Blueprint for an Authoritative Treatise on American Construction Law

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Introduction

There is no generally accepted authoritative treatise on American construction law. I differentiate such a treatise from multivolume works on American construction law. These texts, such as Construction Law and Design and Construction Law, consist of chapters written by different authors. They cover a wide number of fields: The chapters vary widely in quality. These texts purport to state the law and rarely critique or analyze. They are useful but are not authoritative treatises on American construction law.

While attorneys planning a construction contract might consult such a treatise for background, particularly if it discussed how the law affects drafting theory, this would not be its major use. Nor would it address the educational needs of student design professionals or young lawyers, as did my Legal Aspects of Architecture, Engineering and the Construction Process. Finally, it would not be a commentary on a well-known standard contract, as was my Sweet on Construction Industry Contracts.

Such a treatise would be used by lawyers, judges, or arbitrators who are involved in construction disputes as a resource which enables users to find references to the primary leading authorities, such as statutes, regulations, or cases. A book crammed with complete citations to primary leading authorities, such as statutes, regulations, or cases. A book crammed with complete citations to primary authorities from all jurisdictions would ideally fill this need. But no single-volume treatise can do this. (It is unlikely that even a multivolume treatise can do so.) But a treatise which systematically collected the leading cases, stated their holdings accurately, summarized the case law correctly, evaluated basic legal principles with wisdom, and described the functions of legal rules and contracting practices that relate to construction law is what I shall define in Part I could become such an authoritative treatise. It would be invaluable to the legal profession and the construction industry, similar to Prosser on Torts or Corbin on Contracts.

In Part I, I shall suggest coverage limitations. In Part II, I shall deal with the variety of American jurisdictions.

In Part III, I shall suggest the approach such a treatise should take.

I. Scope

A treatise on American construction law can encompass many aspects of law. Let us look first at public law. Such a treatise could include public laws that regulate uses that can be made of land, public laws that require that buildings meet designated standards, and public laws that regulate safety on a building site. More important it could include those public laws, federal and state, that regulate award of public contracts, their administration, and their disputes.

The treatise for which I provide a blueprint in this article could describe that portion of the tort law that deals with personal harm traceable to the injury-prone building process. Worker claims are handled by a mix of social insurance and tort law. Claims for personal harm by nonworkers traceable to the wrongful conduct of those who design or build are brought under tort law. Also, tort law creates liability for defective products and material used to build or be part of the building.

Also, the process of constructing a building can generate economic losses. Those who suffer such losses often assert claims for reimbursement for economic losses based upon wrongful conduct. Increasingly, contractors assert claims for economic losses against architects. These are based upon that part of tort law sometimes called business torts. Similarly, tort law regulates the extent to which a third party can interfere with the contracts or economic relationships of others. Contractors sometimes use this as the basis for a claim against the architect who has advised the owner to terminate the contract with the contractor. Again, business torts could be encompassed in such a treatise.

That part of the law of restitution which deals with contract making, performance, and remedies can be considered part of construction law. For example, most participants in the construction process must be licensed. A contract for design or construction by an unlicensed person is illegal. But often an unlicensed person seeks to invoke restitution as the basis for a claim for work performed under the illegal contract. Similarly, a contractor may employ restitution as the basis for a claim despite the award of a public contract having violated competitive bidding laws. Finally, restitution can be the basis for a remedy for breach of contract. So we can see that aspects of the law of restitution could be considered for inclusion.

Partnership law and its cousin, the law of joint ventures, can also be encompassed in construction law. Ar-
chitects and engineers often practice through partnerships. In large-scale projects the owner may be joint venturers who join to develop a large project or prime contractors who create a joint venture to build the project.

Also, insurance, suretyship, and banking law can be considered part of construction law. They can be relevant to a construction dispute. While common to almost every commercial activity, ancillary contracts, such as insurance policies, surety bonds, and loan agreements, are often referred to in contracts for design and construction and are part of the network of contracts ancillary to them. They would be candidates for inclusion in a treatise on construction law.

Mechanics' lien laws create security interests for unpaid participants who improve the land of another. These liens are strongly identified with construction law. Clearly, they could be covered in such a treatise.

