

The background of the slide features a grayscale image of architectural blueprints. In the upper left, several rolls of paper are stacked. A key is placed on the blueprints in the lower right quadrant. The blueprints include various window and door outlines with handwritten labels such as 'STONE VENEER', 'STUCCO', 'PRECAST CONG. MOLDING', 'DECOR. MOLDING', and 'ASPHALT SHING'. Dimensions like '2'-0" and '2'-6"' are also visible.

NWCCC

March 26, 2009

Assessing and Managing Risk In Construction Contracts

Speakers: John Evans and Heidi Evatt, Williams Kastner

We maintain the fundamental boundaries of tort and contract law by limiting the recovery of economic loss due to construction delays to the remedies provided by contract. We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.

We hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

We preserve the incentive to adequately self-protect during the bargaining process. If we held to the contrary, a party could bring a cause of action in tort to recover benefits they were unable to obtain in contractual negotiations.

Consequential Damages – To Waive or Not To Waive

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'Will you never learn Doris... Not a royal wave !'

4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's, termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

AIA – 201 (2007) 15.1.6

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Liquidated Damages. If Contractor does not achieve Substantial Completion of any portion of Work within the Contract Time for such portion of Work, then Contractor shall pay to Owner, as liquidated damages for such delay, the cash sum of \$5,000 per day for each full or partial calendar day of delay in the Substantial Completion of such portion of Work which shall constitute a cap on the Contractor's liability to the Owner for the Owner's damages resulting from such delay.

A liquidated damage clause becomes a **penalty** when the sum inserted in the contract is not a reasonable estimate of the measure of compensation for a breach, but rather as a punishment for default, and it involves the idea of punishment in order to frighten a party into performance.

Changes in the Work. If the Contractor proceeds with a change in the Work without a written Change Order, Contractor shall not be entitled to an increase in the Contract Sum or GMP, or additional time to achieve Substantial Completion of any portion of the Work.

§ 4.3.1 Definition. A claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, adjustment of the Contract Sum and/or Guaranteed Maximum Price, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

§ 4.3.2 Time Limits on Claims. Claims by either Party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the other party. Claims that are not initiated within the time limits provided in this Section are waived.

§ 4.3.10 Strict compliance with the requirements of this Section 4.3 shall be a condition precedent to the commencement of a dispute resolution proceeding concerning any Claim, including any Claim for an adjustment in the Contract Sum and/or Guaranteed Maximum Price or Contract Time. Notwithstanding anything in the Contract Documents to the contrary, the Contractor's failure to comply with the requirements of this Section 4.3 shall constitute a final and unconditional waiver and release by the Contractor of such Claims and of any and all rights to seek an increase in the Contract Sum or Guaranteed Maximum Price and/or an extension of the Contract Time.

Do Not Inadvertently Waive Your Rights Under the Contract!

