



2020 Construction Conference
September 29 – October 1

Supersized: Analyzing and Defending Claims Involving Large Single-Family Homes

I. Claims Handling

Policy Review and Preparation to Defend

Upon receipt of a construction defect claim involving a large, expensive single-family home, adjusters and their selected counsel may be asked to address issues not found in more common kinds of defect claims. More traditional strategies to determine exposure arising out of an insured's work and set reserves may prove lacking, in light of more complex legal and factual issues. Such heightened exposure may also require an earlier analysis of an insurer's coverage position relative to the claim, including the potential need to pursue judicial determination of applicable policy provisions.

Third Party Involvement

Due to potential increased exposure and litigation costs, insurers must examine earlier and more thoroughly the opportunity to apportion such liabilities to third parties. The panel will discuss strategies to maximize effectiveness of additional insured and contractual indemnity tenders, in order to shift financial burdens to those who have previously agreed to accept them. Consideration will also be given to proper involvement of excess or umbrella carriers, to ensure satisfaction of applicable notice requirements.

II. Claims Investigation and Assessment of Potential Damages (20 minutes)

Expert Involvement

Due to project technical specifications and requirements, these properties frequently require retention of experts across multiple disciplines. Whereas in more conventional claims, an architect or engineer with a sufficiently broad background may be able to opine on a variety of various issues, more complex projects require specialization.

Unique code requirements, construction methodologies and uncommon materials demand experts with specific experience, who are able to address issues with which they are already familiar.

Cost Considerations

The session will address the reasons why these claims present significantly higher damages calculations, including the availability of appropriate materials and qualified labor, the concept of “resort pricing,” higher overhead costs, and increased design and review costs. The panel will also discuss the insufficiency of commercially available estimating tools and software, which do not adequately factor in the types of materials or means and methods necessary to complete projects of select quality.

Availability of Remedies

When considering an appropriate repair or remedy for an alleged defective condition in a quality home, mere replacement or replication of the original detail or material is frequently not an option. In crafting an appropriate remedy, attention must be paid to the concept of betterment, to ensure that a homeowner does not receive a windfall as a result of the claim, and that coverage pitfalls may be avoided. Additionally, in many states, the availability of certain remedies is in part controlled by statute. Knowledge of such schemes is necessary to evaluate whether a proposed remedy may be mandated by a court, and the extent to which it may be covered under a policy.

III. Litigation Strategy

Discovery and Trial

In more common multi-family and single-family home litigation, determination of who is responsible for certain construction decisions is a straightforward process. In larger homes, general contractors and subcontractors are frequently required to interact not only with a homeowner client, but homeowner-retained architects, construction managers/representatives and accounting professionals. Targeted discovery is necessary to determine how complex issues are resolved during construction, and what role each of an often-broad array of individuals played in that process.

Unique issues at trial include juror impressions of, and reaction to the claims made. Most juror’s personal residences look significantly different than those with which they are presented at trial. Defense presentation strategies should recognize these reactions and seek to maximize any potential benefit to contractors.

Resolution

Because owners involved in these claims possess significantly greater resources than more common litigants, those homeowners generally do not share the same motivations demonstrated by homeowners' association or the average owner. Litigation tactics are often driven by personal dissatisfaction with a contractor's performance, perceptions of having been dealt with unfairly, or a desire to control the resolution of a dispute. Adjusters and their counsel should understand that outcomes in these matters are more frequently determined by a homeowners' need to achieve some measure of retribution, rather than simply the recovery of sufficient funds to address at least some of the alleged defects.

Because of these varied motivations, selecting a mediator experienced in these matters is critical. Homeowners with expansive resources invest time in understanding the issues involved in their claim, and if in doubt that a mediator shares that ability or a level of commitment to match that level of understanding, a homeowner will likely not be inclined to be persuaded to compromise. Finding that right mediator – and maximizing that mediator's effectiveness through provision of adequate information concerning the defense position – is critical to case resolution.