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Affidavit of Merit or Certificates of Merit -- Conditions That Are Precedent to Filing a Claim against a Design Professional

Large public and private construction projects usually require the retention of design professionals such as architects and engineers who in turn may retain sub consultants. While the services provided may be lucrative for the design professional(s), the potential exposure can be costly and depending on the size of the project it can be a long time until the alleged defects are discovered. Construction defect litigation is lengthy and time consuming and normally can last at minimum 3 years but as many as upwards of ten years.

I. PRE-CLAIM ACTIVITY

Not all claims begin as a lawsuit. In many instances, a claim begins by a Claimant or his counsel transmitting a demand letter. How the insurer and the insured handle pre-litigation activity is important and can often lead to resolution without the need for costly litigation. The process of negotiation begins immediately upon receipt of a claim at the first notice of loss. It is vital for the insurer's representative, be it an attorney or adjuster, to develop a positive relationship with the insured, as well as the claimant and especially before a claimant retains an attorney. Developing trust is as easy as knowing the details of the claim, acknowledging, to the extent possible, weaknesses and taking reasonable positions in connection with the need for documents and information. If an attorney has already been retained, the insurer's representative should contact the attorney, rather than the Claimant, to acknowledge receipt of the claim and to open a dialogue as to the issues and the best way, for all involved to resolve them. The insurer's representative should identify the immediate issues and the key documents needed to evaluate and resolve those issues. Distinguishing between primary and secondary issues is important. Primary issues are the recognizable ones such as project location, project status, whether the insurance policy has an eroding deductible, what was the design professional's scope of work, what are the specific allegations, and who did the design professional have a contractual relationship with and whether any other parties could be responsible for the issues being raised. Secondary issues are identifying other trades that performed work and who may be the expert(s) that could be retained by other parties.

The insurer's representative should work with the insured to be kept up to speed. Insurance policies typically include a "duty to cooperate" provision, which requires that the policyholder cooperate with the insurance company's investigation and evaluation of the claim. While it can

be very frustrating to respond to an insurance company's repeated requests for documentation and other information, the policyholder must satisfy its cooperation responsibilities.

Parties sometimes agree to delay or suspend litigation to allow time for settlement negotiations. While a "standstill agreement" can be a useful tool to resolve a claim and control litigation expenses, it is important to realize, however, that a standstill can reduce the policyholder's settlement leverage. A standstill must have a clearly defined deadline that provides a realistic period for the policyholder to provide necessary information, for the insurance company to review the information and respond, and for negotiations to proceed. Any negative to standstill agreement is the affects it can have on legal defenses such a Statute of Limitations and Statute of Repose.

The goal of pre-claim actions by the insurer's representative should be to assess exposure to the extent possible and try to resolve the case if it makes the proper business sense. However, claimants usually feel empowered in the pre-litigation phase, especially because most of the time they have not expended significant legal and expert fees so a settlement may not be possible which is why pre-litigation tasks can help to set up a good defense on behalf of the design professional.

II. LITIGATION

A. Contractual Defenses

Contracts can protect contractors and design professionals from liability. They can impose a shorter statute of limitation, a requirement to mediate (as a pre-requisite before filing a lawsuit with the detriment that failing to do so will prevent the prevailing party for recovering attorney's fees). It can provide limitation on the defendant's scope of work, and so forth.

Often, plaintiffs will attempt to impose duties that are not specifically enumerated. In *Bonadiman-McCain Inc. v. Snow* (1960) 183 Cal.App.3d 58, the owner argued that his architect did not give proper advice for the selection of the general contractor and engineer. The court held that this "did not fall within the duties ordinarily assumed upon an architect."

However, if contracts are vague or broad, they may expand the professional's duty to anything related to the matter in the contract. The same can happen when there is no contract, except that when there is no contract the professional may be better able to dispute its scope of work, then when there is a contract that a court decides to read more into it.

An example where a duty can be expanded is when design professionals or sub-contractor provide bids that include limited work only, to have the contractors seek clarification through RFIs or seek shop drawings, which are later used to blame the professionals for responses to the RFIs or improper shop drawings. Other examples are projects that are value engineered and all the professionals work on the fly.

