

IDENTIFYING THE PLAYERS AND PRESSURE POINTS WITH AN EYE TOWARDS THE END-GAME

“Every battle is won before it is ever fought.” Sun Ztu, *The Art of War*

Construction failures appear in many forms: fires, floods, collapses, injuries sometimes involving death to workers or third-parties. There are many varieties of construction problems leading to claims and litigation. The purpose of this discussion is not to answer every conceivable question that may arise, but to provide a basic template and methodology to approach the handling of construction claims, which are either headed to, or in litigation.

FIRST STEP: BE CURIOUS. FIND OUT WHAT HAPPENED.

Witnesses, Documents and Physical Evidence – The Essential Elements of a Construction Defect Case.

When construction cases are tried, the proof comes in three types: people (lay and expert witnesses), documents (contracts and other job file-related documents, including emails and text messages) and physical evidence.

The task before the trial lawyer is to gain a full understanding of all three factors simultaneously and how they interrelate in the context of a construction failure.

Accept No Substitute: Go to the Site.

A picture is worth a thousand words. If you want to describe something to a jury or an arbitration panel it helps immeasurably to go to the scene, walk the site, visualize the remains of the problem to aid in your understanding and your ability to communicate the experience to a third party.

Complications: OSHA and other state and federal regulatory agencies may occupy the scene. Retain effective liaison experts to work with the government investigators.

Document the site.

Photography, video, graphics, measurement – all are important. Cameras, GPS, satellite photography, security cameras, black boxes.

Interview knowledgeable witnesses.

Timing of interviews may be important. Decision to make: Whether to take a statement before all other facts are known. Judgment call.

SECOND STEP: RETAIN THE APPROPRIATE EXPERTS.

Construction litigation is often a game of experts. Find the best people. Get them to the site. Use their preliminary opinions in witness interviews (coordination on this point is essential).

Make sure qualifications fit the task. This requires identification of material issues early on. Construction failure cases frequently require forensic expertise to opine about what happened and who is responsible. This could involve several experts.

THIRD STEP: PRESERVE EVIDENCE.

Spoilation should be avoided. Sanctions can be outcome determinative in certain jurisdictions.

Provide notice to potential targets and third parties. Allow for inspections. Arrive at joint protocols for further investigation and particularly if it involves destructive inspection or testing. Reach agreements on preservation of evidence.

PERFORM A THOROUGH DOCUMENT REVIEW.

In connection with the document review, including contracts, review contracts for indemnification clauses which may be outcome determinative.

Construction failure cases usually are contract cases. Contract cases require a thorough review of all documents in the job file and all contracts for all parties participating in the building delivery system or process. You really don't know the case until you have reviewed the entire contractual landscape. Provisions in third-party contracts may affect the outcome, e.g., arbitration provisions in related contracts.

Be familiar with the Economic Loss Doctrine.

The case outcome may be determined by the terms of contracts. Most construction cases operate in a contractual environment. The application of the Economic Loss Doctrine may dictate what damages are recoverable and what are unrecoverable. The general rule is that you cannot cover in tort for damages that are the subject matter of a contract. What is, in fact, the subject matter of a contract is often a contested issue, particularly in the case of claims against design professionals.

INDEMNITY.

Be familiar with the state substantive law regarding indemnity. Be aware of anti-indemnity statutes. Be aware of limitations on the enforceability of indemnification provisions. Make an early determination as to the scope and effect of particular indemnification clauses.

LITIGATION VS. ARBITRATION.

In reviewing the contract documents between all parties, be on the lookout for arbitration clauses. If the matter involves inter-state commerce, the Federal Arbitration Act applies, in which case a court may be required to order the matter to arbitration and in the event the arbitrable matter occupies common ground with matters outside the scope of the arbitration clause, the court may decide to stay the entire multi-party case until the arbitrable portion of the controversy is decided by the arbitration panel.

The judicial "decision" to send the case to arbitration, if the arbitration clause is governed by the Federal Arbitration Act, is nondiscretionary, jurisdictional and preferential. In short, the judge has no discretion. The matter will be sent to arbitration if any party moves to send the case to arbitration. This can have profound consequences in a given case.

FIND THE MONEY.

Certificates of insurance may or may not tell the truth or the whole truth. Notice letters are incomplete unless they request the matter be referred to all primary and excess liability and umbrella policies. Plaintiff's should confirm the existence, scope and extent of liability and excess insurance coverage. Confirm "additional insured" status for all parties.

Contract documents may require insurance coverage and a party may be entitled to proof of the existence of such coverage as a matter of contract.

Performance bonds should be identified and bonding companies should be notified.

The party with the deep pockets is frequently the target. Defendant has an equal interest in determining whether co-parties to the case are sufficiently insured.

