



CLM 2016 National Construction Claims Conference
September 28-30, 2016
San Diego, CA

Decisions, Decisions, Decisions - How Plaintiff's Decisions in Picking and Choosing the Products and Issues to Pursue Affects Litigation

I. Defining the Claim:

Litigation is commenced by plaintiffs filing a lawsuit against another person or entity. Plaintiffs, in drafting complaints, pick and choose which claims to pursue. Whether done consciously, inadvertently, haphazardly, etc., these decisions by plaintiffs regarding which claims and who to pursue have profound implications on how the litigation progresses. In our panel, we will discuss variations of a construction claim and how the decisions of the specific claim or claims to be pursued will impact the various stages of litigation.

A. Who are the plaintiffs?

Plaintiff's counsel does not always get to choose who approaches them. They could be approached by a tenant, or a property owner, a HOA, or other management association. The identity of the potential plaintiff will start to define the scope of the action and the type of claims counsel may choose to pursue. Indeed, claims by property owners can necessarily differ from those of tenants or other potential plaintiffs. For instance, since a tenant has no privity with a property developer, the tenant's counsel would not file a contract based claim on behalf of the tenant against the general contractor or subcontractors that worked on a building. However, if counsel was representing the property owner instead of the tenant, he or she may likely assert such claims.

B. Who are the defendants?

The identity of the plaintiff and the claim types to be pursued will determine who the potential defendants are in an action. In a construction suit, these potential defendants may include entities such as those involved in the design, development, maintenance or construction oversight of the building including the manufacturers and suppliers of materials. Depending on who is named as a defendant further defines the character of the litigation.

C. What are the claims?

In many construction defect suits against contractors, the plaintiff's claims often focus on the workmanship itself. In these cases, one of the first things plaintiff's counsel will consider is the type of claim to bring, the time limits which may apply, and the insurance coverage which the defendant may have for the claim. Typical claims include negligence or breach of contract. The implications of choosing to allege either of these two causes of action can be profound. If the claim is for breach of contract only, this may limit (or even eliminate) the insurance coverage available if the allegations concern economic losses rather than personal injury or property damage. Further, the statute of limitations and defenses to the breach of contract claim may be affected by the terms of the contract at issue and state law. This all may require a different response from the defense, predicated on contractual defenses or geared toward coverage.

Another claim which plaintiffs often allege in a construction defect suit is a negligence cause of action. A plaintiff might choose to allege a negligence claim if the underlying damages include physical or property injury because it may invoke insurance coverage, avoid certain contractual defenses, and provide for different statute of limitations than a breach of contract action.

Further, another type of claim relates to defective products. If the focus of the case is on a product defect claim, then product manufacturers will likely get involved with the case. In these cases, plaintiffs may name manufacturers in a suit, alleging that a product was defective, in order to take advantage of the fact that manufacturers are likely to defend their products and help share some of the burden of prosecution by pointing to the installing subcontractor as the party who did something wrong when installing the product. Moreover, if a manufacturer is brought into the case, the parties will likely have to spend more money on the case than if a smaller party, such as a "mom and pop" hardware store, was brought into the case.

These situations may only involve the plaintiff against the general contractor, but there are other parties involved in the development of projects. General contractors will seek to transfer liability and risk to subcontractors that may be implicated in the case, and depending on the jurisdiction, the plaintiff may seek to bring negligence claims directly against lower tier parties. The risk transfer from the general contractor will be impacted by the nature of the claim and will be further influenced by any potential contracts between the general contractor and subcontractors. For example, if there is a strong indemnity clause in a contract between the general contractor and subcontractor, regardless of whether the claim is for breach of contract or negligence, the indemnity clause can pass this liability onto the subcontractor.