Where there is a contract there is a risk that a court will insert expanded provisions, but when there is no contract there is absolutely no control over the extent of the professional's duty (which is defined by contract or law). *Carlton v. Terteza* (1993) 14 Cal.App.4th 745).

Other examples for limitations in the contract may include, a shorter statute of limitation or a statute of limitation that starts running from the date of substantial completion—even as to latent defects—and not from date of discovery.

Each State has different statute of limitation terms implemented by statutes, but they all relate to the date of actual discovery of the defect or a date that the defect could have been discovered through the exercise of reasonable diligence. This "delayed discovery rule" permits lawsuits against contractors and design professionals to be filed many years after they have finished their work and is limited only by statutes of repose (California for example, has a 4-year statute of limitation for latent defects and a ten-year statute of repose. *Code of Civil Procedure* Section 337.15). In *Brisbane Lodging, L.P. v. Webcor Builders, Inc. et. al,* 216 Cal.App.4th 1249 (2013) the construction contract executed by the parties included a clause which provided that all causes of action relating to the contract work would accrue from the date of substantial completion of the project. The trial court found on summary judgment and it was affirmed by the Court of Appeal that "this contract provision clearly and unambiguously abrogated the so-called delayed discovery rule, which would otherwise delay accrual of a cause of action for latent construction defects until the defects were, or could have been, discovered." The court concluded the clause was valid and enforceable, noting that the agreement "was one between sophisticated parties seeking to define the contours of their liability." Brisbane was extended to design professionals as well.

Yet, since the relationships in the construction setting are complicated, often we would have subcontractors who are without a contract and must rely on the party who hired them and their contract with the owner. The law is not clear whether those third parties will be able to enjoy the benefit of other parties' contractual limitations. Further, some of the contracts have contradictory language as to the particular limitations.

In addition to statute of limitation and scope of work, other contract limitations that can be useful may include for example, waiver of jury, limitation on damages to the contract amount (Court have held that in the most part this is not unconscionable) and choices of venue. Even choices of venue can be debilitating on parties when they need to litigate in a State or in a County that is not close to the defendant's principal place of business.

Ultimately, sorting these issues becomes challenging when there are many parties and different contracts. Some parties may have indemnity provisions while others do not hence, the question is who can benefit from what provision and whether there can be one venue for a lawsuit on the entire project or several venues.

B. Indemnification

1. Equitable Indemnity

Equitable indemnity arises without a written agreement. It requires joint and several liabilities which gives rise to comparative indemnity based on comparative fault. A jointly liable defendant typically joins all other jointly liable defendants by way of indemnity cross-complaint, which results in "shotgun" indemnity cross-complaints.

2. Good Faith Settlement

This is a very important tool in construction defect cases so that a small player defendant will not have to wait until the main defendants are ready to settle in order to settle and save cost of defense. Under equitable indemnity provisions, a defendant may settle with the plaintiff and "bar" cross-complaints for indemnity using the procedure set forth in *California Code of Civil Procedure* §877.6. The Court must determine that settlement was in "good faith." This means it is not "out of the ballpark." *Tech-Built, Inc v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488.

3. Worker's Compensation Exceptions

A subcontractor's employee cannot sue subcontractor for injuries outside of a worker's compensation proceeding. Other jointly liable defendants (i.e. contractors or other subcontractors) cannot cross complain for equitable indemnity against employer of injured employee. However, express indemnity permits a jointly liable defendant to seek indemnity from the employer of an injured employee. A written indemnity agreement also prevents a good faith settlement bar.

4. Contractual Indemnity

Indemnity agreements are referred to as "specific" or "general." "Specific" are actually broader than "general" indemnity provisions. To analyze an indemnity agreement, one must look at the indemnitor, the indemnitee, what triggers the action causing the obligation to indemnify, and the scope of claims or damages from which there is indemnity.

There can be active or passive negligence that triggers the indemnity. Passive negligence is mere non-feasance. Non-feasance may be vicarious liability, failure to discover a dangerous condition, or failure to provide a duty imposed by law (for example, failing to provide a safe working environment.) Active negligence requires an affirmative act which falls below the standard of care, i.e. breach of a duty. *Maryland Casualty Co. v. Bailey & Sons, Inc.* 35 Cal.App.4th 856 (1995) held that strict liability of developer does not equate to "active" negligence.