PICK YOUR TARGETS CAREFULLY.

Is it a design failure or is it a construction failure? If the design is defective, the contractor typically is not responsible for following a defective design. In most cases the contractor's responsibility does not extend to design choices, but this is not always so. If the defect is obvious the contractor's contract would require the contractor to identify obvious mistakes. In the latter case, the contractor may have responsibility for not raising the issue and then receiving written confirmation of the design direction.

If the contractor departs from the design intent set forth in the contract documents, typically, the designer should have no responsibility ("Hey, that's not the building I designed and I have no responsibility for it!"), then the contractor has breached his contract by failing to complete the work in accordance with the contract documents.

The question is whether the breach is material or substantial. There is always question (a mixed question of fact and law sometimes) as to whether there has been substantial performance which may entitle the contractor to be paid.

The Issue of Substantial Performance.

What is material or substantial performance? How is it measured? How does effect recoverable damages? Who has the burden of proof? Is it a shifting burden of proof? How do you factor in the cost to remedy what was not performed or performed correctly? Who has the burden of proof on that issue? Frequently, the claimant has the burden to prove the reasonable and necessary costs to remedy the defect and deduct that from their proof of damages for substantial performance.

MEASURE OF DAMAGES.

There are profound differences between contract and tort measures of damages. If the Economic Loss Rule applies, contract damages will apply. Contracts themselves may dictate a measure of damage. There may be limitations (e.g., exclusion of consequential damages), warranty applications and contractual remedies which must be complied with in order to fulfill the burden of proof.

Design professional contracts may have damage limits to the contractual amount paid to the professional along with limitations of consequential losses.

The measure of tort damages may differ according to jurisdictions and the type of damage being sought (total loss vs. partial or repairable loss) the question often arises as to whether the remedy is a reasonable cost to repair or diminution and fair market value (is there a difference?).

PROOF OF DAMAGES.

In most states, the common law regards the owner of property as deemed or presumptively qualified, which allows him to testify with of lay opinion regarding the value of damage to his property, lost profits directly flowing from damage to property and out-of-pocket losses. Recent cases are suggesting a retrenchment from this earlier position and increasingly, lay opinion is being circumscribed forcing litigants to resort to proof by properly qualified expert testimony. Lay opinion and proof of damages make sure that proper foundation for the owner to testify. Damages for cost of repair may be presented by one familiar with the "relevant" market and the cost of repair. For example, a local experienced real estate agent or broker may be a suitable expert to talk about diminution and fair market value arising from damage done to real estate. You may need a contractor to testify about the cost of repairs and fold that analysis into the real estate agent's opinion regarding diminution and fair market value.

Actual cash value may not be the appropriate measure of damages. In the third party context damages are frequently proven by either reasonable costs of repair or diminution in fair market value. A property insurance claim might be adjusted on an actual cash value basis, i.e., replacement or repair costs less depreciation. But in the third party context frequently that is not the correct measure of damages. Failure to prove damages by the correct formula may result in a directed verdict due to a failure of proof.

SETTLEMENT STRATEGIES.

Is the liability joint and several or comparative? What is the cost and risk of settling with any party? What is the worth of the empty chair? What is the cost of settling with any party? What is the cost or consequence of settling with an owner suing design professionals and architects, a typical case involving construction? In what order should the settlements occur?

General rule: Follow the indemnity. If it is the General Contractor, be aware of the requirement of privity in order to assert contract claims. It is most frequently the case that it is better to settle from the top down.

The preferred order: Settle with design professionals first; second, obtain assignments when settling with the general contractor then, present claims against subcontractors. Attempts to settle with general contractors and design professionals will point to the work performed, general contract and/or design of the settled sub-contractor. This strategy leaves a hole in the case.

USE OF JURY CONSULTANTS.

If the case is large enough and the issues are complicated enough, modern-day jury experts are very useful.

PRESENTATION OF DOCUMENTS AT TRIAL.

Use of summation and trial director – get rid of the documents. Get a professional to handle the documents.

THE TIMING OF MEDIATION.

After key expert reports have been exchanged, after factual discovery complete, before depositions of experts.

“WHO YOU GONNA CALL?”

Set the scene. Tell the story leading up to the failure. Identify key contractual witnesses. Presentation of live expert testimony. What does the jury want to see and hear? Do not avoid the physical evidence. Avoid detailed examination of contract documents unless absolutely necessary.

For damages, use of forensic accountants: For large and complicated cases this should be the rule.

Overall trial strategy: (KISS) Keep it Simple Stupid. Juries hate documents but they like stories, pictures and physical evidence. Boil it down and eliminate minutia. Talk about responsibility.

Construction cases are interesting, complicated, challenging and fun. We hope this helps you in your approach to your next complicated construction case.