RECOVERY IN CONSTRUCTION DEFECT CASES

Written by:
MARK S. ANDERSON, ESQUIRE
COZEN O'CONNOR
1201 Third Avenue
Seattle, WA 98101
Ph: (206) 340-1000
Fax: (206) 621-8783
E-Mail: manderson@cozen.com

and

LARRY T. BOWMAN, ESQUIRE
COZEN O'CONNOR
2300 Bank One Center
1717 Main Street
Dallas, TX 75201
Ph: (214) 462-3000
Fax: (214) 462-3299
E-Mail: lbowman@cozen.com

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Dallas, TX
Denver, CO
Las Vegas, NV*
Los Angeles, CA
New York, NY
Newark, NJ
San Diego, CA
San Francisco, CA
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Trenton, NJ
West Conshohocken, PA
Washington, DC
Wichita, KS
Wilmington, DE
London, UK

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I. INTRODUCTION

Claims involving construction and design defects present unique issues for subrogation recovery. This presentation discusses various considerations surrounding the liability of the various players connected with the construction project, the legal theories of recovery against those parties, potential hurdles to subrogation recovery, and tactical considerations in determining the appropriate time for joinder and/or separate pursuit of a third-party contribution/indemnity case.

As respects the potential involvement of Zurich in construction defect cases, Zurich may insure the property damaged in the loss or it may insure the liability of one of the potential participants in litigation following the loss, which may include designers, such as architects and engineers, builders, such as construction managers, general contractors, subcontractors and sub-subcontractors, and material and product suppliers. There may be vastly different considerations, goals and limitations on the strategy attendant to whether the Zurich policy involved is a property or a liability policy.

If Zurich insures the property involved in the loss, early consideration should be given to investigation at the scene, retention of appropriate experts to assist in the investigation, retention of qualified recovery counsel, preservation of evidence, notice to potentially responsible third parties, and the institution of litigation within applicable statutory and contractual time periods, within the statutes of limitation and repose.

With respect to those situations in which Zurich insures, pursuant to a liability policy, a potentially responsible party, early consideration must be given to investigation of the scene (if

available), review of any physical evidence or artifacts preserved from the scene, obtaining and review of all statements by witnesses and involved personnel, retention of appropriate experts, obtaining of all pertinent contractual documentation, review of all published expert reports and photographs, and a determination of the possible joinder of other third parties, particularly those parties which may owe a duty of contribution and/or indemnity to Zurich's insured.

There are certain common requirements of all adequate construction claims investigations and what follows is a brief discussion of the necessary steps which must be taken in virtually all construction defect cases so that the file is properly developed and appropriate decisions can be made enroute to a satisfactory result for Zurich and its insured.

II. DETERMINE THE CAUSE OF LOSS

What caused the problem? What is the problem? Injury or death at the work place? Fire? Flood? Collapse?

Complex construction defect cases may have multiple causes of loss involving both design and construction issues and may involve multiple parties, including: architects, designers, engineers, consultants, subconsultants, material suppliers, the general contractor, subcontractors and sub-subcontractors. Retention of qualified experts is crucial to making an early and accurate determination of the cause of the loss. In construction defect cases, your list of qualified experts may include a fire investigator, engineer, civil engineer, electrical engineer, mechanical engineer, structural engineer, metallurgist, weather experts, and possibly standard of care experts. A standard of care expert is usually a person with the same or similar credentials and/or work experience as one of the affected parties in the construction defect case who can opine regarding the standard of care applicable to the conduct of the affected party and who can meet the

particular jurisdiction's requirements governing the threshold qualifications of an expert to opine on the standard of care and compliance with that standard of care on the part of the affected party.

A damages expert for a construction defect case may include construction estimators, engineers, contractors and/or real estate appraisers. There may be a plethora of damage-related experts required for personal injury claims arising from construction defects and an exact identification of all such experts is beyond the scope of this paper.