In the past courts have found 3 types of indemnity agreements, type 1, type 2 and type 3. Type 1 is the most broad while type 3 is the most limited. Type 1 indemnity agreement example would be "subcontractor agrees to indemnify contractor from any and all claims, liability, and damages, except those arising from the sole negligence or willful misconduct of contractor." Type 2 is slightly less restrictive. It typically looks like: "subcontractor agrees to indemnify contractor from any and all claims, liability and damages arising from the performance of services." It would cover the general contractors "passive negligence." Type 3 is the most limited. This provision typically uses the following language: "subcontractor agrees to indemnify contractor from any and all claims, liability and damages caused by subcontractor's negligent acts, errors or omissions."

Courts analyzing these provisions typically look at the express language. If it does not specifically state that something will be indemnified, then the court will assume it is not being indemnified. Indemnity provisions are to be strictly construed against the indemnitee. *Rossmoor Sanitation, Inc. v. Pylon* 13 Cal.3d 622. *California Civil Code* §2778 provides that the

indemnitee defends the indemnitor after a demand is made upon the indemnitor, and that any judgment against the indemnitee is conclusive on the indemnitor if the indemnitor failed to defend. In view thereof, if the subcontractor refuses to accept the defense pursuant to an indemnity agreement, it assumes the risk of any judgment imposed against the indemnitee, if it is found that indemnification was owing.

California Civil Code §§2782-2784 contains certain limitations on indemnity in construction contracts. For example, section 2782(a) states that there can be no indemnity for the sole negligence or willful misconduct of the indemnitee, indemnitee's agents, servants or independent contractors who are directly responsible to such indemnitee, or for defects in design furnished by designers. Section 2872(b) prohibits an express indemnity of a public agency for the public agency's active negligence.

The same Code provides that if a builder or contractor tenders to a subcontractor, the subcontractor is entitled to defend the suit with counsel of its choice or pay, within 30 days upon receipt of an invoice, no more than a reasonable allocated share of the builder's/contractor's defense fees and costs. Also, a subcontractor owes no defense or indemnity to the builder/contractor unless it receives a written tender of the claim including information provide to the builder/contractor by the claimants. Per Code, if the subcontractor fails to timely or adequately pay an allocated share upon tender of invoices the builder/contractor: (1) has the right to pursue a claim for compensatory and consequential damages; (2) may recover interest on defense and indemnity costs from date incurred; (3) may recover reasonable attorney's fees and costs to recover said amounts. The Code also discusses allocation among subcontractors. The California Code only applies to residential construction contracts.

Crawford v Weathershield Mfg. Inc. (2008) 44 Cal.4th 541 was an important case for indemnity agreements and it changed the insurance industry. Therein the court held that the duty to defend requires an immediate defense. Even if the indemnity contract requires a finding of fault, the duty to defend was triggered upon demand. Subsequently, *UDC-Universal Development, L.P. v. CH2M Hill* 2010 DJDAR 794 interpreted design professionals duty to defend under an indemnity agreement following Crawford. The court held that the design professional was obligated to defend the developer even though CH2M Hill was found by a jury not to be negligent. This was based on the language in their agreement that CH2M Hill would "defend any suit, action or demand brought against Developer of Owner on any claim or demand covered herein" to the extent it arose out of or was in any way connected with any negligent act or omission by CH2M Hill.

