

# CONTENTS

---

---

*Note: A summary table of contents is provided here. Detailed tables of contents precede each chapter.*

## **About the Author**

## **Introduction**

## **Acronyms**

# **PART I THE BUILDING**

## **I-1 The Structure**

<b>A. Building Codes .....</b>	<b>I-1 2</b>
1. History.....	I-1 2
2. Organizations .....	I-1 3
3. International Building Code.....	I-1 4
<b>B. Basic Construction .....</b>	<b>I-1 5</b>
1. Footings.....	I-1 6
2. Foundations.....	I-1 7
3. Frame Construction.....	I-1 8
4. Exterior Wall Finishes .....	I-1 10
5. Roofing .....	I-1 10
6. Sheet Metal .....	I-1 14
7. Mechanical.....	I-1 15
8. Insulation.....	I-1 16
9. Windows and Glass.....	I-1 16b
10. Millwork .....	I-1 16e
11. Interior Floor Finishes.....	I-1 16g
12. Interior Ceiling and Wall Finishes .....	I-1 16g
13. Painting and Wallpaper.....	I-1 16h
14. Miscellaneous Exterior Items .....	I-1 17

<b>C.</b>	<b>Construction Experts.....</b>	<b>I-1 18</b>
1.	The Construction Consultant .....	I-1 18
2.	Structural Engineer .....	I-1 21
3.	The Geotechnical Engineer.....	I-1 25
4.	Forensic Roofing Consultant .....	I-1 27
5.	Building Code Compliance Expert .....	I-1 28
6.	The Architect .....	I-1 31
7.	The Insurance Consultant .....	I-1 37

**Checklist**

**I-2 The Construction Contract**

<b>A.</b>	<b>Contract Documents.....</b>	<b>I-2 4</b>
1.	The American Institute of Architects.....	I-2 4
2.	Alternative Sources for Contract Documents .....	I-2 7
<b>B.</b>	<b>Content of the Contract.....</b>	<b>I-2 9</b>
1.	Basic Requirements .....	I-2 9
2.	Additional Provisions.....	I-2 11
3.	Rules of Contract Interpretation.....	I-2 17
4.	Enforcement of Contract Terms.....	I-2 18
<b>C.</b>	<b>Commercial Leases .....</b>	<b>I-2 24</b>
<b>D.</b>	<b>Conclusion .....</b>	<b>I-2 26</b>

**Checklist**

**Appendix**

**I-3 Plans and Specifications**

<b>A.</b>	<b>Plans .....</b>	<b>I-3 1</b>
1.	Site Plans.....	I-3 2
2.	Symbols.....	I-3 3
3.	Floor Plan.....	I-3 3

<b>B.</b>	<b>Specifications.....</b>	<b>I-3 5</b>
<b>C.</b>	<b>Project Management.....</b>	<b>I-3 6</b>
1.	Schematic Design Phase .....	I-3 6
2.	Design Development Phase .....	I-3 6
3.	Construction Document Phase.....	I-3 7
4.	Bidding Phase .....	I-3 7
5.	Construction Phase.....	I-3 8
6.	Cost of Construction .....	I-3 9

**Checklist**

**Appendix**

**I-4 The Property Inspection**

<b>A.</b>	<b>Real Estate Inspection Standards.....</b>	<b>I-4 3</b>
1.	Legislative Requirements.....	I-4 3
2.	Standards of Practice and Code of Ethics .....	I-4 5
3.	Licensing.....	I-4 7
4.	Liability.....	I-4 10
<b>B.</b>	<b>Exterior Inspection Components.....</b>	<b>I-4 12</b>
1.	The Foundation .....	I-4 12
2.	Under-Floor Areas .....	I-4 13
3.	Drainage.....	I-4 13
4.	Parking Area .....	I-4 14
5.	Water Protection Components .....	I-4 14
6.	Doors and Windows.....	I-4 14
7.	Decks and Patios .....	I-4 15
8.	Roof Condition.....	I-4 15
9.	Fuel Energy and Efficiency .....	I-4 16
10.	Optional Inspections .....	I-4 19
11.	Limitations .....	I-4 19
<b>C.</b>	<b>Interior Inspection Components.....</b>	<b>I-4 21</b>
1.	Attic Areas and Framing.....	I-4 21
2.	Plumbing.....	I-4 22
3.	Electrical Systems.....	I-4 24

