

BRANDI BLAIR CO-AUTHORS SYNOPSIS OF ARTICLE “ANATOMY OF A CONSTRUCTION CLAIM” FOR USLAW MAGAZINE+ WINTER 2019-2020 ISSUE

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JSH partner [Brandi Blair](#) partnered with [Denise Montgomery](#) of Sweeney & Sheehan to summarize their article, “Anatomy of a Construction Claim,” for the latest issue of [USLAW NETWORK’S Magazine+](#). The unabridged 4,500-word article originally appeared in [DRI’s For the Defense Magazine in February 2019](#), after Brandi and Denise presented on the topic during DRI’s Construction Law Boot Camp in November 2018.

CONSTRUCTION CLAIM LANDSCAPE

Construction defect litigation is on the rise. Practitioners who are new or unfamiliar to this work need to understand the unique challenges these claims present. A construction defect occurs when construction fails to perform as expected and the failure causes physical injury to an individual, the work itself or other property or work. Matters which do not involve personal injury can have an extraordinarily long period of viability. Some jurisdictions may allow claims for defective construction to proceed years after completion.

It is imperative to identify the named parties to make sure they are the proper entities per the contract and that they were served correctly. It is vital to be aware that the initial complaint rarely includes all of the parties that may be at fault. Construction defect suits involve many parties and may involve other areas of law, such as personal injury or wrongful death.

Common claims include those filed by homeowner associations against owner/ developers of planned communities. They are generally constructed in phases and involve multiple designers, developers and prime subcontractors, who perform work over many years. At the end of construction, the association will complete a transition study which identifies incomplete or faulty construction. It may be performed years after work completion and is often the basis for litigation.

If the transition report cites poor design, the owner or developer may then sue a host of other professionals. Architects, engineers and general contractors are the first-tier parties. Prime subcontractors are second-tier defendants. Third-tier defendants are those the prime subcontractors hired to complete portions of the work. When third-tier parties hire other contractors to complete their work, these last-tier defendants may not be joined to the litigation until years after the suit is initiated which presents a variety of challenges to the practitioners assigned to defend them.

It is your responsibility to identify and pursue your insured's subcontractors, product suppliers, product manufactures and third parties hired by others to perform the work.

INITIAL STEPS

First, review the physical file which contains time records and invoices indicating when work started and finished and payments which could identify subcontractors. It is key to understand what kind of work your insured performed, the alleged damages and the chain of events to identify everyone responsible for the alleged loss.

If the insured does not have complete files, obtain the insurance agent's file. They may have copies of executed contracts. Also check sign-in sheets and safety training records to identify who was on the job site, and when.

The carrier must determine if the entity seeking coverage is entitled to a defense. The two questions which must be answered, are whether there is an occurrence and if the entity seeking coverage is an insured under the policy. The duty to defend is separate from the duty to indemnify and it arises if the complaint alleges facts that fall within the coverage.

Typical policy language defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In a personal injury action involving a single instance of harm, there is an occurrence as defined by the policy. In the context of a claim for damages associated with defective construction an occurrence may vary. Some jurisdictions have held that negligent construction is an occurrence under the definition while others held that improper or faulty construction may constitute an accident if the resulting damage occurs without the insured's expectation or foresight.

POLICIES HIDING IN PLAIN SIGHT

The determination of whether an entity is an additional insured under a CGL policy requires that the insurer have all executed contracts. The American Institute of Architects (AIA) promulgates contracts which are used in the industry. The AIA contracts include provisions for indemnification and additional, primary insured status in favor of the owner and designer. The subcontractor is contractually obligated to indemnify these parties for damages, losses, or expenses, arising from the performance of work. The standard AIA indemnification language does not require the indemnitor to protect the indemnitee for its sole negligence.

