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## Construction Defects: Defending Against The Claims

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### Preface

The following article has been written, in part, by a Lawyer, Mr. Thomas M. Condas, with Attorneys and Insurance Professionals in mind and, therefore, contains case law citations. The information contained herein, is intended to be highly useful for all persons interested in its subject matter.

This article is intended to provide general information and is not, therefore, intended to provide any advice of a legal or professional nature. If you have need of specific advice, we recommend that you contact the appropriate legal or construction professional.

### Overview

With the advent of the ten year cycle ( California Code of Civil Procedure, section 337.15 ) construction defect litigation is again on the rise. The increase of defect claims, however, is not limited to the borders of the State of California.

Over the latter part of 1996, construction defect litigation firms have expanded outside of California to those states experiencing rapid growth rates. Nevada and Arizona appear to have caught the immediate attention of the construction defect crowd, with the long range eyes focusing on the Rocky Mountain states.

History has shown that the construction defect lawsuit is one of the most costly forms of litigation. Should the manner in which these claims are defended not change, history will inevitably repeat itself.

With the dawning of the new year, history can be made in construction defect litigation by the implementation of the simple principles of organization, indemnification analysis, and expert retention and utilization.

The purpose of this article is not to be an exhaustive review of construction defect defense tactics, as to do so would truly overburden even the most advanced microchip. It is however, an attempt to add simplicity to an extremely complicated area of the law.

## Organization

One tantamount theme of construction defect litigation is the need for organization. Organization is the key to keeping defense costs down, the experts informed, and to achieving the best possible result.

Because construction defect litigation usually involves many parties, early identification of issues and relevant evidence is crucial. Of course, the main issues in any construction defect lawsuit consist of:

1. The nature and extent of the particular party's involvement with the specific project and;
2. The damages potentially caused by that party.

A preliminary checklist as part of an organizational chart may help in assessing the issues identified above and should include:

1. Assessing the parties scope of work;
2. Locating additional "pockets" to assist in the cost of defense;
3. Preparation of an appropriate indemnity analysis;
4. Proper expert retention and utilization, and;
5. Necessary discovery.

As the first two factors, although the subject of extensive litigation, are nevertheless self-explanatory, emphasis will be made on the last three.

## Indemnity Analysis

At the heart of every Construction Defect lawsuit is a claim by the Contractor or Developer against the Subcontractors for defense and indemnity pursuant to the terms of the subcontract agreement.

Because there are as many subcontracts as there are subcontractors, a specific analysis on this topic would consume an encyclopedia. Accordingly, a general discussion of indemnity claims follows.

Recently, the Fourth District Court of Appeal issued an exhaustive analysis of the legal principals behind "INDEMNITY" in the case of *Maryland Casualty v. Baily & Sons* ( 1995 ) 35 Cal. App.4th 856. In its analysis, the court opined:

California courts have developed certain principals of interpretation applicable specifically to indemnity agreements. ( See *Peter Culley & Associates v. Superior Court* ( 1992 ) 10 Cal. App.4th 1484, 1942 [13 Cal. Rptr. 2d 624].) One of those long-established principals provides that "[a]n indemnity clause phrased in general terms [e.g., one which does not mention the effect of the indemnitee's negligence] will not be interpreted ... to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts.," ( *Markley v. Beagle* ( 1967 ) 66 Cal. 2d 951, 962 [59 Cal.Rptr 809, 429 p.2d 129]. ) The original rationale underlying this rule was that because an agreement for indemnification against one's own negligence is not favored and is an exception to the general rule, an agreement to indemnify an actively negligent indemnitee will not be implied in the absence of express and explicit language. ( Citation )

From these basic principals, the Courts of Appeal have defined three types of indemnity agreements, creatively identifying them as type 1, type 2, and type 3, each of which are subject to certain rules governing the interpretation of each type of agreement. ( See, *Mac Donald & Krause v. San Jose Steel* ( 1972 ) 29 Cal.App.3d 413. )

Under the *Mac Donald & Krause* analysis, the court reiterated the traditional rule that an actively negligent indemnitee may not recover when the contractual provision does not contain an express statement that a negligent tortfeasor may obtain indemnity for its own negligence. However, a passively negligent tortfeasor is entitled to recover for its own acts of passive negligence under a type 2 agreement. As indicated above, unless the agreement specifically mentions the effect of the indemnitee's negligence, the provision will be interpreted to be a general indemnity clause, and the issue of active versus passive negligence would need to be determined.