C. Other Defenses

1. Affidavit of Merit

Eleven states require that when a complaint is filed against a design professional, an affidavit or certificate of an expert (hereinafter called "AOM Statute") must be filed simultaneously (or within a short period thereafter) stating that in the opinion of the expert the defendant design professional failed to meet the standard of care for the design professional services that are the subject of the complaint. *Ariz. Rev. St.* §§ 12.2601 and 12.2602 (2004); *Cal. Civ. Proc.* § 411.35; *Colo. Rev. St.* § 13-20-602(1)(a); *Ga. Code Ann.* § 9-11-9.1(a) (2002); *Md. Conn. Ann. Cts. & Jud.*

Proc. § 3-2C-02(2003); *Minn. Stat.* § 544.42 subds. 1 and 2 (2003); *Nev. Rev. Stat.* Ann. § 40.6884 (LEXIS 2004), *N.J.S.A.* 2A:53A-26-2A:53A-29 (West 2004); *Or. Rev. Stat. Ann.* § 31.300 (2003); *Pa. R. Civ. P.* § 1042.1-1042.8 et seq. (2003); *Tex. Civ. Pra. & Rem. Code. Ann.* § 150.001-.002 (Vernon 2004). The Affidavit of Merit is not an expert report and is not more than a few pages where a design professional, who is not party to the action, states that based upon his review of the documents to date there is a good faith basis to assert claim. This document, although not large in size or price (usually it can cost between $500.00-$1000.00) has led a substantial body of case law.

In New Jersey, the failure to timely provide a compliant Affidavit of Merit pursuant to the statutory requirement "shall be deemed a failure to state a cause of action" the New Jersey Supreme Court deemed this to mean dismissal with prejudice is warranted. *N.J.S.A.* 2A:53A-29; *Alan J. Cornblatt, P.A. v. Barow,* 153 N.J. 218 (1998). The overall purpose of AOM Statute is "to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of the litigation."*Id*.

Although most of the AOM statutes address negligence on the part of the professional, many causes of action may be based on the breach of the professional's duty of care even if the claim is not technically pleaded as negligence. For example, if a contract states that a design professional will provide services in accordance with the standard of care applicable to similar design professionals performing like services in the geographic region of the project, the professional's breach of that standard is the same as professional negligence. Regardless of the label applied to the cause of action in the pleading, "if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care for that specific profession," then an affidavit of merit is necessary. Id. at 340; *Nuveen Municipal Trust v. WithumSmith+Brown, P.C.,* 2009 WL 3246139 (D.N.J. Oct. 7, 1999); *Diocese of Metuchen v. Prisco & Edwards AIA,* 374 N.J. Super. 409, 416 (App. Div. 2005). This is also consistent with the comments of the New Jersey Court Rules, where the Honorable Sylvia Pressler notes that "[S]imply pleading the cause as a breach of contract will not avoid the affidavit requirement if the breach is based on asserted deviation." PRESSLER, Current N.J. Court Rules, Comment R.4:5-8[5.3] (Gann).

Dismissal with prejudice is sometimes mandated which underscores the importance of what some people call a technical requirement to commence an action against a design professional. While some states like New Jersey require a dismissal with prejudice other states have other statutory penalties less onerous than dismissal with prejudice. Texas requires dismissal for the failure to file an AOM and allows the dismissal to be with prejudice at the court's discretion. *Tex Civ. Prac. & Rem. Code* § 150.002(e). Nevada and Colorado also require dismissal of an action for failure to file an AOM but do not state whether the dismissal may be with prejudice. *Nev. Rev. Stat.* §§11.259 *(*pertaining to nonresidential construction claims) *40.6885* (pertaining to residential construction claims); *Colo. Rev. Stat. Ann.* § 13-20-602(4). Likewise, South Carolina provides for dismissal for failure to state a claim if a claimant does not file an AOM or files a defective affidavit and fails to cure the defect within 30 days. *S.C. Code Ann.* § 15-36-100(E)-(F), but it does not expound upon whether the dismissal may be with prejudice. Oregon also provides dismissal for failing to comply with its AOM statute but does not state whether or not it is dismissed with or without prejudice. *Or. Rev. Stat. Ann.* § 31.300. A federal district court interpreting the Oregon AOM statute found that it did not mandate dismissal with prejudice.

Mastec N. Am., Inc. v. Coos Cnty., 2006 WL 188928 (D. Or. July 6, 2006). Arizona and Maryland both provide for dismissal without prejudice for the failure to file an AOM. *Ariz. Rev. Stat. Ann.* § 12-2602; *Md. Code. Ann. Cts. & Jud. Proc.* § 3-2C-02.

