
mesothelioma

BARNETT COURT OPINION TAKEAWAYS

(1) Court reviewed the Defendant-Architect's Performance based on the standard of care in 1959 (when school was built).

(2) Use of asbestos was consistent with *“generally accepted practices”* at that time.

(3) Court noted that the earliest publication on dangers of asbestos was in 1964 (after school was completed).

(4) Architect *“could not reasonably have been expected to know of the deleterious effects of asbestos between 1956-59...”*

FORESEEABILITY: CASE STUDY #3

Conservation Law Foundation v. ExxonMobil Case

Exxon's 110-acre Facility



NPDES Permit Requirement



Court's view of "good engineering practice"



EXXONMOBIL COURT OPINION TAKEAWAYS

(1) “...EPA guidance and practices of engineers in the field as alleged are sufficient to state a plausible claim that ‘good engineering practices’ include consideration of foreseeable severe weather events, including any caused by alleged climate change.”

(2) The Court clarified that it didn’t matter whether the permit at issue required consideration of “climate change” explicitly, stating “...the appropriate inquiry is not whether the permit requires consideration of climate change but whether the permit requires consideration of weather events that [plaintiff] alleges threaten the terminal, including but not limited to those that might be caused by alleged climate change.”

Standard of Care: CA Specific Jurisprudence

Cases and Laws: Foreseeability and Duty

Severe Weather Event Claims

- Insurance Claims
- Public Entity/ Utility Company
- Property Owners
- Contractors
- Design Professionals

Severe Weather Event Claims

Loss of property,
wages, and
earning capacity

Loss of business
profits

Displacement
expenses

Punitive
Damages

Emotional
Distress

Death of family
members

Severe Weather Event Claims

- Breach of Contract
 - Requires contractual privity
 - Claims governed by terms of the contract
 - Potential to limit recoverable damages

Severe Weather Event Claims

- Negligence
 - Contractual privity is not required
 - Must owe a duty of care
 - Breach -Professional standard of care
 - Causation
 - Damages- personal injury or property damage

Severe Weather Event Claims

- Duty- limits potential infinite liability for negligence
 - Extent transaction intended to affect the plaintiff
 - Foreseeability of harm
 - Degree of certainty that the plaintiff suffered injury
 - Closeness of connection between defendant's conduct and injury
 - Moral blame attached to the defendants' conduct
 - Policy of preventing future harm

CA Case Law re Foreseeability

- Beacon Residential Community Association v. Skidmore Owings & Merrill (2014) 59 Cal. 4th 568

CA Case Law re Foreseeability

- Beacon Facts:
 - Defendants were the only architects on the project
 - Defendants were paid over \$5million for services
 - Owner had final decision-making authority over the design
 - 595 unit condo complex in San Francisco
 - Units unsafe and uninhabitable in high heat

CA Case Law re Foreseeability

Beacon Holding:

- Architect owes duty of care to future homeowners
 - Design involves a residential building
 - The architect is a principal architect
- Duty applies even when architect does not actually build the project or exercise ultimate control over construction

CA Case Law re Foreseeability

- Beacon Rationale:
 - Work intended to benefit homeowners
 - Foreseeable homeowners could be harmed
 - Design made homes uninhabitable
 - Sole architects meant close connection to injury
 - High compensation and specialized expertise creates moral blame
 - Prevent future harm to homeowners relying on architects' specialized skill

CA Case Law re Foreseeability

- Lynch v. Peter & Associates,
Engineers, Geologists,
Surveyors (2024) 104
Cal.App.5th 1181

CA Case Law re Foreseeability

- Lynch Facts:
 - Owner hires contractor for home improvement project
 - Area susceptible to landslides
 - Contractor retains defendant to do limited geotechnical inspection of excavated footing trench for \$360
 - Defendant Geotech prepares memo stating excavated soil competent
 - Soil did not hold up footing and house subsided

CA Case Law re Foreseeability

- Lynch Facts (Cont.):
 - Expressly excluded subsurface exploration, lab testing, settlement analysis and/or slope stability calcs
 - Expressly stated Geotech “is not responsible for potential settlement and/or slope failure, if any”
 - Expressly excluded geotechnical review of grading plan, foundation plan and/or structural design calculations
 - Expressly excluded liability for potential settlement and/or slope failure
 - Limitation of liability clause to twice \$360 fee