In the majority of construction defect actions there are allegations of physical damage. The scope of damages will usually dictate what the insurance carrier is willing to pay. For example, in California, some insurers take the position that a carrier is only required to pay for actual damages, and is generally not responsible for paying "rip and tear" damages. Further, plaintiffs may also consider whether or not the case was filed in a state that provides for access costs. This factor goes not only to the defendant's liability, but also goes to whether or not there is coverage for accessing the damaged material. This may be of particular concern when the defendant has limited funds.

Other factors considered by the parties when pursuing or defending a claim include the dollar amount of the claim, and most parties will also go through a cost-benefits analysis to determine whether or not to pursue or settle the claim. Additionally, plaintiffs may consider many other types of losses: loss of income, permanent stigma or diminution in the value of the property, interference with a sale if the defects emerge during a due diligence inspection, to name a few. For example, in a construction defect suit concerning an apartment building, if the plaintiff is the building manager, some of the damages alleged would likely be loss of income from not being able to rent out the damaged unit(s). On the other hand, if the plaintiff in that case is a tenant of the building, damage to the property or damage from bodily injury would likely be components in the damage calculation.

The panel's claim analysis discussion will utilize various scenarios that are commonly found in construction defect actions. Each variation of the scenario changes one aspect of the claim at a time so the impact on the litigation strategy change can be discussed. For example, claims that involve bodily injury in a construction defect suit will carry with it a different statute of limitations, defenses asserted by defendants, damages, experts, etc. We plan to discuss how each of these changes in the scenario will affect the decision-making of all parties involved.

II. Various Scenarios:

- A. Scenario # 1:** Plaintiff files action seeking damages for construction defects associated with improper installation of windows.

1. Plaintiff's Perspective

Typically in this type of case, the plaintiff would be someone who has an ownership interest in the property. From the plaintiff's perspective, asserting this type of claim is beneficial because there is typically a clear path to liability from installation instructions and published industry standards. Moreover, in this type of case there is also often a clear path to insurance coverage for resulting moisture damage as a result of the allegedly improper window installation.

There are, however, certain drawbacks that accompany this type of claim. For instance, installing subcontractors are typically overseen by generals, architects, bank inspectors, municipalities, engineers, and many others, including the Plaintiff to whom they will point to share liability.

2. Defense Counsel's & Risk Manager's Perspective

From the defense's perspective, the defense counsel often works hand-in-hand with the client's risk manager if the client has one. While the interests of the general contractor's defense counsel and risk manager are aligned, there are times in which their focus may differ. The risk manager is in the unique position to act proactively before something occurs, whereas defense counsel is typically brought in after the problem arises and a claim is made or a complaint has been filed. Thus, before an incident giving rise to a potential lawsuit has even occurred, the risk manager has the ability to be proactive and take steps to prevent a lawsuit from even occurring. For example, the risk manager can make sure any work contracts are written in a way to protect the company and make sure the required

insurance is in fact in place. Moreover, the defense counsel's focus is primarily on defending the litigation once a claim has been filed.

If, however, a potential lawsuit does arise, the risk manager might go through these steps once he or she becomes aware of the potential suit:

1. Investigation
2. Remediation
3. Identify which insurance policy will respond, if any (general liability, contractor controlled insurance program (CCIP), owner controlled insurance program (OCIP), Builders' Risk, etc.) and put the carrier(s) on notice.
4. Determine which subcontractors are involved and if they need to contribute to a deductible.
5. Who does the loss need to be tendered to?
6. What is the protocol for repair? Will the general contractor do repairs or allow the Owner to hire another party in order to reduce the general contractor's future exposure?
7. What happens if Owner doesn't allow the general contractor to do repairs and threatens to sue?
8. Look into additional sources of recovery, for example, a Subguard policy may cover faulty workmanship whereas a general liability policy does not.

As set forth above, the defense counsel and risk manager's roles and activities will likely overlap. However, a risk manager's role is often broader than that of defense counsel's since they address issues that are typically outside the scope of the defense counsel's role, such as proactive risk management and insurance coverage.