2. Statute of Repose

While Statute of Limitations can be a moving target depending upon when the defect or negligence was discovered, many states have adopted the Statute of Repose. *Mich. Comp. Laws Ann.* § 600.5839 (1987); *Miss. Code Ann.* § 15-1-41 (1994); Nev. Rev. Stat. §§ 11.202,11.206 (1973); *N.J.S.A.* § 2A:14-1.1 (1997); *Ohio Rev. Code Ann.* § 2305-131 (1991) The Statute of Repose is a statute that cuts off certain legal rights if they are not acted on by a certain deadline regardless of when the defect is discovered. In the world of construction law, a statute of repose provides certainty- after a certain date, contractors, subcontractors, design professionals, and the like cannot be sued for work undertaken and completed on a project.

In *Town of Kearny v. Louis F. Brandt, AIA,* 214 N.J. 76 (2013) the New Jersey Supreme Court revisited the Statute of Repose to decide two issues: (1) when a building should be considered "substantially complete" for purposes of triggering the statute's time limitation; and (2) whether an allocation of fault can be made at trial, pursuant to New Jersey's Comparative Negligence Act, *N.J.S.A.* 2A:15-5.2, and Joint Tortfeasors Contribution Law, *N.J.S.A.* 2A:53A-2, against defendants who have obtained a dismissal under the statute.

The complex factual and procedural history of the Brandt matter involves structural failures at the Town of Kearny's public safety facility (the "Building"). On learning of these failures, the Town sued the project's architectural firm, Brandt-Kuybida Architects ("B-K"), and three of B-K's architects. Kearny also filed claims against the project's soil and structural engineers, Soils Engineering Services, Inc. (SESI) and Harrison-Hamnett, P.C. ("H-H"), along with persons from those firms. The Court decided that for professionals like the architect whose responsibilities continue through construction, the 10-year statute of repose begins to run when the project reaches substantial completion. In this case, the court decided that substantial completion occurred on April 9, 1996, when the first TCO was issued, giving the owner until April 9, 2006, to sue the architect.

Turning to the New Jersey Comparative Negligence Act and the Joint Tortfeasors Contribution Law. The statutes permit the factfinder to evaluate the fault of all potentially responsible parties. Under the New Jersey Comparative Negligence Act, a plaintiff's claims will be reduced by the percentage of its own negligence. *N.J.S.A.* 2A:15-5.2(a). If a plaintiff's own negligence exceeds fifty percent, the right to recover damages will be barred; any lesser percentage simply reduces the percentage of damages that a plaintiff will be entitled to collect. New Jersey's Joint Tortfeasor Contribution Law permits one tortfeasor to seek contribution from another tortfeasor where any person suffers damage
or injury as the result of the neglect or default of both of them. *N.J.S.A.* 2A:53A-3. A "joint tortfeasor" is two or more persons liable in tort to the same person, arising from the same injury to person or property. *N.J.S.A.* 2A:53A-1. If a settlement is reached before trial, non-settling defendants may obtain an allocation of fault for the settling defendant
that operates as a credit to the benefit of the non-settling defendants at the time of trial.
Young v. Latta, 123 N.J. 584, 595-97 (1991).

In light of the foregoing, the Court held that "[t]he jury's assessment of the SESI and [H-H's] fault promotes fair allocation of responsibility and avoids creating an incentive for a plaintiff to strategically target only one of a range of culpable defendants." This holding is consistent with when a jury allocates liability between settled and nonsettled defendants. *Id.* at 596-97. Part of the rationale is that "in a case in which a plaintiff fails to meet a statutory requirement to file a claim against a particular defendant, our comparative fault statutes do not require that the remaining defendants be penalized when the factfinder allocates fault." Furthermore, the Court reasoned that it would not frustrate the Statute of Repose's purpose to give construction defendants "the right not to have to defend ancient claims or obligations. *Cyktor v. Aspen Manor Condo. Ass'n,* 359 N.J. Super. 459, 470 (App. Div. 2003). Thus, the Court concluded that a jury should allocate liability amongst existing defendants, settled defendants, and those defendants that have obtained a dismissal under the Statute of Repose. The impact of the Brandt decision is significant for trade defendants, general contractors, and developers. Counsel for trade defendants whose clients performed limited services or discrete tasks at construction projects must be mindful of when the relative trade defendant completed its work. The last day the trade defendant performed its limited services or discrete task, whereupon the trade defendant had no further involvement in the construction project, is the date on which the Statute begins to run.