Under prevailing California case law, passive negligence is found in mere non-feasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee has agreed to perform. ( Herman Christianson & Sons v. Paris Plastering ( 1976 ) 61 Cal. App. 3d 327 ).

As a result of the active versus passive issue, the indemnity provisions of the contract are of little assistance in obtaining immediate coverage on the part of the General Contractor or Developer, and create a substantial issue between the General Contractor or Developer and its Subcontractors.( See also, Reagan Roofing v. Superior Court ( 1994 ) 24 Cal.App.4th 425 - the court in dicta, noted that determination of the duty to defend and its relationship to the duty to indemnify, was premature in that no finding had yet been made as to whether the subcontractors were negligent in the performance of their work, which would give rise to the duty to defend and the related duty to indemnify.)

Due to the fact specific nature of the active versus passive issue, an early analysis as to the "type" of indemnity provision, contained in the contract, should be made and a discovery plan to show active negligence on the part of the General Contractor/Developer should be established.

### Litigation Support: The Experts

After the attorney has been retained, and he or she has completed assessing the involvement of the insured and identifying all potential carriers to assist in the defense, the focus should shift to the determination of potential liability, repair methodology and ultimately the cost of repair that will form the basis of the damages being claimed.

This analysis, however, rests largely with the findings, opinions and conclusions of the Construction Expert.

As history has shown, the key to success in a construction related cause of action, is the retention of a qualified expert at the earliest possible stage. Because construction experts are more "KEY PLAYERS" than experts in other types of cases, they play a larger role in the analysis of the case.

Because claims representatives and attorneys alike tend to know little about actual construction practices, construction technologies, and Building Code requirements it, therefore, becomes imperative that the expert step to the forefront and assist at the initial stage.

By utilizing the expert as a consultant early on, the expert becomes a vital component that advises and guides the attorney directly towards vital discovery issues and documents.

Because of the ever increasing importance of the expert, and the possibility of the expert "running wild", and thereby generating excessive fees, the importance of locating and retaining the right expert cannot be over emphasized. In the expert retention process, the following should be considered:

- Look for construction and design professionals who are proactive and familiar with the customs and practices of the design professionals, developers, contractors, subcontractors and materials suppliers.
- Design and construction practices may differ substantially by the Building Codes, Zoning and other Ordinances adopted and enforced by the local Governing Authority. Look for experts familiar with these codes.
- Look for experts who have garnered numerous years of proactive "hands-on" experience in their fields, which enables them to apply not only theory, but which enables them to apply their life's experiences as well.

- Look for experts that are aggressive, who will dig up the relevant facts, and who are willing and capable of providing the attorney with consistently detailed information.
- Look for experts that are easily available to the attorney, when the attorney needs him or her.

It is very important for the legal team to utilize the education and experiences of their experts by allowing the experts to educate the attorney with as many technical terms and technical aspects as possible pertaining to the relevant issues at hand.

Think about the many times you may have misused technical construction terminology, or misconceived the true nature of the technical issue at hand. An educated attorney is an effective attorney.

Traditionally, construction has been divided into specific "Divisions" as defined by the Construction Specifications Institute (C.S.I.). These divisions break each trade, or specialty down into 16 specific divisions with many sub-divisions that provide a high level of organization. These 16 Divisions are:

|              |                                 |
|--------------|---------------------------------|
| Division 1:  | General Requirements            |
| Division 2:  | Site Work                       |
| Division 3:  | Concrete                        |
| Division 4:  | Masonry                         |
| Division 5:  | Metals                          |
| Division 6:  | Carpentry                       |
| Division 7:  | Thermal and Moisture Protection |
| Division 8:  | Doors, Windows and Glass        |
| Division 9:  | Finishes                        |
| Division 10: | Specialties                     |
| Division 11: | Equipment                       |
| Division 12: | Furnishings                     |
| Division 13: | Special Construction            |
| Division 14: | Conveying Systems               |
| Division 15: | Mechanical                      |
| Division 16: | Electrical                      |

The project Architect usually will follow these 16 divisions when he or she prepares their "Project Specifications". The project specifications often are contained within a separate book, commonly referred to as the "Project Manual". This is usually done in conjunction with commercial, industrial, public schools, health care facilities, essential services facilities and public works projects.