III. IDENTIFICATION OF POTENTIAL TARGETS

A. Round Up the Usual Suspects

A construction defect case may boil down to a premises liability case. Premises liability involves the responsibility of those who own, possess and control real estate and improvements to real estate to others who may be injured or may have their property injured arising from the use, possession and control of the same real estate. In order to assess the potential responsibility of any party with respect to a construction defect case, one must first understand whether that party was in such a position to have undertaken a duty with respect to third parties involved in or affected by the construction. Where do these duties come from?

i. Tort duties may arise from any undertaking (i.e., motion, activity, work, conduct) which if performed with less than the required degree of care may create or present an unreasonable risk of harm to another person or their property. By way of example, you may have no liability and undertake no duty to a blind man calling out for your help and requesting you to walk him across a busy intersection. If you volunteer to assist the blind man to walk him across the intersection, you have voluntarily undertaken a duty of reasonable care for his safety.

ii. Perhaps most importantly in the construction defect context, duties arise by operation of contract. Contractual duties create, define and limit the extent of responsibility of the involved participants. In order to understand the extent of one party's duty and it's relation to the duties of other parties, one must have a full and complete understanding of the contractual relationships between the various parties involved in the design, construction and project delivery system involved in each project.

iii. Statutes, rules and governmental regulations: Construction defect cases are fraught with all kinds of codes, statutes, ordinances, rules and regulations which may change the legal landscape and the playing field upon which construction defect cases are litigated. One must have a complete understanding of the applicable codes, statutes, ordinances and other regulations which may affect the shape of the duties, measure the performance of those duties by the involved parties and determine the outcome of the litigation.

B. <u>Who Are The Usual Suspects</u>

i. <u>Design Phase</u>: The usual cast of characters involved in a construction defect case may include the people and professionals involved in the design phase of the project. These typically include architects, structural engineers, electrical engineers, mechanical engineers, design consultants, the owner and developer. If the pertinent defect appears to be one related to the design of the project, a thorough review of the contract documents must be undertaken in order to assess the scope of undertaking of each participant, limits upon their responsibility, and the involvement of other potential third parties. It is dangerous to assume the scope of design responsibility is coterminous with the title "architect", "engineer of record" or

similar titles. The devil is in the details. Find out what a person was requested to do, what they did, and how it relates to the performance of other participants in the project.

In many construction defect cases, the issues which are litigated run along the fault lines which divide the design responsibility from the construction responsibility. In general, the scope of duty of architects, engineers and other designers is defined by their professional obligations and measured with reference to a standard of care not unlike the standard of care applicable to professionals in the medical malpractice context. The work of a design professional will be measured with reference to the level of conduct deemed to be acceptable or in keeping with the standard of care applicable to that professional group of designers in the pertinent design community. Care must be taken in the selection of experts who are qualified to render opinions (1) regarding the standard of care applicable to the design project as well as (2) whether the conduct undertaken by the design professional met or did not meet the applicable standard of care. Recent trends have required affidavits to support the allegations and pleadings before the initiation or continuation of cases involving design professionals. Similar to tort reform requirements in medical malpractice cases, jurisdictions are now passing legislation to require a plaintiff to attach to the complaint or petition an affidavit from a qualified architect or engineer identifying the applicable standard and setting forth a fact or more which demonstrates that the design professional departed materially from the standard of care required. If affidavit support cannot be obtained, the action may not be maintained against the design professional. Access to all the information, such as the expert's file, may be difficult to obtain in the offing stages of litigation and may necessitate invocation of pre-litigation discovery procedures where available in given jurisdictions. For example, in Texas, there is a procedure by which one could subpoena in advance of a filing of a lawsuit a design professional's file. By way of comparison, obtaining

of medical histories and documents from medical personnel is made easier in most states by virtue of the statutory recognition that the patient's medical history and records thereof constitute the property of the patient and must be made available upon demand. No similar protection is afforded the consumer of professional design services and, therefore, access to all of the pertinent documents and information from the design professional's file may be necessary in order for a consulting expert to reach an informed opinion regarding the compliance or noncompliance of the involved design professional's work with the applicable standard of care.

ii. Construction Phase. The next stage in typical construction defect cases is the construction phase of the project. It is important to understand the involvement of all participants, and to obtain as much as possible, all contracts, specifications and other related contract documents including the job files of all companies, partnerships and individuals assisting in the delivery of the construction project. To the extent possible, participants should be interviewed so there is no misunderstanding of the nature of each party's involvement in the construction phase of the project.