Alternatively, counsel for general contractors and developers must be mindful of when substantial completion is achieved. Determining substantial completion is fact-sensitive.
While it may be achieved upon issuance of a Temporary Certificate of Occupancy, it may also be achieved upon issuance of a Permanent Certificate of Occupancy or based on a date agreed upon by the parties in contract. Finally, counsel for all construction defendants must be sure to assert negligence claims not only against existing defendants, but also settled defendants, and those dismissed under the Statute of Repose, thereby
protecting them from penalties when the factfinder allocates fault pursuant to the New Jersey Comparative Negligence Act and the Joint Tortfeasors Contribution.

In *State v. Perini Corporation,* 221 N.J. 412 (2015), the Supreme Court affirmed, the Appellate Divisions' decision, holding that the statute or repose did not commence until the date of substantial completion of the entire overall phased project. Of particular importance, construction on the project was implemented in three phases: Phase I, Phase IIA, and Phase II. Phase I included, inter alia, the central plant, perimeter fencing, and certain inmate housing units. Certificates of substantial completion were executed on May 16, 1997, Phase I items, and approximately 960 inmates occupied the Phase I housing units soon thereafter. Phase IIA encompassed several other buildings, including housing units for another 960 inmates. Certificates of substantial completion for those buildings were executed between July 15, 1997 and October 27, 1997. Finally, Phase II included a minimum-security unit housing more than 1,000 inmates and a garage. The certificate of substantial completion for Phase II were issued on May 1, 1998. It then concluded that the triggering date must be the date of substantial completion of the entire project, not just the date of substantial completion of the central plant or the first group of inmate housing units.

3. Economic Loss Doctrine

Generally, architects, engineers and environmental consultants, can be held liable for acts of professional negligence. The Economic Loss Doctrine has been applied to construction cases

where courts have held Economic Loss Doctrine shields design professionals, who provide services in the commercial property development or improvement process, from negligence-based claims for purely financial losses.

A judicially created doctrine, this doctrine shields a party from tort liability when damages are purely economic and without accompanying personal injury or property damage. The Economic Loss Doctrine has its origins in product liability cases where it arose from product liability cases where the "injury" is limited to the product itself. *East River Steamship Corporation v. Transamerica Delaval, Inc.,* 476 U.S. 858 (1986); see also Nevada (The Economic Loss Rule, absent any exceptions, "bars unintentional tort actions when the plaintiff seeks to recover 'purely economic losses.'" CITE. The rule's purpose, is "to shield defendants from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable [and] marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others.'")

The courts seem particularly divided as to whether, like some other professionals, design professionals are excluded from the protection of the economic loss rule. Some states exclude design professionals from the rule. *Eastern Steel Constructors, Inc. v. City of Salem,* 549 S.E.2d 266, 275 (W. Va.2001) ("a design professional . . . owes a duty of care to a contractor, who has been employed by the same project owner . . . and who has relied upon the design professional's work product in carrying out his or her obligations to the owner . . ."); *Moransais v. Heathman,* 744 So. 2d 973, 983 84 (Fla. 1999) (economic loss rule does not bar a claim for professional negligence against a professional engineer); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* 463 S.E.2d 85, 88 89 (S.C.1995) (like lawyers and accountants, design professionals not protected from tort claims by economic loss rule where there is "special relationship" with injured party).

