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High-End Single-Family Home Litigation: Where Emotions Outweigh Business Judgment

I. Who is Involved?

Wealthy Plaintiffs are accustomed to a high standard of living and to being treated deferentially from the Board Room to the Living Room. Few are familiar with adversarial litigation with entities over whom they have little or no influence. They live in multi-million-dollar homes. They are about details and want construction to their personal residences done perfectly, the first time. This puts contractors in an unenviable position; construction is never perfect and wealthy plaintiffs can use the threat of any imperfection as an excuse not to pay or file suit.

Often providing pressure in these situations are the homeowners' spouse and children. Many times, they must live, day-to-day, with the defects which can run the gamut from an unfinished pool deck to a leaky window.

II. Problems

Change orders in a garden-variety construction project are expected. But throw a wealthy, eccentric homeowner into the mix? You've got a recipe for an ever-changing construction scheduled to which the general contractor can never meet and, perhaps more critically, to which becomes unmanageable for the subcontractors. Deadlines are blown and the homeowner, not wanting to take responsibility, blames the contractor for delays.

Adding to the pressure cooker are unique material choices that present challenges to the contractors. Does the homeowner want a room with cork walls? Is there a type of marble that doesn't' comport with adjacent material that cause problems? While an architect and contractor may ultimately have held responsibility, may problems that arise from incompatible materials is a function of unfamiliarly; the contractors simply don't' work with some of the materials enough to know how things will turn out.

III. Fallout

a. Pre-Lawsuit (such as Florida's Chap. 558)

Unlike prior versions, the 2015 Chapter 558 version now requires claimants to identify the location of each alleged construction defect. While this seemingly subtle yet profound change to 558 might appear innocuous to the casual observer, the potential economic repercussions of this change could serve to dissuade property owners from participating in the 558 processes altogether. This is because whereas the prior iterations of Chapter 558 left open the possibility that a claimed defect might be fairly extrapolated throughout the entirety of the construction project, the 2015 version of 558 would appear to significantly limit – if not preclude altogether – the use of extrapolation. Suppose a wealthy property has 50 windows – if leaks are found in three of them, do all 50 have to be replaced?

While claimants are under no obligation to perform destructive testing or other testing for purposes of the pre-suit 558 notice, claimants would still arguably be required to at least examine all potentially defective locations to successfully meet the heightened notice requirements under 558. Even without necessity of destructive testing, the fact that claimants would be required to undertake such an extensive examination up front would almost assuredly result in exponentially greater pre-suit expert costs for the claimant. Given the recency of Florida's newest iteration of Chapter 558, it remains to be seen how the courts will interpret the new notice requirements or whether the courts will be taking a literalist interpretation and requiring claimants to identify the location of each alleged construction defect, an interpretation that would surely dissuade the more knowledgeable and sophisticated owners from participating in the 558 processes. Nonetheless, prudent practitioners would be well advised to discuss with their clients the potential financial implications of the new Chapter 558 notice requirements in deciding whether to opt-out of the 558 processes when preparing or negotiating the governing construction contract

b. Lawsuit

Typically, causes of action from the homeowner against the general contractor are breach of contract, violation of building codes, and negligence. Typically, from there, GCs pass through indemnity and subrogation claims downstream to their subs.

Indemnity is a right which insures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the entire fault is in the one against whom indemnity is sought. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 492-93 (Fla. 1979). Indemnity shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable.

A breach of contract does not necessarily constitute fault sufficient to defeat the breaching party's right to common law indemnity. *Diplomat Properties L.P. v. Tecnoglass, LLC*, 114 So. 3d 357 (Fla. 4th DCA 2013); *Federal Ins. Co. v. Western Waterproofing Co. of America*, 500 So. 2d 162 (Fla. 1st DCA 1986), *reh'g denied*; *Auto-Owner Ins. Co. v. Ace Electrical Service, Inc.*, 649 F. Supp 2d. 1371 (M.D. Fla. 2009).

An equitable subrogation claim arises when one defendant pays the entirety of the plaintiff's claim that, in equity, should have been paid by another. Under the doctrine, one who pays another's debt to a creditor is entitled to succeed to all the remedies possessed by that creditor against the original obligor. In equitable subrogation, the party who has discharged the debt "stands in the shoes" of the party whose claim has been discharged and therefore is entitled to the right and priorities of the original creditor, even though the party seeking it was negligent, if there is no prejudice.