Alternative dispute resolution systems (the power of a third party, such as an architect, to resolve a dispute); resolving a dispute through arbitration; or generating a settlement through mediation are often created in design and construction contracts. These can be considered for inclusion in a treatise on construction law.

Finally, Construction Law, a multivolume American text I have noted earlier, also includes bankruptcy and labor relations, topics which can be considered topics for inclusion in a treatise on construction law.

Clearly no single-volume, single-author treatise could deal with all these topics. To master all, or even many, of these fields would require superhuman talent and effort.

I would suggest the core of coverage be the law that relates to the principal contracts for design and construction. Such contracts connect the owner, architect, engineer and contractors (prime and subcontractors), and joint venturers. Also, the treatise would cover those ancillary contracts or processes which are commonly referred to in the principal contracts, such as indemnification, insurance, bonds, dispute resolution, and remedies.

The coverage I have suggested centers upon those aspects of contract law that relate especially to these contracts. It should include a general summary and analysis of contract law. Coverage should include those contract formation rules which create endemic problems in core contracts, particularly those which were developed for core contracts central to the construction process. As examples, the treatise would cover in detail those rules mainly of contract law and the law of restitution that relate to competitive bidding, the rules that determine the irrevocability of subcontractor bids, and the doctrine of substantial performance.

Performance requirements, administrative provisions, and risk distribution are usually dealt with in contracts for design for construction. Most construction contracts contain a common contractual skeleton, such as provisions that deal with changes, subparagraphs, termination, and disputes. Contracts for design usually include provisions dealing with services, compensation, responsibility, ownership of drawings (this would necessitate discussion of relevant laws of intellectual property), and termination. The principal issues are validity (less an issue in a system where freedom of contract dominates); interpretation; implied terms (good faith and fair dealing are increasingly relevant); and remedies (often specified in carefully planned transactions, such as construction contracts). Interpretation issues in construction contract disputes, though, do involve special problems, such as determining an interpretation hierarchy of authority when there are a number of relevant writings (drawings, specifications, general conditions, etc.); the effect of nonperformance or termination of one contract in the linked set of contracts (subcontractor-prime contractor, prime-owner, owner-architect, architect-consulting engineer contracts) upon another in the set; and the governing intent when standard contracts published by a third party, such as the American Institute of Architects, are used. All require special attention in such a treatise. In addition, when the ancillary contracts are insurance or surety bonds special rules peculiar to those contracts merit inclusion.

The business torts that cluster around contracts (interference with contracts and claims by one participant that another has caused and should pay for his economic losses) would be included. Finally, as I have indicated, those aspects of the law of restitution, such as those which deal with defective formation of contracts improving another’s land by mistake, remedies for breach, and illegal contracts, should be included.

Some topics, such as mechanics’ lien laws clearly part of construction law, would be noted generally, but not discussed in detail. While they are important and largely limited to construction, they are created by a variety of state statutes, coverage of which would create too great a burden on the author. Nor would general procedural rules for judicial claims be included. They are common to all transactions. But those unique to construction would be included, such as statutes of repose (completion statutes), which bar claims against active design and construction participants after the expiration of a designated time following substantial completion. I would include those statutes which require claims for profes-
sional negligence be accompanied by a certificate issued by a licensed professional who has evaluated the claim merit inclusion. I would also include contractual non-judicial dispute resolution, such as decisions by the architect or engineer, as well as arbitration, or any contractually required mediation. I would exclude bankruptcy law, despite the high risk of bankruptcy to those involved in construction and its drastic effect on performance. While unlike mechanics' lien laws, bankruptcy is governed by federal law, its complexity and the high degree of specialization required by those who deal with it would exclude from coverage.

Even the limited coverage that I have suggested would require the author to master many areas of substantive law, the construction process being a complex set of activities invoking many areas of substantive law. Traditional private law doctrines, such contracts, tort, and restitution, would be highlighted. Such a treatise would be organized around topics central to construction, such as changes, payment, indemnity, and completion.

Coverage problems, difficult as they would be, would be geometrically multiplied by the many American legal systems. I shall cover that in Part II.

II. Jurisdictions

An author planning an authoritative treatise on any aspect of American law would encounter a host of legal systems. This makes it difficult to distill the “law” from the wealth of American materials to be discussed I shall note in Part III.

