Nightmare
IN LONG BRANCH

Learn from one engineer's story how to protect yourself when faced with legal action.

By David J. Lynam

Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles,
And by opposing, end them?
—Hamlet, Act III, Scene 1

As those who work with homeowners or condominium associations know, one of the things these associations won't tell you upfront is that "when in doubt, sue" is a maxim by which they often live. For instance, it is estimated that at any given time, 60 percent of these types of associations in Illinois are involved in legal proceedings, and in other states that percentage is even higher. Developers and contractors also frequently become engaged in litigation when something in the project goes wrong, and the legal version of finger pointing begins. Sometimes that finger can be pointed at you.

A LIVING NIGHTMARE

Julius Ballanco, owner of JB Engineering and Code Consulting in Munster, Indiana, was recently confronted with a daunting choice: to spend thousands of dollars in legal fees to defend himself against a negligence claim brought by a condominium association, to "take arms against a sea of troubles," or to spend a large but certain amount of money and concede that it is sometimes better to "suffer the slings and arrows of outrageous fortune" and choose to fight another day. Did Ballanco make the correct choice? Eight years and more than $150,000 later, Ballanco would reflect on his experience as a "living nightmare."

The Project

Ballanco's story begins in Long Branch, New Jersey, where Renaissance Estates LP enlisted Ballanco and his firm to work on a large residential development consisting of one free-standing and three interconnected mid-rise buildings, an underground garage, seven sets of townhouse buildings, six single-family residences, and a clubhouse.

Not only was this a big project, but because it was right on the ocean, it also posed some unique problems. According to Ballanco, he and his firm had to take hurricane influence factors into account, the pilings became complicated because the development was on sand, and structural loading was difficult. In fact, Ballanco and his firm had to make many changes in the middle of the project because parts of the building were too heavy. In addition, all exterior sprinklers were exposed to wind and saltwater, further complicating the project.

The development had another special issue: snowbirds. Many of the residents flew south during the winter, packing their bags, turning off the heat, and leaving their homes behind. As a result, all of the pipes had to have insulation or heat tracing and had to be placed correctly to avoid freezing problems.

The Problem

Ballanco and his firm have done a lot of design work, and his experiences in plumbing engineering are varied. A large portion of his experience is in forensic engineering—examining system or component failures after litigation over a problem has commenced.

Due to his work in forensic engineering, Ballanco has had plenty of experience with the legal system, both at the negotiation table and in a trial or deposition. However, the Renaissance Estates project took Ballanco by surprise. After he had worked on the project for 2½ years, the condominium association sued him for defective sprinkler designs and for allegedly directing the sprinkler contractor to put glycol in the CPVC pipes used in one of the three interconnected midrise buildings.

Immediately after the condominium association sued, it offered to settle for $25,000, but Ballanco rejected the offer. Like many professionals who pride themselves on their expertise, the monetary value of the settlement did not sit well with him. "I rejected all settlement demands involving money," Ballanco said. "I called it legal extortion. It just ticked me off. [The attorney] started out from the very beginning and asked for $25,000 from my company, and I told him he was out of his mind."

Ballanco chose instead to stick to his guns by fighting the condominium association and the various cross claims brought by the contractor. While the monetary cost of the fight would prove to be high, the stress and anxiety brought on by the litigation were also immense. "It strained my marriage to no end," Ballanco said. "My wife was yelling, 'Why did you ever take that project?' Talk about sleepless nights; I had many."

As his story demonstrates, no litigation is simple or easy, even when you are clearly in the right. Because proving that you are right can be a very costly thing, settlement should always be an option. Strange things can happen once you reach the litigation stage, and in Ballanco's case, they did happen.

The Condominium Association's Accusations

When Ballanco was sued, he felt that his reputation was in as much danger as his pocketbook, if not more. The condominium association and the general contractor each claimed that Ballanco had not adequately designed the sprinkler systems. The condominium association's expert witness, another plumbing engineer, claimed that Ballanco's plumbing system designs did not comply with the law.

To: [redacted]

From: Julius Ballanco, P.E.