C. Round Up the Usual Documents

In order to understand who may be responsible for a given construction defect and the damage resulting therefrom, you must gather up all of the potentially involved contracts which will describe the patchwork quilt of responsibilities of the involved participants. In many states, such as Texas, obligations with respect to use, possession and control of real estate or improvements to real estate must be set forth in writing or they are considered nonexistent. This is known as the statute of frauds. Again, before one can begin to measure the performance of a

party with respect to a construction defect case, that party's contract must be obtained and reviewed thoroughly.

In addition to the contract, every job file from every participant should be reviewed to see to what extent the actual behavior of the participants was in keeping with their contractual undertaking. On large projects, daily records are kept by foreman and job superintendents which contain a wealth of information regarding the day-to-day happenings, sequence of construction and level of involvement on the part of various participants. Knowledgeable personnel including foremen and superintendents should be interviewed early in the case to understand their perspective on the events leading to the damaging event. The construction manager's file and the files of construction consultants may contain a wealth of day-to-day observations in logs, diaries or periodic reporting forms.

The employment records of the parties working on site should be reviewed to make sure that all employment and agency relationships are properly understood and depicted in the litigation. One person's employee may indeed be a "borrowed servant" of another employer to the extent that another participant in the construction project may have the right to use, control and direct the conduct of another party's employee. This may have tremendous ramifications in the workers' compensation context as it may involve the reach and applicability of immunity and indemnity obligations.

The precise wording of the contractual documents will inform you as to the scope of the duties undertaken by each party and how they relate to one another. While the actual conduct of a party on site during a construction project may be informative, the precise scope and extent of the party's obligations in most cases will be spelled out in the terms of written agreements.

The more complicated and larger construction projects will either employ or at least make reference to contract language and specifications drawn up by the American Institute of Architects ("AIA"). The AIA forms, generally speaking, are very protective of design professionals and tend to foist most of the responsibility for construction defects upon the general contractor and subcontractors. Thus, pursuant to the typical AIA format, the design architect will have little responsibility for actual construction defects and in the event the actual construction departs materially from the design drawings and specifications, the architect will have virtually no responsibility whatsoever.

Typically, in AIA contracts the general contractor will assume sole responsibility for the means and methods of construction and for the supervision of subcontractors and other persons doing "the Work." The architect, in the typical AIA contractual scenario, will have no responsibility to make sure or certain that the actual construction is in keeping with the design intent revealed in the contract documents. Unless it is explicitly undertaken in writing, there will be no supervisory role or responsibility possessed by the architect.

The AIA forms also increase the obligation of contractors from the common law requirement (i.e., to hire competent independent contractors to serve as subcontractors) to a more expansive obligation whereby the general contractor assumes responsibility for the actions and omissions of all subcontractors, sub-subcontractors and other persons doing "the Work." This provision, also known as the "buck stops here" provision, may be of critical importance in a case where a general contractor delegates the actual work to a host of subcontractors and does little if any actual detailed supervision.

Under the common law of many states, the general contractor would have little or no responsibility in tort if an act or omission performed by a presumably competent subcontractor within the area of their delegated expertise is the cause of the loss. Under the AIA form, the general contractor retains ultimate responsibility for all actions and omissions of the subcontractors, sub-subcontractors and persons doing the work. This is a substantial shifting of responsibility wrought by few words in a large contract.

In general, the architect's responsibility, described in the typical contracts employed by architects with owners, is to design the project. The architect's responsibility will be described in the most cursory fashion. It may consist of the design of a building described in terms of size, and dimensions and predominant materials at a given location.

The essential contractual undertaking of the general contractor is to build the building in accordance with the contract documents. The contractor's obligations may be couched in terms of constructing the "Work" in accordance with the contract documents including drawings, specifications, and the like.

As you might expect from this description, much of the infighting in construction defect litigation concerns the argument advanced by the design professionals that the work was not performed in accordance with the contract documents or the contractual design intent. Conversely, general contractors and subcontractors will oftentimes take the position that the contract documents were vague, ambiguous or lacked necessary detail to properly guide the persons doing the work in the proper performance of their duties.