While lines are not always sharp and clear and while there is some cross-fertilization, American law differentiates public from private construction contracts. The award of contracts by public entities, such as federal, state, and local entities, are complex and heavily regulated. They must be awarded fairly, without waste, corruption, or favoritism. Usually this means award by competitive bidding.

At the apex of public contracts stands the federal procurement system. It has developed its own contract forms, jurisprudence, and dispute resolution. As we shall see it has influenced private construction contracts.

Federal procurement uses the power to award contracts to advance economic and social goals, something not the objective of most private contracts. For example, some contracts must be set aside for disadvantaged minorities, for women, or for small businesses. Similarly, federal procurement requires a commitment to affirmative action hiring policies by the contractor to reach designated goals in hiring war veterans, disadvantaged minorities, and women. Many states and local entities have similar rules. Such provisions are not usually found in private contracts. These programs have raised federal and state constitutional questions. Finally, since the contracting entities are federal administrative agencies, administrative law is of great importance.

Most public entities have special forums to resolve disputes. Federal procurement requires that claims by a contractor against a federal agency be brought either before the agency’s board of contract appeals or before the United States Claims Court, with an appeal to the Circuit Court for the Federal Circuit.

Other public entities have specialized dispute processes. Some states require claims be brought before an administrative agency appeals board or a special arbitration panel, with varying degrees of judicial review. Other states require claims be brought before specialized courts. Some states permit claims to be brought in courts of general jurisdiction. Commonly a claim must be first presented to the public contracting entity, such as a state contracting agency or a city council, a designated number of days after it matures. The period for presenting claims is much shorter than in private disputes.

An author who ventured ambitiously into public contracts would face issues of constitutional and administrative law not found in private construction contracts. Also, the public contract rules of fifty different states, one federal procurement system with a multitude of contracting agencies, and rules of thousands of local entities would create an overwhelming burden on the author. It would be an impossible task to integrate this material into a single-volume treatise on American construction law.

Yet public contract law cannot be ignored in such a treatise. It has influenced private construction law. While most public construction contracts must be awarded by competitive bidding, most private construction work, though not required to be awarded competitively, is awarded competitively. As a result law which has been developed in public contract disputes, particularly those which involve the bidding process, relief from mistaken bids, and the legal status of any formal contract, have influenced private contract law.

Similarly, federal procurement policies expressed in its standard contracts have influenced private contracts. Clauses which allow a federal agency to terminate at its own convenience have begun to appear in private construction contracts. Also, differing site conditions clauses, which grant an equitable adjustment to the contractor who discovers unexpected subsurface conditions, were developed in the federal procurement system. Now they are common in private contracts.

But any such inclusion would be limited to sketching
the development and operation of such approaches, not the detailed regulations which permit them or control them.

Finally, because some public contract policies, such as affirmative hiring goals, have found their way into some private contracts, issues involving such programs, such as who can bring legal action for their breach of such commitment, would be included.

But even an author who emphasizes private construction contracts faces a daunting task. He would be expected to describe “American” construction law in the face of American private law largely being governed by state law, not federal law. To be sure, the frequent use of forms published by the American Institute of Architects has generated a large degree of harmonization. Also, building projects have common characteristics which tend to generate similar contract clauses. Finally, American courts frequently follow cases from other jurisdictions, particularly if the contract language is similar. Yet to state “American” rules requires much work, careful thought, and great confidence.

Such a task would not be as formidable as it may seem, particularly if the coverage I have suggested in Part I is followed. Where jurisdictions have developed different rules, the author can describe the majority rule and any significant minority rules. (It is rare to have more than three views and often views can be reconciled.) The jurisdiction divide would not be different to solve, provided an intelligent decision is made to cover only certain aspects of public law.

But how would the author extract rules from the mountain of American sources? I shall discuss this in Part III.

III. Sources

Suppose the author examines the legal problems generated by the major and ancillary private construction (with some supplementation from public law sources) contracts of active participants, and the relevant business torts and restitution doctrines ancillary to those substantive doctrines. How can he avoid being overwhelmed by the mass of material? Let us look at sources of the law.