Date: April 7, 2005

Subject: Anti-freeze solution

CC: [redacted]

As we discussed by telephone, the specifications for the fire sprinkler system in Building One of Renaissance by the Ocean required the sprinkler system to be filled with an antifreeze solution that was 50 percent glycerin. The system was originally filled with this solution. You indicated that part of the system had to be retrofitted when there were changes to various units. This required you to drain the system to make the repairs.

Upon completion of the retrofit, you indicated that glycerin was not available due to a strike. Since the cold weather was approaching, you filled the system with and antifreeze solution that was 50 percent glycol.

While glycerin was specified, and should have been installed, CPVC plastic pipe is chemically resistant to certain concentrations of glycol. The chemical resistance table published by Noveon lists 50 percent ethylene glycol as recommended for chemical resistance. That means that the CPVC plastic pipe can handle the fluid. It lists 25 percent propylene glycol as being recommended. For a higher concentration of either ethylene glycol or propylene glycol, the table lists a caution, further testing suggested.

Figure 1 Original memorandum

On the other side, Ballanco argued that his designs were both adequate and legal and that he knew the development's problems were caused by the sprinkler contractor. His biggest concern, however, was the lawsuit's threat to his credibility. "The worst was the attack on my integrity, which annoyed the living daylights out of me, because that's all I have to sell," Ballanco said.

As it turned out, Ballanco's designs were adequate, but the sprinkler contractor's execution of his designs had caused a number of problems throughout the development. The sprinkler contractor had not installed the type of sprinklers that Ballanco had indicated in his plans, and the contractor used the very antifreeze solution that Ballanco had advised against using in every conversation between the two. In the end, Ballanco's task became one of showing that his designs were solid and that any problems were not his fault.

Once the case entered the evidence-gathering stage, Ballanco got his chance to confront the facts and present his side of the story. He flew to New Jersey for his deposition, where the condominium association's lawyers questioned him for hours. The deposition was, in Ballanco's words, contentious. "I continued to refer, during the deposition, to their expert

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Figure 2 Modified memorandum

[in colorful terms]. I used words like that just because I was so frustrated. Finally, the attorney blew up at me, and it got very combative. People were holding everybody back, and [the attorney] goes, 'I'm sick and tired of you calling this guy a moron!' And I said, 'Well, if you let me finish the answer, I'll tell you why he is moron, and I'll prove it to you.'"

Ballanco's name calling stemmed from his personal feelings about the opposition's faulty analysis of his designs. For instance, the 54,000-square-foot underground parking garage was so big that it required two sprinkler systems per NFPA 13: *Standard for the Installation of Sprinkler Systems,* but in the expert witness's analysis, he erroneously collapsed the two systems into one system and claimed that the design was illegal. Ballanco didn't know that the expert witness had made the error in the analysis until he arrived at the New Jersey deposition. "They showed me a photograph of it, and I just got livid when I saw it," he said. "The first time I saw the photograph was at the deposition, and I knew exactly where it was and exactly what they had done."

While giving his deposition, Ballanco's experiences as a forensic engineer and as an expert witness helped him convince the plaintiffs to drop the claims based on his allegedly faulty design. "Their contention was that I didn't provide an adequate design—that disappeared," he said. "The details were adequate, the specifications were adequate, and they had nothing they could make stick at trial. Those issues disappeared quickly."

The Altered Memorandum

With the design claims dropped, the case seemed all but over, but then the entirely unexpected happened. Ballanco had noticed early in the case that the expert's copy of a memorandum written by Ballanco to the sprinkler contractor had been altered. The memorandum addressed an issue that had dogged Ballanco since the beginning of the project: one of the buildings was to have CPVC pipe, meaning that the antifreeze agent used in most steel pipes, glycol, could not be used, as it could degrade the CPVC pipes. Instead, a more expensive antifreeze agent, glycerin, was required. In the lawsuit, the condominium association accused him of telling the sprinkler contractor to use the corrosive glycol and wanted him to pay for the damaged sprinkler system.