CA Case Law re Foreseeability

- Lynch Holding:
 - Geotechnical engineer owed the property owner a duty of care to perform its geotechnical inspection with the skill expected of a professional in its position
 - Expansion of Beacon holding
 - Not the principal architect
 - Paid \$360, not \$5million
 - Scope of work very limited

CA Case Law re Foreseeability

- Lynch Rationale:
 - Transaction intended to affect homeowners
 - Harm foreseeable based on location in landslide area
 - Injury reasonably certain-house subsided laterally into slope
 - Moral blame due to contract exclusions-abdicated required steps to make inspection
 - Duty furthers policy of preventing harm to residential homeowners

CA Case Law re Foreseeability

- Lessons:
 - “The declining significance of privity has found its way into construction law.” Beacon, 59 Cal.4th at 574
 - Duty even when not the final decision-maker
 - Contractual protections do not always apply in negligence claims
 - Contractual exclusions may not overcome duty

CONTRACT LANGUAGE AND RESILIENT DESIGN



CONTRACTS – A HISTORICAL PERSPECTIVE (1)

- SHOULD ALWAYS BE IN WRITING
- IN CA, THE B&P CODE SECTION REQUIRES A WRITING IN MOST INSTANCES (A = B&P Section 5536.22. E = B&P Section 6749)
- SHOULD ALWAYS BE DISCUSSED/NEGOTIATED
- WHEN YOU ARE BUSY, EASY(ER) TO SAY “NO”
- SCOPE IS VERY IMPORTANT AND OFTEN OVER-LOOKED
 - WHAT YOU WILL DO
 - WHAT YOU WILL NOT DO
- GET IT EXECUTED – SAVE IT FOREVER!

CONTRACTS – A HISTORICAL PERSPECTIVE (2)

- LIMITATION OF LIABILITY
- INDEMNITY
- DUTY TO DEFEND – POST- CA CIVIL CODE 2782.8
- PREVAILING PARTY ATTORNEY AND EXPERT FEES



NATURAL DISASTERS...

RISK DUE TO SHIFTING STANDARD OF CARE

- HOW TO CONTRACTUALLY MITIGATE:
 - DEFINE STANDARD OF CARE
 - IF NOT DEFINED – CA LEGAL DEFINITION IS PRETTY GOOD – SEE NEXT SLIDE
 - SCOPE...AGAIN – WHAT YOU ARE DOING AND NOT DOING
 - THINK LEED. DO NOT GUARANTEE BUT STATE LEED LEVEL AS A GOAL
- STANDARD OF CARE IS ALWAYS MOVING
 - LIKE THE SECOND HAND ON YOUR WATCH OR THE TIDES
 - IF MOVES SLOW AND THEN FAST
 - IT WILL MOVE FOLLOWING THESE RECENT FIRES
 - IT DID MOVE FOLLOWING HURRICANCES
 - IT WILL MOVE AGAIN POST BIG EARTHQUAKE

STANDARD OF CARE IN CAPER CACI 600

A Design Professional (DP) is negligent if they fail to use the skill and care that a reasonably careful DP would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care. You must determine the level of skill and care that a reasonably careful DP would use in similar circumstances based only on the testimony of the expert witnesses, including the DP named in this action who have testified in this case.

STANDARD OF CARE IN CAPER CACI 602

ADP is not necessarily negligent just because their efforts were unsuccessful or because they make an error that was reasonable under the circumstances. ADP is negligent only if they were not as skillful, knowledgeable, or careful as another reasonable DP would have been in similar circumstances

NO CONTRACT IS PERFECT

- A 100 PAGE CONTRACT IS NOT NECESSARILY BETTER THAN A 10 PAGE CONTRACT
- MEETING OF THE MINDS IS CRITICAL
- NO “MAGIC” LANGUAGE YET FOR DEALING WITH RESILIENT DESIGN
- DESIGNING TO CODE HAS NEVER BEEN AN ABSOLUTE DEFENSE
- HOWEVER, DESIGNING UNDER CODE IS A SLAM DUNK LOSER!