With residential projects such as single family, tract housing, apartments and condominium construction projects, it is far more common to find the "Project Specifications" contained on the plans, usually confined to sections entitled "Notes".

Since it would be extremely rare for the defense team to be representing all or most of the aforementioned 16 construction divisions in any single cause of action, it becomes imperative that counsel clearly define the scope of their client(s) work by carefully reviewing their Contract Agreement. With large Subdivisions, such as multiple or Tract Housing and Common Interest Developments, such as Condominiums, they usually are constructed in multiple phases starting with the "Models". Therefore, it is equally imperative that counsel clearly define which phase or phases and units contained within each phase of construction their client was contracted for and subsequently subject to liability.

While not precluding any or all of the 16 CSI Divisions, some of the most common and high-cost defect issues fall within the following categories:

1. Soils: ( Division 2: Site Work )
2. Structural Integrity / Seismic Resistance: ( Division 3: Concrete, Division 4: Masonry and Division 6: Carpentry )

3. Mechanical: ( Division 15: Mechanical )
4. Plumbing: ( Division 15: Mechanical )
5. Electrical: ( Division 16: Electrical )
6. Water Intrusion: ( Division 5: Metals, Division 7: Thermal and Moisture Protection, Division 8: Doors, Windows and Glass and Division 9: Finishes )

By now, you are probably beginning to see the complexities of the interrelationships of "the trades". Each trade has an interdependency upon each preceding trade. In example the roofing contractor cannot roof the structure without the framing contractor constructing the frame. The framing contractor cannot frame the building without the concrete contractor placing the foundations. Likewise the concrete contractor cannot place the foundations without the excavating contractor cutting, filling and compacting the earth ... and so it goes.

Therefore it is critical that defense counsel clearly distinguish the scope of their clients work and how that work was interdependent upon other trades.

If an alleged defect issue pertains to the work of one subcontractor that has been followed by the work of another subcontractor, it must be determined which subcontractor was actually responsible for the alleged defect.

One small case in point: Assume it is alleged that the framer ( your client ) caused defective work as may be evidenced by excessive holes drilled or notched out in the wall studs, thereby creating a loss of its structural integrity. Assume further that the defects as alleged do in fact exist. What do you do? Look to the responsible party such as the plumber who drilled excessively large holes to access his pipes, or the electrician that notched out the studs to make way for his wiring conduits.

In order to make these determinations, it is of the utmost importance to review the subcontract(s) of not only your client, but also any and all other trades that may have had anything to do with the work your client actually performed.

In addition to subcontracts and depending upon the nature of the claim, the relevant issues surrounding the case, many of the key discovery issues can also be found by looking to the following sources:

### The Building Department

The Building Department is a resource, which is commonly overlooked. In most cases, the Building Department will maintain records pertaining to the project in their files, or the records may have been reproduced on microfilm, and archived. Commonly, the records may ( not always ) consist of the following:

- Building Department Set of the Approved Construction Drawings
- Permit Applications (Grading, Building, Electrical and Mechanical)
- Permits (Grading, Building, Electrical and Mechanical)
- Plan Check Documents
- Inspectors' Field Notes
- Inspectors' Correction Notice(s)
- Notice of Completion and Certificate of Occupancy

### Codes and Ordinances

There are numerous codes in application that govern construction. The most commonly applicable is the Uniform Building Code ( UBC ). The UBC has many versions applied to it, such as the State Building Code Amendments to the UBC.

Many municipalities have adopted amendments to the UBC, such as the City of Los Angeles, County of Los Angeles, County of Orange, and many other Governing Authorities throughout the State of California.

Commonly, the applicable codes are referred to as "UNIFORM CODES", such as the:

- Uniform Building Code
- Uniform Mechanical Code
- Uniform Plumbing Code
- Uniform Fire Code
- Uniform Housing Code
- Uniform Code for the Abatement of Dangerous Buildings
- Uniform Sign Code
- Uniform Administrative Code
- Uniform Building Security Code
- Uniform Code for Building Conservation
- Uniform Zoning Code

In addition to the Uniform Codes, as described above, the National Electrical Code (NEC ), may also be applicable to the issues.