Ballanco had focused on the issue of CPVC's sensitivity to glycol antifreeze from the beginning of the project. In fact, he ended every conversation with the contractor by mentioning that they had to use glycerin in the CPVC pipes. "It got to be a standing joke with them," he said. "To the point that, whenever we were going to end the conversation, he'd say 'I know, glycerin, not glycol, right?' And I'd say, 'Yes!'"

Despite all of Ballanco's warnings, the sprinkler contractor still used the cheaper, more corrosive glycol antifreeze in the CPVC pipes. Afterward, Ballanco wrote a memorandum on the antifreeze issue, stating that the sprinklers should have been filled with a glycerin-based antifreeze solution. The memorandum went on to mention that the CPVC resin supplier had approved the use of glycol in lower concentrations in the CPVC pipes. A portion of Ballanco's original memorandum is shown in Figure 1.

The memorandum presented by the condominium association was quite different. The first paragraph, in which Ballanco clearly stated that glycerin should have been used instead of glycol, had been deleted. Without that paragraph, the memorandum seems to condone the use of glycol. It appeared that Ballanco had recommended the use of glycol and that he was to blame for the building's sprinkler problems. If Ballanco was indeed found responsible, he would have to pay to replace the entire sprinkler system.

Even worse, the sprinkler contractor died early in the litigation. Without the contractor available to cross-examine, Ballanco had to make his case on his own testimony.

Even though it was clear that a paragraph was missing (see Figure 2), the memo was admitted as evidence. Despite the fact that Ballanco was confident that the memo had been improperly presented and that overall the evidence supported his belief, basic evidentiary problems had to be addressed.

The Decision

Ultimately, Ballanco was not found responsible for the sprinkler system problems. The judge found that even if the altered memorandum was accurate, the memorandum was clear that the corrosive glycol solution had already been used in the CPVC pipes. The damage had already

been done by the time Ballanco wrote the memorandum; therefore, he could not be held responsible for the damaged pipes. After eight years of litigation and countless sleepless nights, the "living nightmare" of a case was over, and Ballanco could finally return to his business and family.

THE INSURANCE PROBLEM

The court ultimately put an end to Ballanco's part of the case by dismissing the condominium association's case against him. However, Ballanco was still stuck with his legal fees—not to mention all of the potential work he missed out on while dealing with the case. For example, in the first year of litigation alone, he dedicated an estimated $30,000 worth of his time to the case. As to the total amount of time he spent on the case, he said, "We stopped counting when I put in over $100,000 of my time." Obviously, the legal fees were only the beginning of the costs Ballanco incurred during the case.

Ballanco's legal fees could have been covered by insurance, but as it turned out, the people he trusted never got around to buying the insurance he thought he had. When he started as a code consultant for the project, insurance was not much of an issue because code consultants never directly sign off on any plans or drawings. However, once he began, the contractor convinced him to design the sprinkler system. Now acting as a designer, he was no longer just a code consultant and had significant legal exposure.

Once his role in the project changed, Ballanco told the contractor that he was not covered by errors and omissions (E&O) insurance and that they would have to cover him as an additional insured. He said, "Their response was: 'Don't worry; we'll cover you for that.' That was from day one." Although it was in his contract, the developer never actually added Ballanco as an additional insured, and he therefore had no claim to any coverage. "When the lawsuits started flying, they all forgot that they had said one word to me [about insurance]."

Ballanco said that one of his primary mistakes was trusting the developer to procure the insurance he needed to protect himself. "Their contention was, 'You don't need this. We've got you covered. We'll take care of you, and we'll roll it over onto the sprinkler contractor,'" he said. He had placed his trust in the developer but later said, "I should have never done that."

Of course, with his own E&O insurance, Ballanco's legal fees would have been covered. However, the principles he so vigorously stood by would have suffered, because with insurance coverage he would have had to surrender at least some control over the conduct of the lawsuit. An insurance company would have desired a settlement of the case at an early stage, depriving Ballanco of his chance to prove himself right. However, in another way, Ballanco had lost control of something else: his ability bring the suit against him to an end.

Looking back, Ballanco has his regrets. He would have chosen insurance coverage over what transpired. "I would have preferred to have insurance, though I would have argued against the settling."