BASIC ARCHITECT CONTRACT REQUIREMENTS (SLIDE 1)

- (1) **A description of the project for which the client is seeking services.**
- (2) A description of the services to be provided by the architect to the client.
- (3) A description of any basis of compensation applicable to the contract and the method of payment agreed upon by both parties.
- (4) The name, address, and license number of the architect, the name and address of the client, **and the project address.**

BASIC ARCHITECT CONTRACT REQUIREMENTS (SLIDE 2)

- (5) A description of the procedure that the architect and the client will use to accommodate additional services and contract changes, **including, but not limited to, changes in the description of the project, in the description of the services, or in the description of the compensation and method of payment.**
- (6) A description of the procedure to be used by either party to terminate the contract.
- (7) **A statement identifying the ownership and use of instruments of service prepared by the architect.**
- (8) A statement in at least 12-point type that reads: **“Architects are licensed and regulated by the California Architects Board located at 2420 Del Paso Road, Suite 105, Sacramento, CA 95834.”**

OTHER IMPORTANT CLAUSES/CONSIDERATIONS

- NO PERSONAL EXPOSURE TO PRINCIPALS/EMPLOYEES/AoR/EoR (EXCULPATION CLAUSE – MUTUAL)
- LIMITATION OF LIABILITY
- MUTUAL CONSEQUENTIAL DAMAGE WAIVER
- MEDIATION FIRST
- ARBITRATION OR LITIGATION?
- INDEMNITY

EXCULPATION CLAUSE (no personal liability)

Exculpation - No officer, director, partner, member, shareholder, or employee of either party, their respective parents or affiliates or its successors or assigns shall have personal liability under any provision of the Agreement or arising out of the services provided related to the project, nor shall OWNER make any claims against any individual professional working for ARCHTECT. Neither party shall sue any individual and shall look solely to the other party's corporate interest and/or available insurance proceeds for any financial recovery.

LIMITATION OF LIABILITY (LOL) CLAUSE

In recognition of the relative risks and benefits of the Project to both the Owner (as well as all principals of Owner, bind themselves to this limitation) and the Architect, the risks have been allocated such that the Owner agrees, to the fullest extent permitted by law, to limit the liability of the Architect to the Owner and any third parties for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, inclusive of attorney and expert fees/costs and all court costs such that the total aggregate liability of the Architect shall not exceed \$50,000 or the amount of the fee charged and actually paid by Owner to Architect for the professional services on this project, whichever is greater. It is intended that this limitation shall apply to any and all liability, claims or causes of action however alleged or arising, unless otherwise determined by a court of competent jurisdiction to be prohibited by law.

MUTUAL CONSEQUENTIAL DAMAGE WAIVER

Notwithstanding this or any other provision of the agreement, to the fullest extent permitted by law, neither the Owner nor the Architect, their respective officers, directors, partners, employees, contractors, subcontractors, consultants, design professionals or material suppliers shall be liable to any of the others or make any claim for incidental, indirect, punitive or consequential damages arising out of or connected in any way to the Project or to this Agreement. This mutual waiver of consequential damages shall include, but be not be limited to, loss of use, loss of profits, loss of business, loss of income, loss of reputation, delay, carrying costs on any financing, loss of use or opportunity, loss of good will, cost of substitute facilities, goods, or services, cost of capital; or for any special, consequential, indirect, punitive, or exemplary damages as well as any other consequential damages that either party may have incurred from any cause of action including, but not limited to, negligence, strict liability, breach of contract, and breach of express or implied warranty. The parties shall require similar waivers of all such damages to protect all the entities or persons named herein in all contracts and subcontracts with others involved in the project.

