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Build Your House on Solid Rock Not Sinking Sand: How to Challenge Experts in Construction Defect Cases

1. Role of Experts in a Construction Defect Case and Qualifications

Experts in litigation are generally used to provide assistance to the tier of fact to understand issues and to provide opinions on the facts. In construction defect cases, the effective use of expert witnesses can make or break your case. For the defense, being able to effectively challenge or disqualify the plaintiff's expert witness can lead to a non-suit or eviscerate the case to allow for either early resolution or a defense verdict. However, to be able to ensure you can effectively challenge opposing expert witnesses, the analysis must start early in the case.

An expert needs to have a wide range of experience and skills to be effective. At a minimum, most states require that an expert be licensed in the jurisdiction where the trial is located in order to testify. In addition, an expert witness should possess the following skills and attributes: (a) knowledge and hands-on experience in the relevant trade/issues, not just academic or litigation support work; (b) familiarity with the type of project at issue and the technical issues peculiar to the project; (c) understanding of the customs and practices of the community of professionals involved with similar projects in similar conditions at the time of construction; and (d) familiarity with different types of design and construction contracts at issue and the contractual obligations such contracts create.

The expert's investigation and ultimate opinions on a wide variety of technical issues related to design, construction, codes, standards, practices, and contracts can substantially impact the outcome of a case. The expert needs to be able to develop valid opinions, based on the facts, supported by qualified and quantified data and accepted industry literature and methods, in conjunction with his or her analysis. The experts' knowledge and understanding of the standards for rendering expert opinions (Daubert, Robinson, Frye) is essential.

Critical to this preparation, an expert must be able to develop or withstand a so-called "Daubert", or legal challenge, to the expert's methods. The qualified expert must be able to: understand accepted testing procedures, analyze and interpret data from the testing, formulate conclusions based on the data, and critique other interpretations.

Essentially, under the Federal Rules of Civil Procedure, Rule 702, the following analysis must be performed to determine whether the witness is sufficiently qualified to render expert opinions: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).)

2. How to Determine if You Can Challenge to Other Side's Experts

To challenge the other side's experts, you may first need to determine that you have retained the proper experts as your experts will be essential in helping you determine how to challenge the other side's experts. The vetting and choosing of a truly qualified expert is of utmost importance for successfully challenging the methodologies of an opposing expert. Differences exist between an expert who meets the court's requirements for qualification on paper, and those who truly hold the requisite experience to be a powerful asset. Your expert must be of the appropriate discipline and have actual knowledge and understanding of the particular subject matter at issue. You may or may not need an engineer.

Your expert must have experience in the design, analysis, and/or construction administration of the specific building type which is subject to the case. Ex: A respected, renowned, properly licensed architect who specializes in contract negotiations and specification writing will be an ineffective expert for challenging extrapolation in a case involving installation deficiencies of window flashing at a high rise condominium. Your expert must be licensed to practice in her respective profession in the jurisdiction where the subject property is located. Many states consider diagnostic and forensic engineering and architecture, including preparation of expert reports and delivery of expert testimony, as professional practice. Holding a license in another jurisdiction is not sufficient, and essentially discredits your expert. These issues and standards can and should also be used to challenge the qualifications of the opposing experts.

3. Opposing Extrapolation Claims

One key tool plaintiffs use in construction defect cases to increase the amount of damages claims is extrapolating the findings from a small sample set to the entire building or project. The defense can challenge this attempt to extrapolate if it is prepared. This approach to challenging a portion of the experts' opinions can serve to eviscerate the overall claim by the plaintiff or, at times, discredit the plaintiff's expert.

The defense experts need to be able to critically analyze and apply reverse logic to evaluate the opposing expert's sample size(s). Buildings vary by type and are creations designed by people; thus, no set formula or statistical algorithm may be appropriate. There is no cookie-cutter equation for "appropriate sample size" for testing a suspected building defect. Thus, in part, the size of a sample set

is largely a function of the level of experience that the opposing expert has in designing/analyzing/constructing buildings of a similar type.

Investigation of construction defects inherently involves multiple levels of sample size determination. However, this does not equate with what makes the evidence sufficiently reliable upon which to allow the trier of fact to accept extrapolation from the sample set to the full universe of the project.

Determining the sample size and how that sample set is applied to the greater universe requires a detailed analysis. For example, if you have a sample set of 33% of windows, what is that comprised of? Are there different types of windows, different window assemblies in different building types? Were there different designs for each building type? What about what crew performed the work? Further, what means and methods of selection, testing and evaluation of the sample size were employed? Thus, the only way to determine, and thus challenge, the significance of the size of a sample, and multiple levels of subsamples, is through careful analysis of a qualified expert who is intimately familiar with the building type(s) being investigated.