In general, equitable subrogation is appropriate where: (1) the subrogate made the payment to protect his or her own interest, (2) the subrogate did not act as a volunteer, (3) the subrogate was not primarily liable for the debt, (4) the subrogate paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party. See *DaimlerChrysler Ins. Co. v. Arrigo Enterprises, Inc*., 63 So. 3d 68 (Fla. 4th DCA 2011). The Florida Supreme Court added a sixth element to a cause of action for equitable subrogation when it held that the subrogate could only prevail on a cause of action for equitable subrogation if it established that it obtained a release of the tortfeasor from the subrogation *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999).

Typically, the homeowner is entitled to the reasonable cost of repair or replacement for the defective work.

c. Typical Defenses

The First Cost Defense allows for a set-off against a plaintiff's damages for costs that a plaintiff would have incurred regardless of the defendant's conduct. *See Sch. Bd. of Broward County. v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059, 1070-71 (Fla. 4th DCA 2014).

Betterment, like a First Cost Defense, precludes a plaintiff from being placed in a better position through litigation than it would have been had it not been damaged by defendant's conduct. *See, Grossman v. Sea Air Towers, Ltd*., 513 So. 2d 686 (Fla. 3d DCA 1987); *Mall v. Pawelski*, 626 So. 2d 291 (Fla. 4th DCA 1993).

It may be found that the homeowner failed to mitigate its damages, and/or engaged in economic waste. If damages are awarded, homeowner is only entitled to recover damages that amount to the reasonable cost of correcting the alleged damage.

Any award of damages should be based on the difference between the value the Property would have had if there were no defects and the actual value of the Property when the work was completed. *See, Centex-Rooney Construction Co. v. Martin County*, 706 So. 2d 20 (Fla. 4th DCA 1997); *Aponte v. Exotic Pools, Inc.*, 699 So. 2d 796 (Fla. 4th DCA 1997); *Grossman Holdings, Ltd. V. Hourihan*, 414 So. 2d 1037 (Fla. 1982); *Gory Associated Industries, Inc. v. Jupiter Roofing & Sheet Metal, Inc.*, 358 So. 2d 93 (Fla. 4th DCA 1978); *Temple Beth Sholom and Jewish Center, Inc. v. Thyne Const. Corp.*, 399 So. 2d 525, 526 (Fla. 2d DCA 1981).

Any alleged errors or omissions in the design of the Project were patent, inspected, and accepted by the prime design professional and/or owner. Therefore, the design professional has no duty to claimant and/or any alleged breach of a duty was not the proximate cause of the loss, pursuant to the *Slavin* doctrine. *Easterday vs. Masiello*, 518 So. 2d 260 (Fla. 1988).

The plans and drawings were reviewed and approved by the architect, structural engineer and local building department and approved and permitted for construction.

The interpretation of the building code by the Building Official that the plans and drawings complied with the applicable code must be afforded great judicial deference and that agency's interpretation that the design complied with the applicable code when that was approved for permitting and construction must be sustained even though another interpretation may be possible.

There is no personal injury or damage to property other than the (describe property designed) as a result, the alleged violations of the building code in the (property design), and this Defendant had no actual or constructive knowledge of any alleged building code violations in the design. Therefore, Plaintiff's claims for violations of the applicable building code are precluded by *Fla. Stat.* § 553.84, and the *Seibert* doctrine. *Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Association, Inc*., 573 So.2d 889, 892 (Fla. 2d DCA).

IV. Challenges for Insurance Professionals

For claims examiners, cost and efficiency are the key concerns. The defense team must have their strategy prepared early in the case so that it can be determined how and when to challenge the other experts, the costs involved, and whether it is necessary a part of the defense strategy. That means, an early budget must consider and include the potential actions to challenge an expert. This may include the need for statistical experts and early work by the statistician to enable the challenge to extrapolation evidence to be performed. Often, in construction defect cases, defense team waits until the case does not appear it will settle to retain an engage a statistician. This may be a mistake and lead to a harder battle to preclude the extrapolation evidence. Having a statistician involved early on can help the technical construction experts in developing their opinions and position to bolter to claim of the improper sampling methods and sample sets.

If a claims examiner sets reserves prior to receiving a litigation budget from counsel, it is most likely based upon personal experience and/or "rules of thumb" for the particular jurisdiction – how much cases in that jurisdiction have settled for or where trial results have come down on a per home/unit basis and/or the amount the trade is contributing. It is therefore unlikely that a claims examiner would budget for challenges to the other sides' experts. Thus, when it becomes apparent to counsel that challenging the other side's experts, whether early or late in the case that issue should be brought to the examiner's attention quickly and separately from the other aspects of the case. Counsel should have a budget/cost estimate for any actions or motions to affect the recommended challenge and be prepared to describe and discuss in detail what will be required to do so.