Key documentation in the litigation over construction defects in this regard would be those documents in the form of requests for information from the general contractor and

subcontractors which are funneled up to the architect or other design professionals during the course of the work requesting clarification of various details in the plans and drawings. In the absence of written requests for information ("RFIs") which document the lack of clarity or the need for additional detail in the architect's design drawings and plans, a general contractor or subcontractor may have difficulty convincing a fact finder that the architect or other design professional shares responsibility for defective construction. There is language in many contracts, especially AIA forms, by which the general contractor and subs assume a responsibility to become familiar with the details of the work and to satisfy themselves before embarking on the construction project that they are able to perform the work given the level of specificity of the directions contained in the contract documents. While performance of the work in the absence of RFIs may not establish a presumption or estoppel running against the contractor on this point, it certainly draws into question the claim, after the fact, by a general contractor or subcontractor that they were unable to follow the design intent having performed the work to its conclusion without badgering the design professionals over the lack of detail in the drawings and plans.

Contract documents typically call for the general contractor to comply with codes or other legal requirement and to be responsible for safety of the job site. The general contractor is viewed as assuming a supervisory and coordinating role with respect to the details of the construction and with respect to the interface between the work of various trades. In cases where the work of several subcontractors intersect, such as water damage/leakage case where leaks appear in a structure points where disparate building materials come in contact (such as windows and stucco, stucco and concrete, roof and walls, decks and balconies and the walls, etc.) the

general contractor's role may be brought into question with respect to the coordination of the work performed by the various trades to effectuate a proper result (i.e., a waterproof building).

IV. NOTICE TO POTENTIAL TARGETS

A. Spoliation of Evidence

Notice to potential target defendants in construction defect cases is imperative to avoid a later claim of spoliation of evidence. Before the subject area of the building project containing the construction defects has been remediated, all potentially at-fault parties should be invited to the scene and provided with an opportunity to examine the damages and the defective workmanship in place. A failure to invite known potential target defendants to examine evidence before it is destroyed has been held in many jurisdictions to constitute spoliation of evidence which may yield judicial sanctions ranging from exclusion of expert testimony to outright dismissal of the case and monetary sanctions. While physical preservation of failed building components and photographic evidence may be sufficient to preserve the evidence, the better practice is to provide early notice and to provide an opportunity to inspect.

B. RCLA Statutes

Recently, many jurisdictions have passed legislation commonly referred to as "RCLA" statutes which mandate proper notification to contractors, subcontractors and designers in construction defect cases. These statutes are the subject of a jurisdictional summary chart which has been appended to these materials. Many state statutory schemes only apply to homeowners claims. Other states, such as Colorado, have applied such legislation to commercial cases as well. Some states, such as Hawaii, mandate the filing of a grievance with a design professional review board before a lawsuit may be filed. Many statutory schemes call for the opportunity to

remediate the defect by the subject contractor or subcontractor. Many of these schemes place a statutory cap on damages recoverable against those entities and most jurisdictions will not allow a lawsuit to proceed until the terms of the RCLA statute have been met. Some states require notice within sixty days of discovery of the defect. RCLA statutes are here to stay and should be studied in detail by all recovery personnel operating in the construction defect arena.

One of the anxiety and tension producing areas created by recent RCLA statutes is the conflict between the timeframe set forth in the statutory scheme to permit the general contractor to inspect the premises and to offer to make repairs or to actually make repairs, compared to the need to preserve evidence and avoid spoliation in the event owner or general contractor wish to proceed against a subcontractor or sub-subcontractor or other person. How long do you have to keep the damaged building in damaged condition to allow for people to inspect and assess the scope and cause of the damages? In one case a defendant argued that the building should be kept intact during the entire course of the litigation, as to prevent the possibility of spoliation. The homeowner was desirous of completing repairs and getting back into the residence. Under most RCLA statutes, the general contractor is given a certain amount of time (such as 35 days in Texas) to inspect, make repairs or offer to make repairs and after that, the statute recognizes explicitly a right possessed by the homeowner to perform the repairs and sue the contractor for reimbursement. Spoliation considerations may override the statutory grant of a right to the homeowner to make his repairs and preserve his lawsuit against the contractor. At present there is not case which settles this issue definitively.