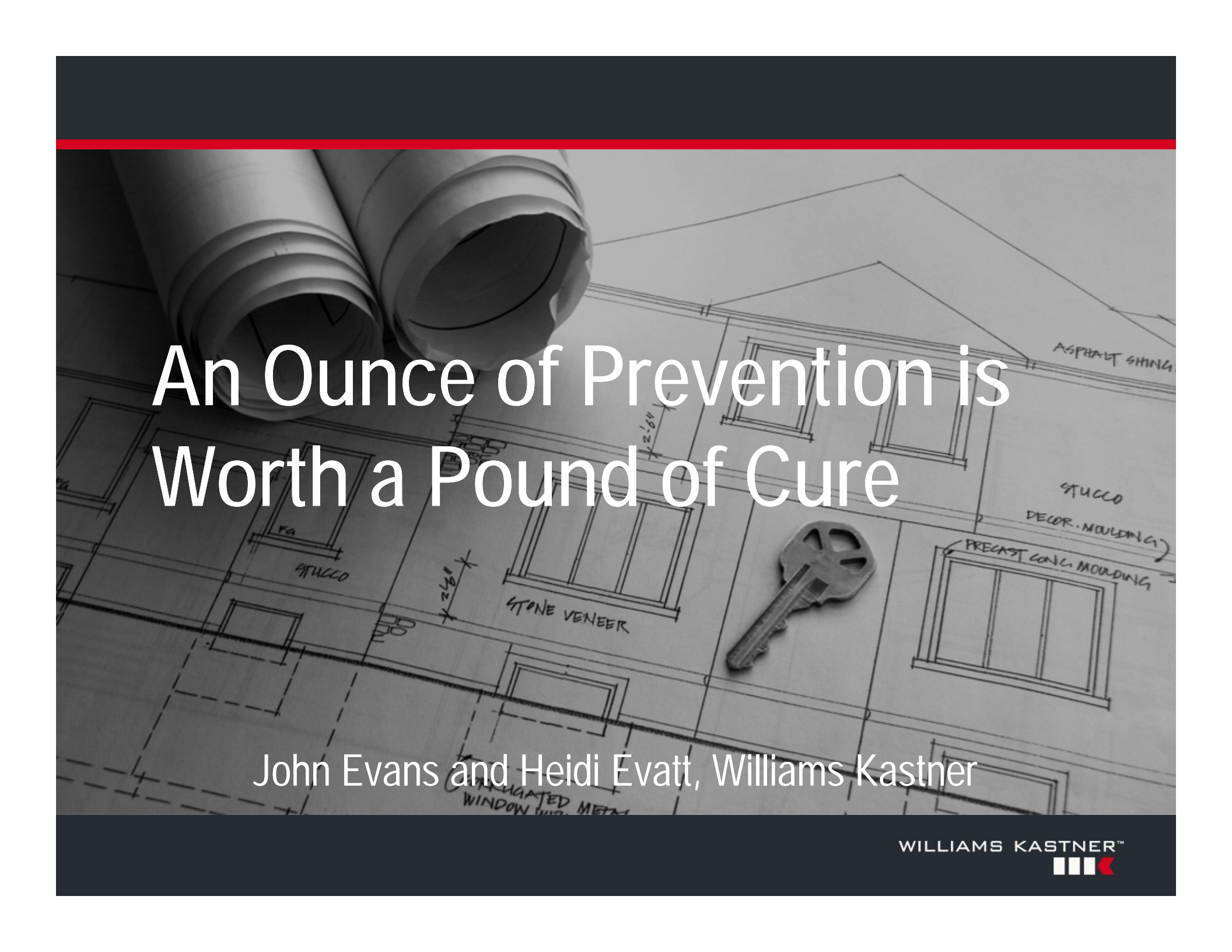
Dear Contractor,

The Contract contains notice and claim requirements that you must follow in order to perfect any claim you may have. We will not waive these requirements, and any communications we have with you should not be taken as a waiver of these requirements. We may wish to meet and confer with you on issues that arise during the project, but we do not intend to waive any claim or defense we might have under the contract documents or at law, including your failure to follow the contract requirements regarding claims/notice/disputes.

Preserve Your Rights Under the Contract!

Dear Contractor,

It is our position that you have failed to perfect any claims and have repeatedly failed and/or refused to follow the procedure set forth in the contract for submitting claims. Throughout this project we have made it very clear that we would not be waiving any of our contractual rights, claims or defenses. In agreeing to meet and confer with you on the issues you have raised, it should be understood that we do not intend to waive any claim or defense we might have under the contract documents or at law, including your failure to follow the contract requirements regarding claims/notice/disputes.

The background of the slide features a grayscale image of architectural blueprints. In the upper left, two rolls of paper are unrolled, showing the edges of the plans. The blueprints themselves show various window and door layouts with handwritten annotations. A single key is placed on the right side of the blueprints. The text 'An Ounce of Prevention is Worth a Pound of Cure' is overlaid in white, bold, sans-serif font across the center of the image. The overall composition suggests a focus on construction, design, and the importance of preventive measures in the industry.

An Ounce of Prevention is Worth a Pound of Cure

John Evans and Heidi Evatt, Williams Kastner