3. Claims Professional's Perspective

The claims professional typically gets involved in the case when a claim has been tendered to his/her company. A claims professional's duties vary from state to state, but they are always under a duty to promptly investigate claims and analyze them for coverage under an applicable insurance policy in order to determine if a defense and/or indemnity obligation is triggered by the claim.

If it is determined that coverage may be afforded under the policy, the claims professional will take steps to protect the interests of the insured. This, however, does not mean that defense counsel must always be retained, since it might be more practical to resolve the pending lawsuit by, for example, agreeing to fix the problem or paying the cost of fixing it without litigating the issue in exchange for a release.

If the matter cannot be quickly resolved, the claims professional will have to undertake an exposure analysis. This will include an analysis of the insured's potential exposure for uncovered claims as well as the insurer's potential exposure for covered damages. In many cases, the carrier may seek contribution from the insured for a portion of the uncovered claim, with the carrier funding the remainder toward the uncovered portion. It is in both their interests for the insurer and the insured to maintain open communication, discuss these types of damages and contribution requests and work together toward the resolution of the case.

4. Consultant's Perspective

When a claim involves windows, an expert might consider a myriad of things depending on the claims asserted in order to determine if the windows are in fact defective. First, the consultant needs to investigate the conditions at the property. The consultant will often perform an inspection of the windows at the site. A site inspection can be either visual (taking photographs) or invasive (cutting open adjacent wall surfaces in order to see how the assembly of the window was put together). In connection with invasive testing, windows are often spray tested, which involves having the walls opened up in order for the consultant to determine if water is entering into the building envelope and, if so, by what means.

Most instances of claims involving windows include air and water intrusion, which the consultant will investigate the existence or nonexistence thereof. The consultant will then attempt to ascertain whether there are any problems with the product or installation of the product. If the consultant does indeed find that there are problems with the product, the consultant can often provide assistance with tracking down the manufacturer or supplier. Moreover, the consultant can conduct research and analysis on the product in order to help prove up the alleged problem with the product and also determine if it was the correct product for the application.

When investigating possible problems with the installation of the product, the consultant will look at the workmanship means and methods of the window installation. Such a task would include determining the compatibility of adjacent products such as sealant or weatherstripping (adhesives, hardware, etc.). Further, the consultant may also consider the architectural plans, specs, details, and RFIs or ASIs in order to determine whether the issue involves improper installation of the windows.

The consultant can also assist in determining whether the maintenance or lack thereof played a role in the claims being asserted. Lastly, the consultant's findings can be helpful in pursuing any warranty claims.

- B. Scenario # 2:** Same as above but instead of improper installation, the claim stems from allegedly defective window products. This scenario may also apply to other building products such as failed lap siding (fiber cement), plumbing (such as Victaulic and yellow brass / dezincification issues)

1. Plaintiff's Perspective

From the plaintiff's perspective, alleging claim that involves a defective product has several advantages. First, manufacturers tend to be larger corporations with a dedicated dispute resolution arm and a budget to respond and negotiate the resolution of a claim. Additionally, the performance of products tends to provide a clear path to liability through ASTM or industry-standard performance metrics. Manufacturers also tend to be subject to consumer protection laws which may provide broader rights for consumers.

Conversely, prosecuting a product defect cause of action also comes with some disadvantages. First, alleging a product defect claim may constitute more expensive litigation and it may confuse adjacent issues of workmanship or design. Further, prosecuting the claim may require sophisticated expert testimony in order to define and explain the performance metrics to the factfinder. Lastly, litigating a product defect suit may require litigation in multiple fora: a class action on a product, and a discrete action on a failed installation on a single building.

2. Defense Counsel's & Risk Manager's Perspective

Defense counsel and the risk manager's analysis will be similar to that above but with addition of evaluating the product and any potential defenses or risk transfer opportunities related thereto. This may include a review of product selection to ascertain who selected the product and if it was appropriate. Working with the consultant to determine if the product itself is defective. If the product is defective or if the selection was by the manufacturer or supplier, there may be an opportunity for risk transfer to the manufacturer or supply chain.