V. LEGAL THEORIES FOR RECOVERY IN CONSTRUCTION DEFECT CASES

A. Breach of Contract/Warranty

Generally speaking, if it's not in writing, it doesn't exit. Get the contracts and read them. Many cases result from overlapping responsibilities of designers and builders for given construction defects with vague design specifications. Most cases involving building defects come down to this.

i. Statute of Limitations

Again, there is need to review time limitations contained in the various contracts and in limited warranties provided by the various participants in a construction project. Generally speaking, claims for contribution or indemnity will not be triggered by the timeframe running from the date of loss, but will begin to run after the payment of money following an unsuccessful verdict or judgment against a defendant; however, in comparative fault post-tort reform jurisdictions, such as Texas, contribution and/or indemnity claims should be made before any settlement with the plaintiff, and alleged joint tortfeasors should be encouraged to participate in settlements. In Texas one cannot settle the plaintiff's claims on behalf of one joint tortfeasor and then bring a claim for contribution against another joint tortfeasor. In such instances, contribution claims are waived and only written, enforceable indemnity claims may be made.

The point in time to worry about the viability of contribution and indemnity claims is before any settlement with the plaintiff. In jurisdictions such as Texas, a settlement with the plaintiff will in most cases involve a waiver of contribution claims against other potential responsible parties.

ii. Statute of Repose

A typical statue repose, such as the Texas statute or repose, is ten years of the date of substantial completion. The actual trigger date for the beginning of the running of the statute of repose time period is usually the date of substantial completion, but it may be a time when the property is habitable or when construction is "completed". This may involve a question of fact.

One main problem with the applicability of the statute or repose is the fact that it will, in most cases, cut off even contribution claims, which may not be ripe until sometime after the litigation has developed.

The rule: With any construction defect case, the statute of repose should be ascertained immediately to see to what extent it may terminate claims at any time against potentially responsible third parties.

iii. Waiver of Subrogation

Many large construction projects utilize A.I.A. standard form contracts for all general contractor, subcontractor and consultant agreements. This form is designed to avoid subrogation cases between the property carrier and incorporates the A201 broad conditions which contains a broad waiver of subrogation for losses covered by property or builder's risk insurance. These claims are enforced in most jurisdictions.

The A201 form was amended in 1997, and there are now few, if any, exceptions which exist to avoid the waiver of subrogation provisions. The actual agreement must always be reviewed as, in many instances, the parties to the contract delete or amend the waiver provisions through an addendum to the contract.

There is not time in this paper to review all the arguments pro and con on the enforceability of waivers of subrogation. Up until the 1997 iteration of the A201 form a subrogation case could be brought after the completion of the Work (a defined term) and the temporal limitation was held to apply to AIA Waiver of Subrogation clause. Recent cases have suggested that the temporal limitation is not longer available and so long as the Work which has now become a residence or a commercial building is the same property which was insured during the course of construction ("insurance applicable to the Work"), the waiver applies.

Litigation still centers on whether adjoining property, (insured under contracts other than a builder's risk form, under insurance contracts that are separate and different from insurance applicable to "the Work") is subject to a waiver of subrogation designed to eliminate litigation over damage to the Work.

B. Negligence - The Economic Loss Doctrine

If the damage occurs to the subject matter of a contract, in most states, the cause of action must be couched as a breach of contract or breach of express warranty claim and, in most states, there would be not cause of action in tort, for negligence or otherwise. If the essence of the claim is that the purchaser did not get the benefit of his bargain, in all likelihood the purchaser will be limited to a contractual claim for the disappointment over or breach of his contractual expectations. Tort remedies may not be superimposed to expand a party's rights under a contract. This is, in essence, part of the economic loss doctrine that applies to most construction defect cases.

In many states, there is no tort cause of action for negligent construction against a builder or a designer. These cases rely on the economic loss doctrine in concluding that construction

defect cases arise in contract and not in tort if they only involve damages to this "product". The economic loss doctrine has been widely accepted and appears to be expanding in scope. However, recently, California determined that a claim could be brought against a contractor where the construction defect caused damage to other portions of a home. This is commonly referred to as the "component part exception" to the economic loss doctrine.

Of course, where the construction defect damages other property that was not part of the work or causes personal injuries, then tort claims may generally proceed. As a practical matter, and as will be explained in this section, regarding liability insurance coverage issues, the focus in the claims against the general contractor will be for injuries in addition to damage to "the Work" itself. Claims against subcontractors may proceed based upon the theory that the Work performed by one subcontractor has damaged the Work performed by others, which should be compensable under most CGL forms.