The standard forms also require subcontractors to provide insured status for claims caused by the subcontractor's acts or omissions during operations. Completed operations coverage applies when the insured's work results in an occurrence of bodily injury or property damage during the policy period. The insurance must be primary and non-contributory to any GL policy maintained by the additional insured. If it is commercially available to the named insured, it must provide no less coverage than ISO CG 20 10 07 04, CG 20 37 07 04, and CG 20 32 07 04. If the insured executed an AIA subcontract, they promised to provide this to the enumerated parties.

Owner Controlled Insurance Programs (OCIP) and Contractor Controlled Insurance Programs (CCIP), often referred to as "wrap-ups" are policies unique to the field of construction. Both are policies which are held by the owner or general contractor for the length of the project and provide general liability, workers compensation and excess coverage for the project. A wrap-up policy is primary to any other coverage a subcontractor may have as part of its underlying contract. The subcontractors may not be aware of the existence of such a policy, so it is imperative to find out if one exists.

INSURANCE COVERAGE IMPLICATIONS

Homeowners often assert claims involving breach of common law or statutory warranties, consumer protection violations, fraud or unfair trade practices. An insurer must review each policy and explain to the insured the claims asserted and what coverage and exclusions may apply.

Insurers must be vigilant in identifying and raising any claims which fall under a policy exclusion. If there is any question of what claims are covered, coverage counsel should be engaged prior to drafting the appropriate reservation of rights to the insured and defense counsel should be provided a copy of any reservation of rights letter.

REPRESENTING THE INSURED

Construction defect claims often involve damages associated with punch-list work, which is unfinished work that is pending final payment. Punch-list items can be significant hurdles in the overall management of the claim. Some jurisdictions require that any claim arising out of the action must be asserted in the underlying action or it can be barred. Assigned counsel needs to ask the insured if their work has been completed and paid in full or whether there is a pending lien. Unpaid work can impede settlement between the insurer and the plaintiff, since most settlement agreements seek to end all disputes between the parties. Memorialize discussions with the insured which concern ancillary claims they need to pursue.

Another competing interest in these claims is the role of a surety. A construction bond is a type of surety bond used by investors in construction projects to protect against disruptions or financial loss. Bonds are not insurance policies and may impose significant financial obligations upon the insured. Proper representation of the insured may require cooperation between the surety and appointed counsel.

RISK AND ALLOCATION

Many construction defect claims occur over a period with multiple policy years and insurers. Depending upon the applicable Statute of Limitations or Statute

of Repose, a claim may not be filed for a decade after construction was complete.

Issues arise when the loss is ongoing, indivisible and implicates multiple policies and policy periods. Each carrier must determine when coverage is triggered. Courts generally apply one of four trigger theories and two methods of allocation. The four theories and when they trigger are:

1. Exposure – first injury-causing condition
2. Manifestation – personal injury or property damage becomes known or discovered
3. Continuous – injury or damage occurs continuously from the time of exposure or installation until the time of discovery
4. Injury-in-fact – personal injury or property damage occurs

The allocation methods for losses under multiple policies are:

- All-Sums or Joint and Several – allows a policy holder to choose the policies that pays the loss. Once the plaintiff is compensated, insurers allocate the loss among themselves.
- Pro-Rata – provides that policies respond in proportion to the amount of the injury or damage that takes place during that policy period.

EXIT STRATEGIES

The statute of repose is the deadline a plaintiff can file a claim. It is longer than the statute of limitations and it is important to identify the date that the statute of repose begins for an early motion to dismiss. Keep in mind that it can differ between entities. The statute of limitations is shorter and requires an analysis of what the plaintiff knew regarding defects.

Additionally, there are various statutes that protect purchasers of new construction. Many jurisdictions have statutes that require warranties and provide exclusive administrative remedies for new construction. If the plaintiff is an association which submitted any administrative claim for relief, these statutes provide an excellent avenue for early dispositive work.

Successful management of these complex claims requires counsel to wear multiple hats and advocate the interests of the insured and insurers at every phase of litigation and to be aware of all aspects of the timeline. Understanding the relationships between the parties, the insured's role in the construction, and the project timeline are essential to the successful management of these complex claims.

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