3. Claims Professional's Perspective

The claims professional will need to evaluate the specific damages alleged in each matter. However, if the damage alleged by plaintiff is simply a defective component, and no damaged is alleged to result therefrom it is unlikely that coverage will be afforded for much, if any, of the claim. While this may reduce the insurer's exposure, the disparity of exposure between the insurer and insured can present its own set of problems.

4. Consultant's Perspective

The consultant will typically undergo a similar analysis as to what has already been discussed, while the Plaintiff may assert product problems, the consultant will still need to investigate the related workmanship component as the manufacturer will typically attack design and workmanship issues to shift blame from the product.

When product claims are asserted the consultant will often perform testing of the product and conduct an investigation of the product and other like it to either refute the claims or transfer the risk to the manufacturer and suppliers.

C. Scenario # 3: Same as above but in an apartment building (or other commercial structure)?

1. Plaintiff's Perspective

From the plaintiff's perspective, an advantage in asserting a construction defect cause of action that involves some type of commercial structure is that the damage amount may include additional losses such as claims for business interruption and loss of use. On the other hand, the property owner or tenant of a commercial building may come off as a less sympathetic plaintiff to a jury. Further, gathering the necessary evidence to prove such losses may be more complicated. Lastly, commercial properties may have first-party insurance schemes available to them, which they are likely to explore, and which the defense may use to detract attention from the liability story.

2. Defense Counsel's & Risk Manager's Perspective

This scenario presents the defense with more claim components to deal with and increased complexity. However, this may work to the defense's advantage especially if the causal link between the alleged defects and business loss claims is not strong. In actions with commercial properties the resolution strategies to be employed are often different from residential claims as the plaintiff's decisions are more likely to be based upon business, rather than personal considerations.

3. Claims Professional's Perspective

The increased claim complexity usually brings additional insurance policies into play for the entities involved. While this may enable the risk to be spread among more insurers, the complexity of these negotiations may often entail more expense than benefit.

4. Consultant's Perspective

The consultant must now also evaluate the alleged causal link between the physical damages alleged and the impact on the use of the property. Further, business interruption claims may also require the retention of specialized consultants to respond to these claims. These specialized consultants will work with the construction consultants to ascertain the specific impact on the property and how it relates (or fails to relate) to the damages asserted.

D. Scenario # 4: Same as above but the claim is for defective design and specification?

1. Plaintiff's Perspective

Claims involving defective design and specification are advantageous from the plaintiff's perspective because they may involve errors and omissions insurance, which may have different limitations than commercial general liability policies. Conversely, these types of claims typically have a less clear path to liability and are more likely to be dependent on testimony from a licensed professional in that jurisdiction about the standard of care.

2. Defense Counsel's & Risk Manager's Perspective

The pro-active risk manager is well positioned to deal with this possibility when drafting the construction agreements. Many construction agreements address the relative rights and duties between and among the design and construction teams. While many contractors overlook this language as "boilerplate", the careful review and crafting of this language can greatly impact the potential liability and exposure faced by the construction team. Likewise, the defense counsel will have to carefully evaluate the contract documents, including possible indemnity provisions in favor of the design team, to ascertain risk transfer strategies.

3. Claims Professional's Perspective

As many general liability policies limit or exclude coverage for design claims, the claims professional will need to carefully evaluate whether the claims are design, construction or some combination thereof. This analysis will impact the carrier's coverage position and resultant exposure.

4. Consultant's Perspective

Design claims may necessitate the retention of design professionals in that same field. In some jurisdictions, Plaintiff must provide a "Certificate of Merit" before filing an action which states that a design professional in the field in question has been consulted and believes the claims are meritorious. Accordingly, the defense will often retain design professional consultants to rebut Plaintiff's claims. The consultant will likely also conduct an evaluation of whether the allegedly improper design was constructed as designed or changed by the construction team.