The ultimate economic loss issue involved with claims against general contractors and subcontractors is whether the pertinent contract is that contract which exists between plaintiff (developer/owner of property) and the general contractor, or whether the economic loss doctrine applies from the perspective of the contracts entered into by various subcontractors. If the test involves damage to the subject matter of the contract from the perspective of the contract benefits flowing to the owner or developer of the land, then it would seem that even the work performed by subcontractors would be subject to the limitation that claims must be brought in contract and not in tort. Typically, there is no direct contract between subcontractors and the owner or developer of a construction project property. Typically, the owner or developer contracts with the general contractor and the general contractor in turn contracts with subcontractors. Subcontractors in turn contract with sub-subcontractors, etc. If the ultimate

plaintiff is limited to a contractual theory even though he has no contract with a subcontractor, this expansion of the economic loss doctrine would seem to cut off virtually any form of tort claim against participants in a construction project. There are cases going either way on this issue to date.

C. Strict Products Liability

The same economic loss principles apply to product claims. If damage is done to the product itself, typically the owner of the product is relegated to contract or warranty theories. By the same token, if the defective product causes damage to other persons or other property, the economic loss doctrine does not apply and tort remedies are available for redress of these wrongs.

Sometimes plaintiffs have attempted to avoid the application of the economic loss doctrine by suing a component part of one product alleging that the component part caused damage to other components of the same product. In most instances, courts have applied the economic loss doctrine if it can be shown that the entire product was the subject of a contract between the owner/plaintiff and the manufacturer of the completed product. Attempts to create a product or tort cause of action against component suppliers have been thwarted by application of the economic loss doctrine in these "component part" cases.

VI. TACTICAL CONSIDERATIONS IN LIABILITY CASES WITH RESPECT TO JOINDER AND CONTRIBUTION/INDEMNITY CLAIMS

A. Whether or Not To Join Third Parties in the Primary Case

Are you better off joining third parties? It depends.

Many recovery cases arise from a situation where an insured has been sued in a large construction defect case and has a right of indemnity and/or contribution against other tortfeasors. In some cases, the plaintiff may only have a contractual right of action against the general contractor and/or architect under a breach of contract theory. It is then up to those entities to file a third-party claim against subcontractors and/or subconsultants. The first consideration to be made is whether or not joinder is permissive or mandatory. In some jurisdictions, joinder of these entities may be mandatory and a claim will be lost if it is not pursued in the original litigation. More commonly, joinder is permissive and is at the option of the defendant.

Some jurisdictions have abrogated joint and several liability to an extent such that joinder of a third party not originally sued by the plaintiff will not be allowed. These decisions generally only affect rights of contribution under tort law and not the right of express contractual indemnity. As discussed above, most construction defect cases are brought in contract given the expansion of the economic loss doctrine. Therefore, in most jurisdictions, a contractual claim for indemnity will be the proper course of action.

If joinder is merely permissive and not mandatory, then a decision must be reached as to whether or not the third party should be joined in the original litigation. Generally, joinder of all at-fault parties that can be brought in the original litigation should be made by a defendant in

order to minimize that defendant's risk. In our experience, the prospect of years of litigation with dozens of depositions will generally result in agreement by all parties to participate in an early mediation, once the experts have reached their conclusions, and thus there is a greater opportunity to settle the case before engaging in substantial costly discovery efforts.

Reasons for settling the underlying case and pursuing a later claim for indemnity or contribution against the third party may include pressure from the insured due to business and/or financial consideration (e.g., the insured's bonding capacity is affected by the ongoing litigation) and/or a settlement demand made by the underlying plaintiff is less than the liability assessment made by the defendant's liability adjuster. Clearly, every case is different and a variety of scenarios may arise which make the early settlement of underlying case and later pursuit of an indemnity claim attractive to an insurer.

What if you insure the contractor and you believe the problem is one of design? Generally, there is no privity between the contractor and the architect. As we have also discussed, the economic loss doctrine or a jurisdiction's joint and several liability provisions may bar a claim for contribution. Under these circumstances, the general contractor may have to assert a counterclaim against the owner, thereby forcing the owner to sue the designer for indemnity.