4.	Heating Systems.....	I-4	25
5.	Central Cooling Systems.....	I-4	25
6.	Fireplaces and Chimneys .....	I-4	26
7.	Walls, Ceilings and Floors.....	I-4	27
8.	Optional Inspections .....	I-4	27
9.	Limitations .....	I-4	28
<b>D.</b>	<b>The Inspection Report .....</b>	<b>I-4</b>	<b>29</b>
1.	Recent Court Decisions.....	I-4	29

**Checklist**

**I-5 The Defects**

<b>A.</b>	<b>Water Intrusion.....</b>	<b>I-5</b>	<b>3</b>
1.	Causes .....	I-5	4
2.	Health Risks .....	I-5	17
<b>B.</b>	<b>Structural Failure .....</b>	<b>I-5</b>	<b>33</b>
1.	Improper Site Preparation .....	I-5	33
2.	Concrete Cracks .....	I-5	34
3.	Inadequate Foundations .....	I-5	35
4.	Defective Shear Walls.....	I-5	38
5.	Defective Below-Grade Walls .....	I-5	41
6.	Defective Hold Downs.....	I-5	42
<b>C.</b>	<b>Defective Design .....</b>	<b>I-5</b>	<b>43</b>
1.	Weather Related Defects.....	I-5	44
2.	Drainage Defects.....	I-5	50
3.	Electrical Defects .....	I-5	50
4.	Landscaping Defects.....	I-5	52
5.	Insufficient Fire Protection .....	I-5	52
6.	Noise Intrusion.....	I-5	59