HOW CAN YOU AVOID THE SAME RESULT?

As Ballanco's story demonstrates, plumbing designers and engineers are subjected to many potential dilemmas when faced with legal action. Following are some ways to help you navigate these dilemmas.

First off, it is important for you to understand that you may not be able to avoid litigation, because when an injury occurs, parties like those that Ballanco encountered will attempt to shift responsibility to those who have the least leverage and financial wherewithal to defend themselves. However, you can attempt to avoid Ballanco's financial losses by carefully drafting agreements that attempt to shift responsibility and the use of insurance.

Engineers and designers can protect themselves by acquiring their own individual insurance, which may be necessary because professionals cannot use their LLC or corporation as a shield against professional negligence claims. Commercial general liability (CGL) and E&O policies cover amounts you have to pay if sued and will pay your legal fees throughout the litigation (up to the coverage limits, which are unique to each policy). Such insurance policies are expensive, but in the end the costs may pale in comparison to the price of litigation. It is up to each individual to evaluate and determine which burden they would rather bear.

If you are unable or unwilling to obtain your own insurance, it may be possible to get limited insurance coverage under another contractor's CGL policy by being listed as an additional insured on that policy. An essential step in being able to piggy-back as an additional insured on contractor policies is to be sure that a requirement to that effect is written into the contract you sign, along with the appropriate indemnity clause. While Ballanco was correct in requesting to be covered as an additional insured, he should have been more persistent in obtaining a certificate of insurance listing him as such. Without such a certificate or a copy of the policy with his name appearing as an additional insured, he had no way of establishing that he had any right to coverage.

Certificates of insurance are generally issued by the insurance provider and list the names of the insurer, the insured, and any parties who are an additional insured. In addition, they list the names and monetary limits of any policies held by the insured. While a certificate of insurance is a form of proof of insurance, it is not a statement of coverage. Statements of coverage are contained in the specific policies themselves, and those are where you get your rights and coverage. As such, it crucial to make sure that both the certificate and the policy list you as an additional insured.

It is worth noting the difference between being an "additional insured" and being an "additional named insured" under the policy. Depending on the language of the contract of insurance, being an additional named insured may negate certain coverages that an additional insured would have, and vice versa. Unfortunately, there is no standard language for

additional insured coverage on CGL policies. It is vital that you evaluate and understand which of these options would be most beneficial to you and that you negotiate each contract accordingly. If you are sued based solely on your own negligence, no coverage may be available despite being listed as an additional insured. In addition, some states recognize a party listed as an additional insured differently than others, so while you might be covered as an additional insured in one state, another state's courts may not recognize that coverage. As always, it is important to know your rights and the insurer's obligations under a policy.

Another important point to know is that if you are listed as an additional insured on multiple policies, you may be able to pick and choose which insurance provider to use. For example, Illinois' targeted tender rule allows you to choose which insurance carrier will cover litigation costs if you are sued [*Institute of London Underwriters v. Hartford Fire Ins. Co.,* 234 Ill.App.3d 70 (Ill. App. Ct. 1992)]. You should be aware, however, that as of the writing of this article, this targeted tender rule is unique to Illinois.

LESSONS

All engineers can learn lessons from Ballanco's "Nightmare in Long Branch." First, always take the initiative to obtain insurance and do not rely on others to make sure that your interests are protected. Next, if you forego obtaining your own insurance and are relying on another party's coverage, be sure that you understand the rights that go along with being named in that policy. Furthermore, although Ballanco found himself in a bad situation, it could have been even worse if not for his familiarity with the legal process. As such, you should take the time to help yourself by getting to know your legal rights. Finally, choosing whether to prove that an antagonist is wrong and that you are right can come with a heavy cost. Sometimes it is better to "suffer the slings and arrows of outrageous fortune" by controlling the outcome and paying a negotiated amount beforehand, thus saving the fight for another day.

By following these recommendations and learning from Julius Ballanco's experience, the next time adversity strikes you may be much better equipped to avoid your own "living nightmare." PSD

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