A leading consideration that should be employed in deciding whether to bring third-party claims is whether the case has to be tried or whether it should be settled. In comparative fault states where contribution and indemnity claims have to be made before one settles with the ultimate plaintiff, it would seem to make sense to cast a wide net and include all potential contributing parties by joinder early on in order to gain the benefit of their contribution towards

an ultimate resolution. If the case has to be tried, in many jurisdictions, contribution and indemnity claims are preserved and ripen only after imposition of an adverse judgment or verdict. Statute of limitations in those cases runs from the time of the judgment or adverse verdict, and in some cases even later (when the adverse judgment is paid). In many states contribution and indemnity claims are preserved. In a case where a defendant is better off not bringing a claim against a third party for contribution or indemnity because it may create difficulties defending against the plaintiff's case, there may be a desire to postpone the assertion of contribution or indemnity cases until after the underlying case goes to verdict or judgment.

Keep in mind that the statute of repose is always ticking. Once the statute of repose runs, even contribution and indemnity claims will not survive.

Sometimes bringing a case against a third party may involve an admission by conduct that there may have been shortcomings in the performance by the original defendant. This may or may not be a desirable strategy. Again, the ultimate decision with respect to joinder of third parties may be whether it is believed the case will try or may settle.

B. Preservation of Claims Against Third Parties in Settlement Agreements/Releases

Many states have abrogated contribution claims by or from settling joint tortfeasors. For those jurisdictions which continue to allow such claims, generally, in order to pursue a contribution claim following settlement with the underlying plaintiff, the defendant will need to have a release which releases both the defendant and all parties from whom the defendant intends to seek contribution. The rules surrounding contribution are jurisdiction-specific and therefore before negotiating the appropriate release language, a lawyer knowledgeable about that

jurisdiction must be consulted to ensure that the contribution rights have been properly preserved.

Indemnity claims generally arise via contract and may not require specific release language (although it should be made clear that the payment by the defendant is being made for a claim which falls under the indemnity obligation set forth in the contract. There are also different statutes of limitation regarding indemnity claims. An indemnity claim arising out of a written contract provision may be subject to the standard contract statute of limitations. However, if the indemnity claim arises under the common law, there may be a specific statute which applies, which is often one or two years from the date payment has been made. Again, each jurisdiction is specific as to the statute to be applied and the requisite language to be contained in the release and a practicing lawyer from the jurisdiction should be consulted in order to avoid missing a statute of limitation.

Generally, in order to trigger the indemnity obligation, a tender needs to be made after receiving notification of a claim. Most indemnity provisions include a right to recover attorneys' fees incurred after the matter has been tendered. The breach of contract claim will not arise until the proper tender of indemnity has been rejected. Therefore, to ensure that attorneys' fees expended in the liability case are recoverable, the tender letter should go out as early as possible.

VII. COVERAGE FOR CONSTRUCTION DEFECT CLAIMS

This has been a fertile area in the last few years. Basically speaking, development of the economic loss doctrine and case law restricting coverage for CGL claims based upon construction defects have developed in roughly parallel fashion. Recent case law indicates that CGL carriers may be successful in arguing that there is no coverage to the work itself and that

construction defects in the work itself due to poor workmanship may not constitute "occurrences" in figuring coverage under the typical CGL policy. By the same token, a claim brought against one subcontractor alleging damage to the work of another subcontractor may be sufficient to trigger coverage.

Unfortunately some of the best factual claims, based upon nonperformance of explicit contractual responsibilities, may be excluded from coverage. Artful drafting may trigger a duty to defend and may make the case worthwhile from a cost of defense perspective, but pleading only gets you so far in a large case. Ultimately, liability insurance carriers increasingly attempt to limit their responsibility for construction defects so as not to assume the responsibility of a performance bonding company or a guarantor of the good workmanship of their insured. Thus, it becomes important to show that damage to other persons or other property (beyond damage to the work itself) was caused as a result of the defective construction. This is of course dependent upon what the facts present.

It is very common these days to have a liability case precede in parallel with declaratory judgment actions brought by liability carriers attempting to escape their duties to defend or indemnify their liability insureds. Negotiating settlements in this increasingly complex environment requires effective counsel experienced in handling these multi-faceted claims.