One of the most common mistakes during discovery is the citation and utilization of the wrong code(s), or the incorrect Edition of the Code. Common practice by the writers of the codes (such as ICBO for the Uniform Codes), is to publish a new edition every three years, with the governing authorities being required by the State to adopt the new edition every three years. Therefore, if a project was constructed in 1988, the applicable codes might not necessarily be the 1988 edition, it might be the 1985 edition of the code, depending upon when the code was published and subsequently adopted by the governing authority, as well as the date in which the project was permitted for construction.

Ordinances on the other hand, are regulations which are adopted by the local governing authority, which may adopt or modify specific sections of code to apply to a specific application, manner or situation, other than for which it was originally intended for by the code. Therefore, when in discovery, it is important not to overlook local ordinances.

Other items for consideration during discovery may also include the following:

1. Original Construction Drawings and Specifications
2. Approved Change Orders
3. Architects' or Engineers' Clarifications
4. Construction Exception Reports, Correction Notices, etc.
5. Construction Schedules and Revised Updates
6. Contracts: Prime and Subs ( All that are applicable )
7. Correspondence and Memorandums
8. Field Notes by the Architect and Consulting Engineers
9. Logs
10. Project Meeting Notes or Meeting Minutes
11. Reports:
  - a. Daily Reports
  - b. Applicable ICBO Reports
  - c. Applicable Manufacturers' Specification Sheets and Test Reports ( Construction Specifications Institute [ CSI ] and Sweets Catalog Sheets )
  - d. Applicable Manufacturers' or Producing Mills' Certifications ( Mill Certifications )
  - e. Applicable Results of Soils and Materials Testing Reports
12. Requests for Information and Answers
13. Revision Sketches and Drawings
14. Submittals and Shop Drawings
15. "As-Built" Drawings

## Conclusion

Now that you have diligently reviewed the complaint, reviewed your clients' contract, defined their scope of work and to which phase or phases their work was performed, garnered applicable case law, it is now time to focus on the actual nature of the plaintiffs' list of alleged defects and determine whether or not your client is potentially liable.

It now becomes absolutely crucial that all alleged defects be defined as clearly as possible, as to exactly what is truly defective, where they may actually exist and which "Established Standard(s)" the design or work is in violation of. This, in my opinion, is the true heart of the case.

Here it becomes very important to bifurcate the alleged defects into two categories: "Design Defects" and "Construction Defects". Each type is a different species in and of itself.

Commonly destructive testing is performed by plaintiff in order to establish the actual existence of the defects, as alleged, and to provide "ironclad" documentation of their existence. This is an opportunity that demands the presence of both counsel and their experts to witness and provide thorough documentation of these tests and findings.

It is also very important to be cognizant of the means and methods utilized by the plaintiffs experts while conducting these destructive tests. It is a common occurrence for the plaintiffs experts to cause more damage than may actually exist. In example, when removing stucco in order to expose the lath, nailing and flashing paper surrounding windows and doors, the materials are damaged in the process, thus rendering false or "tainted" findings. Unless the damage, or alleged defect can be proven to have existed prior to the time of the destructive test, it can be easily lost in the convenient interpretation of the plaintiff expert.

In the event that defects are factually identified, there is no escaping the next phase of your task. That task is to establish a clear and reasonable repair methodology and factor accurate and realistic costs for repairs or replacement. Caution is recommended here, because sometimes the "cure is worse than the disease".

Good old fashioned common sense is in order at this juncture. Remember the old Army adage? "There's the right way, the wrong way and the Army way!" Meaning that there are many solutions and options available to resolve and "mitigate" the problems of defective construction. The nature of the scope and extent of the defective work is the crucial factor to consider.

With the present nature of construction defects litigation, being proffered by innuendo and insinuation, the proverbial "Smoke and Mirrors" it is most often difficult or even impossible to pin down the plaintiffs' experts to prima-facie facts. Yet this must be done! Use your experts to assist you with questions to ask plaintiffs' experts during deposition, mediation or even trial (if it goes that far).

Until meaningful legislation is passed which provides us with a clear and legal definition of precisely what a defect really is (other than something that is not "Perfect") and thereby provides the legal profession with clearer parameters in which to operate within, the nature of construction defects litigation and in particular the defense thereof, will remain a difficult and costly undertaking.

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