MEDIATION/ARBITRATION OR LITIGATION

- MEDIATION FIRST MAKES SENSE...UNTIL IT DOESN'T
- ARBITRATION IS DIS-FAVORED FOR LOTS OF REASONS
 - USED TO BE CHEAPER
 - USED TO BE FASTER
 - USED TO BE FAIRER
 - NO REAL RIGHT TO AN APPEAL
- LITIGATION HAS MORE PROTECTIONS
 - JURIES ARE BEHOLDEN TO NO ONE
 - RIGHT TO APPEAL

INDEMNITY AND THE DUTY TO DEFEND

- TOO MUCH TO DEAL WITH IT IN DEPTH HERE
- AVOID CONTRACTUAL INDEMNITY WHERE YOU CAN
- IF NOT, NEED TO HAVE A NEGLIGENCE “TRIGGER”
- NO IMMEDIATE DUTY TO DEFEND
- CA CIVIL CODE SECTION 2782.8 HELPED A GREAT DEAL
 - FOR MOST CONTRACTS WITH ADP, NO LONGER AN IMMEDIATE DUTY TO DEFEND
 - DOES NOT COVER CONTRACTS WITH THE STATE OR FEDS
- TRY AND MAKE RECIPROCAL

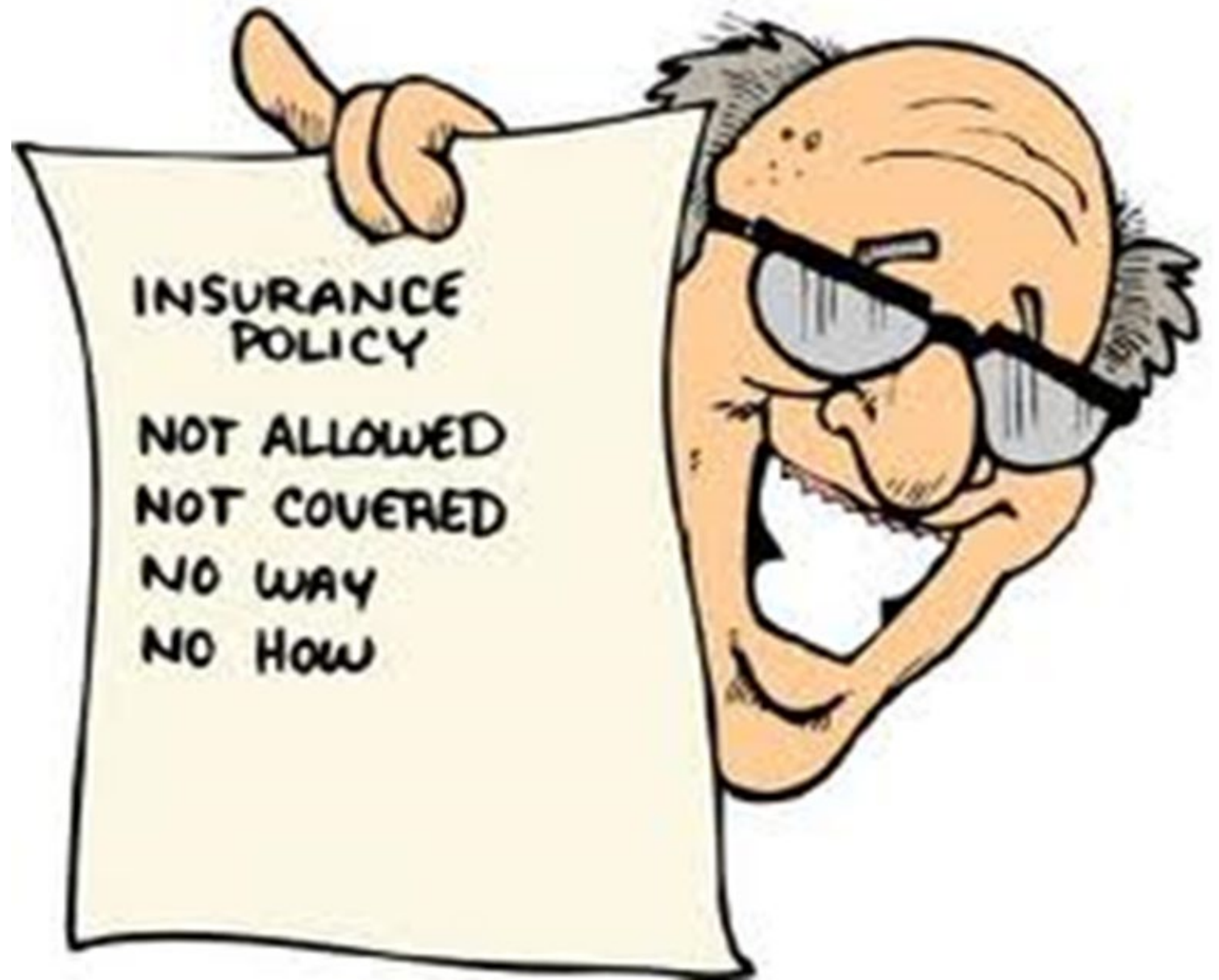
DESIGN CONTRACT TO MATCH RISK

- IS THE PROJECT IN A FIRE ZONE (THINK MALIBU...)
- IS THE PROJECT IN A FLOOD ZONE?
- IS THE PROJECT NEAR MAJOR AND ACTIVE FAULTS?
- DESIGN YOUR CONTRACT TO CALL OUT THOSE KNOWN RISKS AND THAT YOU, AS THE A&E CANNOT BE HELD RESPONSIBLE
- SIMPLE AFFIRMATIVE STATEMENTS CAN HELP AND DEFINE THE INTENT AS OF THE DATE OF THE CONTRACT
- LAY IT OUT AS CLEARLY AS YOU CAN TO MATCH THE ANTICIPATED RISK
- JUST KNOW, HOWEVER, THAT YOU CANNOT ACCOUNT FOR ALL RISK
- EX. “THE PROJECT IS IN A KNOWN HIGH RISK FIRE ZONE. EFFORTS WILL BE TAKEN DURING DESIGN TO MITIGATE SOME OF THAT RISK BUT THERE IS NO WAY TO DESIGN THE HOME TO MITIGATE ALL FIRE RISK.”