Traditionally, we consider constitutions, statutes, administrative regulations, and case decisions as “law.” (Later I shall suggest that standard contracts, such as those published by the American Institute of Architects, can be considered “law.”) Constitutional law surfaces from time to time in construction law. For example, courts are asked to determine the constitutionality under the U.S. Constitution of affirmative action programs or contract set asides for special groups, such as minorities or small businesses. But constitutional law would not need significant specific attention.

While federal statutes do regulate contract award and disputes processes, they would not be an important source for such a treatise. The focus upon private contracts, supplemented by some federal procurement policies, would...
relieve the author of a searching inquiry into this source. But state statutes control public contracts of that state, mainly statutes which regulate the award of public contracts. Detailed reference to state statutes would prove an insurmountable task. Even more, no one could keep track of the thousands of city charters or ordinances which regulate public contracts made by cities. Also, state legislatures have begun to take an active interest in private construction contracts. For example, most states bar certain construction contract indemnification clauses. State statutes often terminate a claim because of the passage of time after completion. Increasingly statutes regulate the payment process. This is in addition to the almost universal use of mechanics’ lien laws to grant unpaid prime and subcontractors security interests in the buildings they have improved. Also, many states have stop notice statutes which allow unpaid participants to stop the flow of money to the prime contractor if they are not paid. Finally, many states require surety bonds for public projects. These state statutes are complicated and frequently revised. Detailed description of such sources would be left to other specialized texts.

Federal regulations would be almost as difficult to collect and analyze as the statutes of state and local public entities. While the federal government has consolidated regulations of major federal contracting agencies into the Federal Acquisition Regulations, the maze of regulations are a source of law which would take great effort to gather and evaluate. As noted, they need not be explored in such a text. (Bidding rules, particularly those that relate to relief for bidding errors, would be an exception.)

Almost all states and local entities have regulations which control the award of contracts, mandate terms, and regulate claims. The unmanageability and proliferation of public law rules are a reason for the limited coverage suggestions of public contract law made in Parts I and II. As noted, such a treatise could only sketch broadly public contract law, noting only those law and policies which have an impact on private construction contracts or which signal a particular approach that can be employed in private contracts.

Unlike statutes and regulations, case decisions are not difficult to find. (The editor of Design and Construction Law, a multivolume treatise, expected to analyze 4,000 judicial opinions but found 40,000 handed down since 1940.) Even though there is a tendency not to publish all opinions, the number of published opinions seems endless. While the construction law cases make up but a small part of the cases reported, many being criminal appeals, there are still many cases that involve construction law, even if narrowed down as I suggested in Parts I and II.

In addition to the hundreds of state appellate court opinions that cascade weekly from the courts, opinions are published by the federal boards of contract appeals. Each year two (and now three) volumes of such decisions are published. No single author proposing to write a treatise on American construction law could possibly read all relevant construction cases. But would the author need to read all these cases?

There are screening techniques. The author could hire an assistant to filter out the relevant cases. Alternatively, the author could scan the legal newsletters which collect and digest construction cases. But the conscientious author who uses these methods to filter out relevant cases would still face a huge task. (Opinions in complex construction cases can be as long as twenty to thirty double-column pages.) But the author can reduce the needed work to a manageable level.

Most case decisions do not involve novel or important principles of law. Yet this would not relieve the author from having to read many decisions, though clearly he would not have to read them all. American judicial opinions recite facts at great length. Also, American lawyers are fact-oriented. They usually seek a case which resembles their case, particularly in the use of similar contract language. As a result, the author not only provides relevant case authority for legal principles but also often includes a brief factual summary of the case. This helps the reader determine whether the case cited is factually close enough to his case to be controlling or persuasive.

There is another reason for reading a representative number of cases even though most do not involve the articulation of a legal principle. The common law distills a rule from a cluster of cases, each of which may not be sufficient to articulate a principle. Subsequent cases track its development. The author cannot ignore cases which appear to be decided upon their facts. He cannot concentrate only on those cases which express articulate legal rules.

Even if a court announces a legal rule, an author must be wary. He must still read a representative number of cases (the amount is often difficult to determine) in order to look for consistent application, for special facts or glosses on the rule which enable the author to phrase the rule accurately and to get a “feel” for judicial attitude toward the rule. But clearly the author need not read all the cases.