**Checklist**

**PART II INSURANCE**

**II-1 Understanding Insurance and Underwriting**

**A. Understanding Insurance and Insurance Claims Handling ..... II-1 1**

1. Property Insurance ..... II-1 1

2. The Contract of Personal Indemnity ..... II-1 2

3. Liability Insurance ..... II-1 4

4. Differences Between Property and Liability Policies ..... II-1 5

5. Rules of Contract Interpretation..... II-1 6

6. Investigation Required ..... II-1 20

7. Payment Limited to Indemnity ..... II-1 21

**B. Underwriting ..... II-1 22**

1. How an Insurer Decides to Insure or Not Insure ..... II-1 22

**C. The Right to Rescind ..... II-1 43**

1. What Is a “Material” Fact? ..... II-1 47

2. The Claim of Post-Loss Underwriting ..... II-1 48

**D. Insurance Required by Law..... II-1 49**

**Checklist**

**II-2 Construction Defect Policies**

**A. Commercial General Liability Policy..... II-2 1**

1. History of the CGL Policy ..... II-2 1

2. Understanding the CGL ..... II-2 4

3. The Additional Insured Endorsements..... II-2 44

4. Failure of Agent or Broker to Obtain Insurance Requested ..... II-2 48b

5. Coverage Without a Suit..... II-2 48e

6. Need for Property to be Damaged ..... II-2 48g

7. Need for Fortuity..... II-2 48i

8. Contractors Pollution Liability ..... II-2 48k

9. Lack of Coverage if Employee Acting Outside  
Scope of His Employment ..... II-2 48l

**B. Property Insurance ..... II-2 49**

1. Conditions ..... II-2 49

2. Warranties ..... II-2 51

3. Coinsurance and Deductibles..... II-2 63

4. Exclusions ..... II-2 68

5.	Certificates of Insurance .....	II-2 80e
6.	The Builder’s Risk Insurance Policy .....	II-2 81
<b>C.</b>	<b>Legislation.....</b>	<b>II-2 85</b>
1.	California’s Creation of a Homeowners’ Bill of Rights .....	II-2 85
2.	Enforcement of Homeowners Bill of Rights Statutes.....	II-2 87
<b>D.</b>	<b>Performance and Payment Bond Claims.....</b>	<b>II-2 87</b>
1.	Good Faith .....	II-2 88
2.	Duties to Obligee .....	II-2 92
3.	The Surety’s Investigation of Claims .....	II-2 92
4.	Allocation of Debt.....	II-2 95
5.	Extra Contractual Claims.....	II-2 95
6.	Tort of Bad Faith.....	II-2 96
7.	States That Do Not Recognize Independent Bad Faith .....	II-2 100
8.	Subrogation.....	II-2 100
9.	Takeover Issues—The Surety’s View .....	II-2 101
<b>E.</b>	<b>Flood Insurance.....</b>	<b>II-2 102</b>

**Checklist**

**Appendix**

**II-3 Liability Insurance**

<b>A.</b>	<b>How to Buy Liability Insurance .....</b>	<b>II-3.A 1</b>
1.	Introduction.....	II-3.A 1
2.	What Is Liability Insurance?.....	II-3.A 2
3.	Tips on Purchasing CGL Insurance .....	II-3.A 4
4.	Issuing Insurance without Authority.....	II-3.A 5
5.	Common Questions on Construction Insurance .....	II-3.A 15
6.	Duties of the Insurance Agent or Broker to the Insured .....	II-3.A 21
7.	Should an Insurance Salesperson be Trusted?.....	II-3.A 24
8.	A New Source for Victims of Fraudulent Insurance Applications .....	II-3.A 26
<b>B.</b>	<b>Duties of the Insured and Insurer .....</b>	<b>II-3.B 1</b>
1.	The Implied Covenant of Good Faith and Fair Dealing .....	II-3.B 1
2.	Property.....	II-3.B 3
3.	Liability.....	II-3.B 7
<b>C.</b>	<b>Other Insurance Clauses .....</b>	<b>II-3.C 1</b>
1.	Introduction.....	II-3.C 1

2.	Types of “Other Insurance” Clauses.....	II-3.C 1
3.	Resolution of Conflicts Involving “Other Insurance” Clauses .....	II-3.C 3
4.	Conflicting “Other Insurance” Clauses in Secondary or Excess Policies.....	II-3.C 7
5.	Formulae for Apportioning Losses between Co-Insuring Policies.....	II-3.C 8
6.	Allocating the Duty to Defend between Co-Insurers.....	II-3.C 9
7.	The Minnesota Apportionment Scheme .....	II-3.C 10
8.	Subrogation.....	II-3.C 14
9.	Right to Intervene .....	II-3.C 16
10.	Insurance Fraud.....	II-3.C 17

**Checklist**

**Appendices**

**II-4 Bad Faith**

<b>A.</b>	<b>Common Law Bad Faith .....</b>	<b>II-4 1</b>
1.	Introduction .....	II-4 1
2.	Development of the Tort of Bad Faith .....	II-4 5
3.	Adoption of the Tort of Bad Faith in First Party Cases .....	II-4 6
4.	Arguments Against the Adoption of the Tort of Bad Faith in First Party Cases .....	II-4 8
5.	Courts That Do Not Accept the Tort of Bad Faith .....	II-4 10
6.	Duties of the Insurer .....	II-4 11
7.	Grounds for Finding Bad Faith .....	II-4 12
8.	Avoiding Charges of Bad Faith .....	II-4 13
9.	Punitive Damages .....	II-4 15
10.	Statutory Bad Faith .....	II-4 16
11.	The Duty of the Insured .....	II-4 17
12.	Suspending the Duty of Good Faith .....	II-4 18
13.	Abuses of the Tort of Bad Faith .....	II-4 18
<b>B.</b>	<b>Third Party Bad Faith.....</b>	<b>II-4 20</b>
1.	Avoiding Charges of Bad Faith .....	II-4 20
<b>C.</b>	<b>Survey of Bad Faith by State .....</b>	<b>II-4 34</b>
1.	United States of America .....	II-4 35
2.	Alabama .....	II-4 36
3.	Alaska .....	II-4 38
4.	Arizona .....	II-4 39

