



2020 Construction Conference  
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## **Caution! Ethical Complications with Pre-Litigation Investigation of Construction Claims**

### **I. Background and Purpose**

Pre-litigation concepts and strategies can often overlook fundamental canons of the claims and litigation management process, ethical limitations and boundaries. This is highlighted with the interplay of coverage and liability. This roundtable panel delves into the roles of claims professionals, coverage, defense attorneys, and experts during pre-litigation investigation of matters. Knowing the typical methodologies versus the emerging trends utilized by each entity in these matters, and more importantly, the ethical implications considered and/or omitted during this process is critical. The discussion of coverage and liability often can push ethical boundaries and borderline improper claims handling or even bad faith during handling in pre-litigation.

### **I. Introduction to Investigation of Pre-Litigation of Claims**

Investigating claims and finding solutions and the data captured by them are proving useful on the front end of litigation for risk reduction, and efficient use of resources and on the back end of litigation (i.e. post-loss) with more effective claims resolution and assignment of liability.

There are numerous items to consider when handling claims prior to litigation. These are the categories to consider during the investigation of claims that may or may not impact a licensee's ethical obligations.

As to the benefits:

- There may be a win-win solution. The owner is happy with the result and the contractor/insurance carrier is happy keeping the matter out of litigation. However, do not let results circumvent ethical obligations to the insured.
- There may be a fast cost-effective solution to the dispute. Sometimes lawyers get in the way and slow down a case or resolution process.
- There can be salvaged business relationship. Working with trade partners and property owners to find solutions and resolving the defect claim without litigation may allow for the business relationship to continue.

- A way to move forward effectively with construction if project is ongoing.

There are coverage issues that need to be considered when evaluating the claim prior to litigation.

- Is the claim covered under the applicable builder's policy? Investigation needs to determine whether it is a design defect or construction defect. Coverage needs to be conveyed so the insured has an understanding of what is covered even without a lawsuit.
- Investigation is limited since no formal discovery can be completed. Cannot compel deposition testimony or information from third parties. Need cooperation. This may impact coverage.
- When expert reports are created during investigation who should they be shared with. There are potential risks turning them over to the property owner who may use them against the builder later.

There are cost considerations that a builder and insurance carrier must consider. Sometimes, resolving a claim in pre-litigation versus litigation is not always the most cost-effective solution. How does this impact a individual's ethical obligations?

- Repairs v. litigation costs (repair may not always be the best option)
- Release of liability. Language in the release is important. What is a property owner releasing since there is no lawsuit? Sometimes it is not well defined.

Integration of all these concepts provides a more holistic understanding of risk, incident facts, and adjudication of claims. Examining the potential for resolution and evaluate liability allows us to know, rather than surmise or opine on, what happened in the event of a loss.

## **II. Case Studies**

Pre-Litigation Investigation of Claims in action.

The best way to exemplify how strategies, emerging trends and important considerations will shape the future of claims and litigation is by looking at recent examples.

### **A. Case Study #1**

1. Construction issues involving the carrier, experts, owner and developer. Octavia involves defects of a louver system in San Francisco. What happens when the retained expert determines that it is a design issue and there is no resultant damage? Is the expert only communicating with the attorney? Does this defeat coverage under a commercial general liability policy? Is a repair even necessary?

### **B. Case Study #2**

1. Retention of evidence in a claim. What is a party legally required to maintain? What if the company policy differs from what is demanded by the Plaintiff?

**III. Process and Procedure:** Discuss how the investigation and data obtained will play into legal process and procedures. Discuss if and how the data can, should and likely will be used by the various parties

**Trends in Coverage:** Emerging trends vary by jurisdiction. However, there is a predominate claim in the industry. It involves creating coverage for costs to prevent damage from occurring or to stop damage that has already begun to occur. For example, a contractor defectively installs louvers for windows in a residential high rise. Water intrusion damages interior drywall. Typically, the damaged drywall is a covered cost, but the louver repair costs aren't. However, some courts are finding coverage for the costs to repair the louvers under the theory that it must be done to prevent further covered damage. The difficulty with this argument is that, it is not necessary to repair the louvers to effectuate repairs of the already damaged drywall.