Also, the author can rely on reliable secondary material, such as papers published in scholarly or professional law journals. A skilled author knows he has to read many cases to describe the law accurately. But he also knows when he has read enough cases. The sheer volume of cases need not make the task insurmountable. Also, as
noted in Parts I and II, the coverage limitations make the task more manageable.

But there is another potential problem. Must the author include references to frequently used private standardized contract forms, such as those published by the American Institute of Architects? Technically they are not law. But they, as well as the contract clauses used in federal procurement contracts that may find their way into private contracts, often reflect accepted contractual solutions and may state custom in the construction industry. The author cannot ignore them. They must be included as unofficial sources of law.

If I am correct that a single-author, single-volume authoritative treatise can be written are what would be the author’s approach? I will discuss this in Part IV.

IV. Approach

Clearly, the author must organize, classify, and describe the law from proper sources. But a treatise that hopes to be authoritative must go farther. It must analyze and evaluate the law. Analysis can be internal or external. Internal analysis assumes legitimacy of the legal system and evaluates it “from the inside.” The author would examine the law that he has described and determine whether it is clear, whether it has left gaps unnecessarily, and whether it is coherent. He would criticize the cases which do not follow the law and determine whether the rules have been correctly extracted from cases. If his basic source is a statute, he must evaluate the desirability of the statute. He must also determine whether the cases interpreting that statute have fulfilled the likely intentions of the legislature. Similarly, he must do the same when reviewing those cases which have interpreted the language of the contract, particularly a standard contract. But going beyond “external” critique multiplies his problems.

Such an approach requires the author to ask and answer important policy questions. Are common-law rules or statutory solutions fair to the participants? Do such rules accord with the reasonable expectations and economic judgments of participants? Do they place responsibility upon the party in the best position to avoid harm or shift or distribute risks? Are they the workable rules? Will participants be able to adjust to them? Will they impede useful activities? Do contract solutions, principally those of standard forms, meet these standards? Does the law conflict with accepted customs and practice?

Any treatise which seeks to become authoritative must grapple with these questions. But the author should make certain that the reader does not confuse the law with the author’s opinions. Also, he must back his analysis and evaluation with sound arguments.

Such a treatise should explore the purpose of legal rules and, in this field of law, contractual or structural solutions. For example, why does the law demand a high level of specificity for clauses which exculpate? Why do contracts provide for progress payments? For retainage? Who should bear the risk of defects? Should we choose a “flexible” (one which encourages low bids by promising more money if the unexpected occurs) contract over a “tight” (one which seeks to force the bidder to put all possible costs in the bid price by protecting the price and time provisions in the original contract) one? Is it advisable for the owners to make separate contracts (multiple primes) with the specialized subcontractors rather than a single contract with a prime contractor? These policy issues should be discussed. (Perhaps this shows why at present no such treatise exists as yet.)

Conclusion

I have noted the many obstacles which face an author who proposes to write a single-volume, authoritative treatise on American construction law. Whether such a treatise will be accepted as authoritative depends upon the accuracy, clarity, and coherence of the texts; the incisiveness of analysis and evaluation; its sensitivity to the needs of the construction industry, and the degree to which the treatise does not appear to show bias. That these obstacles are formidable is demonstrated by the current lack of any such a treatise. Yet I believe they can be overcome. I hope my “blueprint” will provide a framework for such a needed treatise.

Chair’s Letter
(Continued from page 2)

knowledge among its members. One thing we are trying to achieve is to better equip our members to become part of the solution. This role is desperately needed from the time the contract terms are drafted to the time of final payment.

My Chair’s Letter, in the October 1991 The Construction Lawyer, spoke of building bridges and eliminating fences among the construction professions. This was said at the conclusion of our successful October 1991 conference on “Preventing and Resolving Construction Disputes on the Job Effectively.” That program was a first—a jointly sponsored program with the AGC, AIA, and ASCE. It emphasized many approaches to problem solving with avoidance of litigation being a primary goal. Our April 1992 Annual Meeting in Seattle carries on this theme with discussions that include “Partnering” and ADR Rules for the complex case.

We want to assist our members to develop the attitude and qualifications to be considered part of the solution. Otherwise, we may be seen as only capable of battle while the business community, without our help, moves toward eliminating the construction battle as a costly relic of the past.

Luther House
Chair