Courts will permit plaintiffs to rely on statistical methods in determining its damages. However, the defense must be able to hold plaintiffs' feet to the fire to limit this to what the law provides. The use of statistics necessarily yields an inaccurate calculation of damages. (*Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 750.) California courts have affirmed that the use of statistical sampling to determine damages *cannot* be used if based upon flawed statistical analysis. This issue was clearly addressed this past week by the California Supreme Court decision in *Duran v. U.S. Bank National Association* (59 Cal. 4th 1172 (2014)). The Court in *Duran* clearly stated that improper implementation of a sample cannot provide the proper foundation for extrapolation:

A sample must be randomly selected for its results to be fairly extrapolated to the entire class. Although the trial court initially drew names for the RWG at random, several of its later rulings compromised random selection. "A 'random sample' is one in which each member of the population has an equal probability of being selected for inclusion in the sample." (Saks & Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts (1992) 44 Stan. L.Rev. 815, 821, fn. 48.) Even when selection procedures appear to be random, errors may arise that undermine randomness. For instance, nonresponse bias can occur if a sample is chosen randomly from a group containing only survey respondents. The potential for bias arises because those who do not respond have no probability of inclusion in the sample. Thus, although the participants are randomly selected from among respondents, the sample will not reflect the characteristics of members of the population who chose not to respond to the survey. (Phillips, et al., What's Good in Theory May Be Flawed in Practice: Potential Legal Consequences of Poor Implementation of a Theoretical Sample (2012) 9 Hastings Bus. L.J. 77, 90-91.)

Selection bias occurs when members of the population are chosen based on a nonrandom criterion or are selectively included or excluded from the sample group. In litigation, selection bias can occur when members of the population are allowed to opt out of the class. If plaintiffs with high-value claims opt out, the sample will be skewed toward low-value claims and may result in an unfairly low estimate of damages. Conversely, if the opt-outs represent mainly low-value claims or plaintiffs with no valid claim, the sample results will be unfairly inflated. Self-interest may motivate class members to act in ways that will maximize the class award. Thus, any nonrandom method of picking sample cases will potentially be skewed and therefore be an inaccurate estimate of the population average. If this issue can be exploited, the court may understand it should exclude this extrapolation evidence. A sample that includes even a small number of interested parties can produce biased results. The impact of this error is magnified when the biased results are extrapolated to the entire population. Selection bias cannot be cured simply by increasing the size of the sample. "When a selection procedure is biased, taking a large sample does not help. This just repeats the basic mistake on a larger scale." *Duran*, supra, at 41-42.

Notably, other jurisdictions treat extrapolation evidence differently and will allow extrapolation evidence to be introduced to go to the jury. For example, in 2003, the Florida Supreme Court addressed the admissibility of extrapolation evidence in expert witness testimony under *Frye* in a products liability case and found that *Frye* only required the trial court to examine the general acceptance of the underlying science and experiments from which the expert witness obtained the data used to draw his conclusions, not the reasoning or conclusions themselves. *Castillo v. E.I. Dupont de Nemours & Co.*, 854 So. 2d 1264 (Fla. 2003). In *Castillo*, the court found that the science underlying each method was generally accepted, and therefore the opinions of the plaintiff's expert witness were admissible; however, any questions about how the expert reached his conclusion would go to the weight a jury should give to the opinions not the admissibility.

Thus, the defense will do well to work aggressively to demonstrate that the plaintiff cannot meet the requirements for the introduction of its "sampling" evidence at trial that the samples were fairly representative of the whole. Once this is undermined, the plaintiff will be hard pressed to convince the court of the relevance and proper foundation for this extrapolation claims. The cases examining the recovery of damages all refer to the certainty of the actual damages suffered by the aggrieved party. The Courts have found that speculative harm is insufficient to sustain this burden of proof. Thus, although courts have recognized statistical methodology of random sampling and extrapolation as a method for determining damages, the use of statistics does not dispense with proof of damages nor does it change substantive law regarding Plaintiff's burden to prove its actual damages.

Plaintiff may attempt to argue that, because statistical sampling and extrapolation are accepted methods to calculate damages, the court should simply accept the extrapolated quantities. This is not the case where the statistical sampling, and by extension, the extrapolated quantities, are flawed and substantially overstate plaintiff's damages. For example, if the plaintiff's randomized list has flaws, that can lead to selection bias, overstated defect rates, and margins of error, and therefore an overstated claim for damages, which should be rejected.

III. Claims Analysis: Setting Reserves And Analysis Of The Defense Approach

For claims examiners, cost and efficiency are the key concerns. Thus, when consideration to challenging an expert, the defense team must have their strategy prepared early on 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 times, 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 particular 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 effect the recommended challenge and be prepared to describe and discuss in detail what will be required to do so.

Most judges in most jurisdictions will be reluctant to prevent or limit a party from presenting its case via expert testimony – especially in technical cases such as construction defects requiring expert testimony. A claims examiner is likely to assume that the judge will require that such a motion be filed as a motion in limine (pre-trial motion) rather than one that can be resolved at an earlier stage of the case. However, if there is a basis early on in the case to challenge the other side’s experts, counsel and the claims examiner should discuss it. Of importance is to consider the goal of the disqualification motion:

- Is the goal to disqualify an expert or limit what subjects upon which the expert can testify?
- What percentage/how much of the damage claims will be eliminated by challenging the other side’s expert?
- Is the other side’s expert trying to introduce “junk science” into the case?

Like a motion to challenge an expert, when it becomes apparent to counsel that challenging extrapolation testimony, 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. With proper planning, and the retention of a strong defense expert team, challenges to the plaintiff experts can be an effective part of the defense strategy.