### **Determination of Liability with Limited Discovery**

Whether an expert opinion is a consideration or not in the assignment of liability on a construction accident, defect, or property loss claim, the procedure to which liability is determined shouldn't be any different. This is especially true for experts who are generally involved post-loss and will be on the front lines providing consultation to the claims professional and attorney. The difference between the way this was done in the past versus where the industry is going directly correlates with technology. Specifically, the availability and type of data produced, the reliability of the data itself, and the subsequent development of expert opinions.

Will the claims and litigation community, on both the plaintiff and defense sides, or property owner and contractor's side in pre-litigation, universally accept the data produced by experts and technology? There is surely a universal cause for concern with perhaps rudimentary tasks performed. Examples:

- Destructive testing on defect claims. What happens when a property owner makes a claim with no legal counsel? The expectation is the contractor will investigate and/or perform testing of the defective components. Will the property owner accept the findings of the defense even if they are not favorable to the owner? Will the property owner react to the testing by hiring their own consultants and counsel?
- Accident reconstruction on construction sites. Emerging technologies with photographs, videos, proximity sensors and more can recreate accidents with little contention. However, have the accidents been recreated without context or do they capture the entire picture? Discovery is limited at the pre-litigation phase so you may not have the full picture of the landscape.

In any scenario, the good comes with the bad, and vice versa. With a law that is lagging, it is unclear how the opposition will react. Clearly the use of technology and experts yields many pros, and conversely additional cons. Voluminous data will undoubtedly provide more details on cause and origin investigations and provide more

accurate determinations of liability across the board; however, certain questions will undoubtedly arise through the claims and litigation process that test the rules of expert testimony and limits of the scientific method. The insurance and legal communities will be pressed to make policy interpretations and push the matter forward, respectively, as the investigation evolves.

### **The Scientific Method**

Experts rely upon the principles of the scientific method as a systematic way of solving a problem; hypotheses are formed and then systematic tests are performed to determine the conclusion (i.e. cause, liability, etc.). Understanding the scientific method as it relates to investigation of claims is critical, including the following six steps:

- Purpose/Question – Ask a question. Example: What caused the fire?
- Research – Conduct background research. Example: Inspect the fire damage. Interview interested parties. Etc.
- Formulate Hypothesis – State an opinion that must be tested; generally, in a cause and effect format. Example: The fire was caused by sparks produced by welding crew working in the attic of the building.
- Conduct Experiment – Test the hypothesis. Example: Bodycam video from the welding crew depicted sparks landing on the framing and attic insulation. Sensors in the attic pinpointed the time and occurrence of the fire.
- Data/Analysis – Record observations and analyze what the data means. Example: Review industry standards. Review data. Etc.
- Conclusion – Conclude to accept or reject the hypothesis.

The previous exercise is basic and arbitrary; considering the data discovered with technology (i.e. bodycam, sensors), there is potentially less contention with the expert opinion and subsequent assignment of liability in a scenario like this.

### **Accepting Results – Plaintiffs & Defense**

A more contentious foreshadowing of claims handled without litigation will occur when the builder performs their own investigation in response to a defect claim and produces the results. The results need to be accepted by the opposition even if they do not have their own consultant investigating the claim. What happens when the defense results are not favorable? Does this incite the opposition? Should the defense forego creating a formal report? This would apply in either direction – if the claimant alleges defects to a property, extrapolates across a property, and presents such opinions to the builder, the defense may have difficulty rebutting their opinion without comprehensive litigation. Similar to any skeptic, when there is a universal acceptance or acknowledgement of something new or unknown, the opposition is going to have a hard time.

## **IV. Conclusions & Takeaways**

## **Risk Reduction, Claims Resolution, and Assignment of Liability**

Innovation will never slow down. Emerging trends and important considerations during investigation of claims are being implemented on construction sites and inside homes every day. How can this aggregated “data” during investigation help us reduce overall risk in the construction industry? The answer is simple – by properly evaluating the claim versus the risks and having foresight. Additionally, claims resolution can benefit from important considerations through cost efficiency making determinations quicker and finding solutions prior to engaging in litigation. Lastly, claims professionals, attorneys, and experts can utilize experts and technology to more quickly and definitively assign liability. The takeaway: contractors, claims professionals and attorneys alike can benefit on all levels by understanding, embracing and leveraging the claims handling process during pre-litigation investigation of claims.