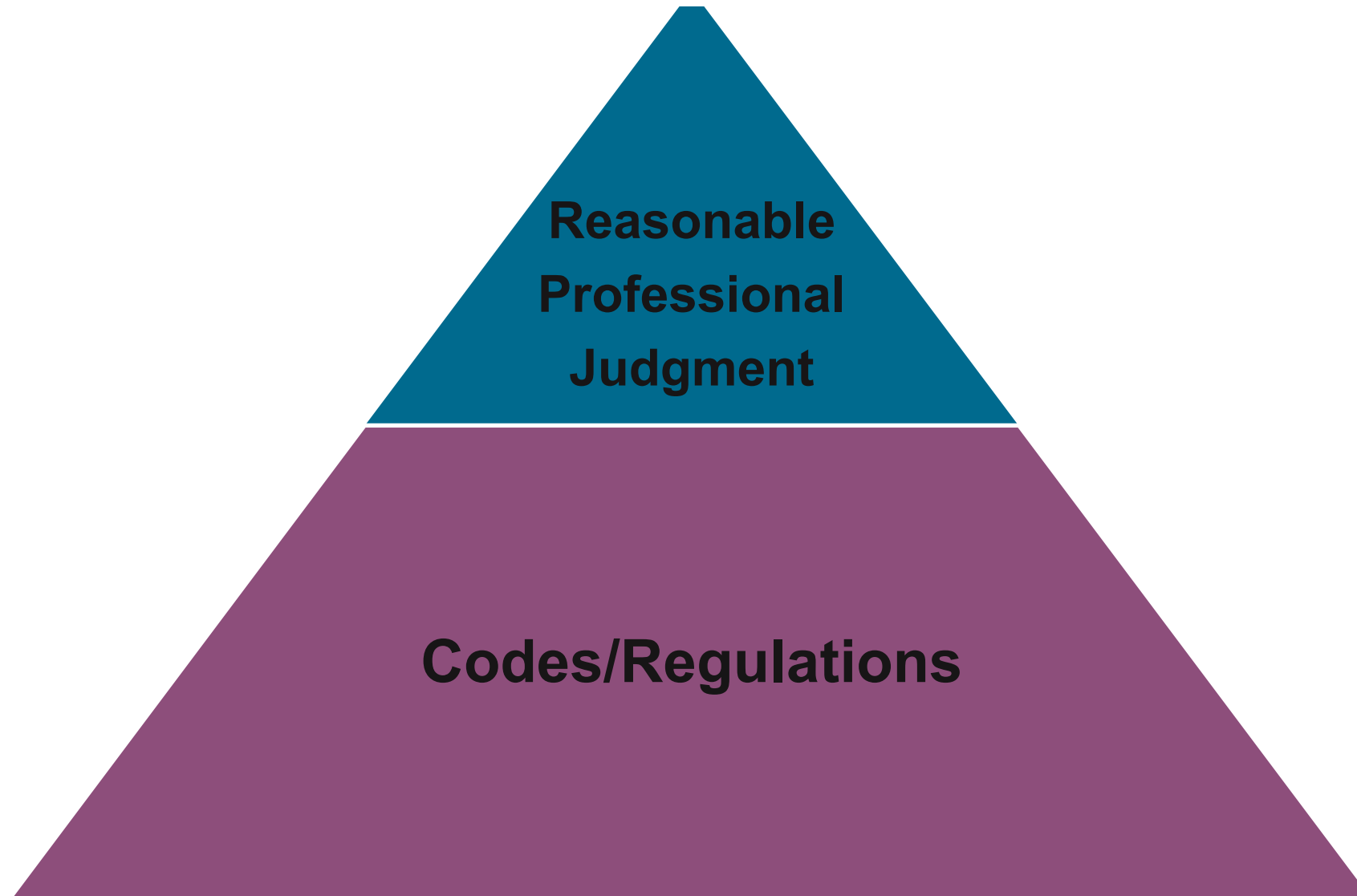
CONTRACT CLAUSES AND RESILIENT DESIGN

- EVERYTHING OLD IS NEW AGAIN
- SAME RULES OF ENGAGEMENT
- DO NOT “OVER PROMISE AND UNDER DELIVER”
- EXCLUDE PERSONAL EXPOSURE CONTRACTUALLY IF YOU CAN
- KEEP UP WITH THE STANDARD OF CARE AS IT EVOLVES
- GEOGRAPHICAL DIFFERENCES MATTER
- OWNERS/INSURERS/BANKS WILL DEMAND RESILIENT DESIGN
 - A&E’s NEED TO KEEP UP
 - AND PROTECT THEMSELVES WHILE DOING IT