5.	Arkansas .....	II-4 41
6.	California .....	II-4 42
7.	Colorado .....	II-4 44
8.	Connecticut .....	II-4 46
9.	Delaware .....	II-4 46
10.	Florida .....	II-4 48
11.	Georgia .....	II-4 49
12.	Hawaii .....	II-4 51
13.	Iowa .....	II-4 52
14.	Idaho .....	II-4 53
15.	Illinois .....	II-4 55
16.	Indiana .....	II-4 57
17.	Kansas .....	II-4 59
18.	Kentucky .....	II-4 60
19.	Louisiana .....	II-4 62
20.	Maine .....	II-4 64
21.	Maryland .....	II-4 65
22.	Massachusetts .....	II-4 66
23.	Michigan .....	II-4 68
24.	Minnesota .....	II-4 69
25.	Mississippi .....	II-4 70
26.	Missouri .....	II-4 70
27.	Montana .....	II-4 71
28.	Nebraska .....	II-4 72
29.	Nevada .....	II-4 72
30.	New Hampshire .....	II-4 73
31.	New Jersey .....	II-4 74
32.	New Mexico .....	II-4 75
33.	New York .....	II-4 75
34.	North Carolina .....	II-4 76
35.	North Dakota .....	II-4 77
36.	Ohio .....	II-4 78
37.	Oklahoma .....	II-4 78
38.	Oregon .....	II-4 79
39.	Pennsylvania .....	II-4 80
40.	Rhode Island .....	II-4 80
41.	South Carolina .....	II-4 81
42.	South Dakota .....	II-4 82

43.	Tennessee .....	II-4	82
44.	Texas .....	II-4	83
45.	Utah .....	II-4	84
46.	Vermont .....	II-4	85
47.	Virginia .....	II-4	86
48.	Washington .....	II-4	87
49.	West Virginia .....	II-4	88
50.	Wisconsin .....	II-4	88
51.	Wyoming .....	II-4	89
52.	Federal Circuits .....	II-4	90
<b>D.</b>	<b>Defenses to the Tort of Bad Faith .....</b>	<b>II-4</b>	<b>92</b>
<b>E.</b>	<b>Required Continuing Education.....</b>	<b>II-4</b>	<b>94</b>
1.	Continuing Education Requirement.....	II-4	94
2.	Fraud Training Requirement.....	II-4	95
3.	Integral Anti-Fraud Personnel.....	II-4	96

**Checklist**

**Appendices**

**PART III LITIGATION**

**III-1 The Construction Defect Suit**

**A. Avoiding Litigation..... III-1 1**

    1. Existing Structures ..... III-1 1

    2. New Structures..... III-1 5

**B. Using Insurance Contracts..... III-1 7**

    1. Limiting Liability ..... III-1 7

    2. Contractual Indemnity ..... III-1 17

**C. The Parties..... III-1 34**

    1. The Plaintiff ..... III-1 35

    2. The Defendant..... III-1 45

**D. The Complaint..... III-1 51**

    1. Pleading Causes of Action ..... III-1 54

    2. Causes of Action ..... III-1 56

    3. Strict Liability in Tort ..... III-1 63

    4. Election of Remedies ..... III-1 69

    5. Assignment of Warranty ..... III-1 70

**E. Litigation Between General Contractor and Subcontractor ..... III-1 70a**

    1. Breach of Contract ..... III-1 70a

    2. Indemnity Provisions ..... III-1 73

    3. The Certificate of Insurance..... III-1 88

**F. Litigation with Design Professionals ..... III-1 93**

**Checklist**

**Appendix**

**III-2 Tort Defenses**

**A. Economic Loss Doctrine..... III-2 2**

**B. Negligence..... III-2 8**

    1. Contributory Negligence..... III-2 8

2.	Last Clear Chance .....	III-2 11
3.	Assumption of the Risk.....	III-2 12
4.	Intervening or Superceding Negligence.....	III-2 20b
5.	Comparative Negligence.....	III-2 22
<b>C.</b>	<b>Strict Liability .....</b>	<b>III-2 37</b>
1.	Comparative Fault in Strict Liability Cases.....	III-2 37
2.	Doctrine of Avoidable Consequences.....	III-2 41
3.	Joint and Several Liability .....	III-2 42
<b>D.</b>	<b>Statutes of Limitation .....</b>	<b>III-2 45</b>
<b>E.</b>	<b>Statutes of Repose .....</b>	<b>III-2 49</b>
<b>F.</b>	<b>Construction Defect Cases from Canada.....</b>	<b>III-2 52</b>
1.	Mutual Duties of Parties .....	III-2 52
2.	Duty of Good Faith and Fair Dealing .....	III-2 54a
<b>G.</b>	<b>Negligence <i>Per Se</i> .....</b>	<b>III-2 55</b>

**Checklist**

**III-3 The Trial**

<b>A.</b>	<b>Preparing a Case for Trial .....</b>	<b>III-3 1</b>
1.	Counsel .....	III-3 1
2.	Investigation.....	III-3 20
<b>B.</b>	<b>Proceeding to Trial .....</b>	<b>III-3 46</b>
1.	Discovery .....	III-3 47
2.	Trial Preparation .....	III-3 62

**Checklists**

**III-4 Evaluation and Settlement**

<b>A.</b>	<b>Damage to Property .....</b>	<b>III-4 3</b>
1.	Structure Losses .....	III-4 4
2.	Contents Losses .....	III-4 9
3.	General Release of All Claims.....	III-4 15
4.	Attorneys' Fees .....	III-4 19

**B. Injuries to Persons ..... III-4 20**

- 1. Damages..... III-4 20
- 2. Liability..... III-4 25
- 3. Considerations for Early Settlement ..... III-4 32
- 4. Settlement Negotiations ..... III-4 47
- 5. When a Claim Should Not be Settled ..... III-4 50
- 6. Dispute or Denial of a Claim ..... III-4 51

**Checklist**

**Appendix**

**III-5 Alternative Dispute Resolution**

**A. Mediation..... III-5 2**

- 1. What Is Mediation?..... III-5 2
- 2. Who Should Attend Mediation? ..... III-5 5
- 3. Selecting the Mediator ..... III-5 6
- 4. The Structure of a Mediation ..... III-5 15
- 5. Role of the Attorney..... III-5 21
- 6. When the Mediator Should Withdraw ..... III-5 22a
- 7. When Mediation Should Not Take Place..... III-5 22a
- 8. The Mediation Process..... III-5 22b

**B. Arbitration.....III-5.B 1**

- 1. What Is Construction Industry Arbitration? .....III-5.B 4
- 2. Selecting the Arbitrator.....III-5.B 7
- 3. The Structure of an Arbitration.....III-5.B 15
- 4. Role of the Attorney.....III-5.B 19
- 5. Communications with the Arbitrator .....III-5.B 21
- 6. Scope of Arbitration.....III-5.B 21
- 7. When the Arbitrator Should Withdraw.....III-5.B 28
- 8. The Award .....III-5.B 31

**C. Right to Repair Statutes in Construction Defect Claims .....III-5.C 1**

    1. Single Family Residence Defects .....III-5.C 1

    2. Condominium Associates .....III-5.C 6

    3. Notice Requirements and Right to Repair .....III-5.C 10

**D. Using Judicial Reference .....III-5.D 1**

**Checklist**

**Appendix**