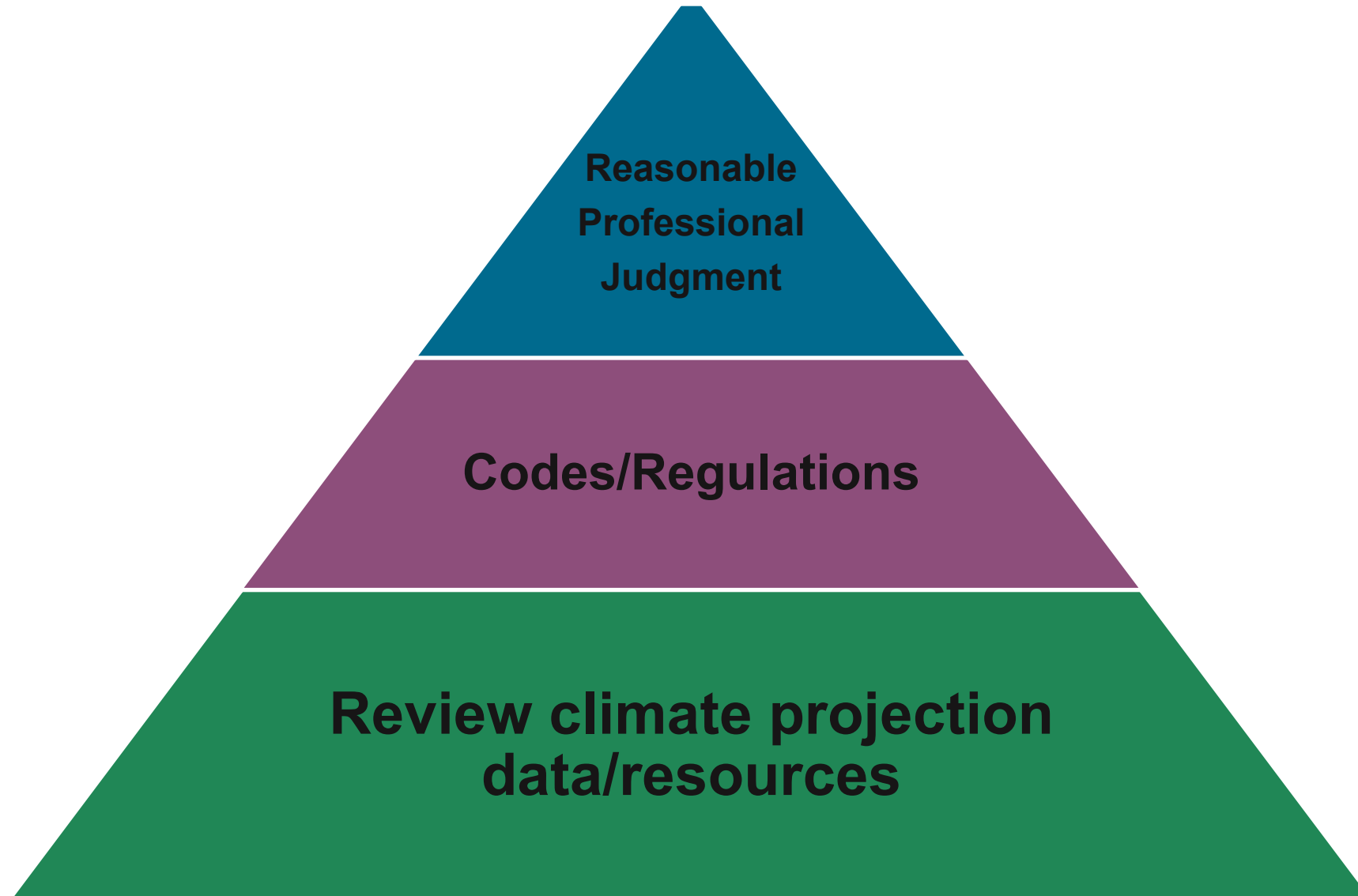
WE DON'T
WANT TO
END UP
HERE...



STANDARD OF CARE – TRADITIONAL CONTEXT



EVOLVING STANDARD OF CARE



3 STEPS: SEE. SAY. SAVE.

Managing Climate-Related Risks in Design



See the Risks.

- Educate yourself on future-forward climate data.



Say Something.

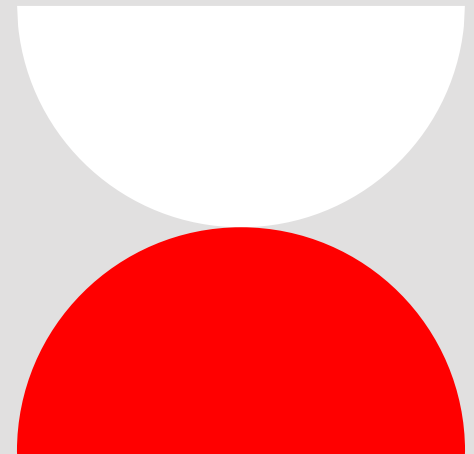
- Flag potential climate risks to clients AND give them the choice to act on resiliency measures.



Save the Record.

- Document all discussions - having proof that you flagged risks protects you in liability claims.

Q & A



Additional Resources

Architects Guide to Business Continuity

NOTE: There are links in this document that to no longer work, and there are links to items behind paywalls STN21_Architects_Guide_to_Business_Continuity_2021_V03.pdf

AIA Resilience Design Toolkit

2023_Resilience_Design_Toolkit_HKS_AIA_FINAL.pdf

AIA Resilient Project Process Guide

https://www.aia.org/sites/default/files/2024-12/AIA46_Resilient_Process_061422.pdf

AIA Users Guide to the Climate and Hazard Risk Acknowledgement

Hazard_and_Climate_Risk_Acknowledgement_Form.pdf

AIA Understanding Resilience

https://content.aia.org/sites/default/files/2019-07/Understanding_Resilience.pdf

Thank you