In other states, however, the rule protects the design professional. *Blahd v. Richard B. Smith, Inc.,* 108 P.3d 996, 1001-02 (Idaho 2005) (court recognized existence of a "special relationship" exception and a "unique circumstances" exception but did not apply them to geotechnical engineer); *BRW, Inc. v. Dufficy & Sons, Inc.,* 99 P.3d 66, 72-73 (Colo. 2004) (no exception to rule for claim against an engineer by subcontractor who relied upon allegedly defective specifications where a "network of interrelated contracts" was involved); *SME Indus., Inc. v. Thompson, Ventuleltt, Stainback and Associates, Inc.,* 28 P.3d 669, 680-82 (Utah 2001) (negligence claim of contractor or subcontractor against design professional rejected); *City Express, Inc. v. Express Partners,* 959 P.2d 836, 840 (Haw. 1998) (owner who contracted with architect could not assert claim against the architect in negligence); *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.,* 679 N.E.2d 1197, 1200-02 (Ill. 1997) (negligent misrepresentation claim are not permitted against an engineer because an engineer's plans and drawings were "incidental to a tangible product"); *Terracon Consultants v. Mandalay Resort Group, et al,* 206 P.3d 81 (Nev. 2009). *Berschauer/Phillips Contr. Co. v. Seattle School Dist. No. 1,* 881 P.2d 986 (1994); *Horizon Group of New England, Inc. v. New Jersey Schools Construction Corp.,* 2011 WL 3687451 (App.Div.2011).

The Economic Loss Rule is frequently invoked by the courts but varies significantly from state to state. The rule may have a great impact upon the ultimate success of parties to litigation, the

scope of any recovery, and determinations of insurance coverage. Thus, a careful review and analysis of the rule of law as it can be a useful tool to dismiss, at minimum, the negligence claims which can start small at the beginning of a case but then morph into an extremely high exposure claim.

4. Spoliation of Evidence

Sometimes on construction defect cases remedial work is performed by plaintiff. This work is sometimes performed before plaintiff commences litigation and sometimes not intention of the ramifications of destroying evidence. Other times this work is performed after the litigation has commenced and proper notice was not provided. If such work is performed and defense counsel was not notified of this work an argument can be made that defendant is prejudiced by failing to have the opportunity to inspect, analyze, and see the item in in its original state.

It is well established, of course, that spoliation in a civil action occurs when relevant evidence is destroyed. When spoliation occurs, sanctions, up to and including dismissal of the Complaint, can be imposed.

In *Robertet Flavors, Inc. v. Tri-Form Construction, et al.,* the Supreme Court of New Jersey held that spoliation of evidence in construction negligence cases, performed without the knowledge of the defendant, without the defendant having a chance to test and/or analyze the item prior to spoliation, and where plaintiff spoliates evidence where it has the intention of commencing a lawsuit, seriously prejudices the ability of the defendant to properly defend the case. 203 N.J. 252 (2010).

The relevant facts of Robertet were that in or around 1995, Robertet Flavors, Inc., ("RFI") retained Tri-Form Construction, Inc. and its president, Robert Karabinchak, to serve as construction manager for the construction of a building at the corporate headquarters of Robertet Flavors. *Id.* at 259. RFI also retained Academy Glass, Inc., whose task was to install window systems in the building. Id. Reports of leaks in 1999 in the window system led RFI to contact Academy Glass, who inspected the windows and attempted, unsuccessfully, to fix the leaks. *Id.* at 261. In February of 2002, the plaintiff arranged for consultants to inspect the property, who recommended removal and replacement of the window system, and the portions of the building that had been damaged by water infiltration. *Id.* By February of 2003, the remediation had been completed. *Id.* at 264. The remediation was completed prior to the plaintiff having advised Tri-Form or Karabinchak of the scheduling or occurrence of the repairs. *Id.* at 284. Thus, Tri-Form and Karabinchak were not presented with the opportunity to inspect the property prior to the remediation and repair. *Id.*

The Supreme Court determined that the claim against Academy Glass could proceed in spite of the spoliation but the claims were limited to those claims that were observable prior to its remediation efforts. Therefore, Academy Glass had the opportunity to inspect, and indeed, inspected the allegedly defective construction prior to remediation.

Other states also impose harsh sanctions for spoliation of evidence. In *Plorin v. Bedrock Found. and House Leveling Co.,* 755 S.W.2d 490 (Tex. App. 1988), after a contractor completed repairs

on a residence, the homeowners filed a suit alleging that the foundation was uneven. After filing the suit, the homeowners agreed to let the contractor inspect the alleged problems but a few days before the inspection was to take place, the homeowner allowed another firm to repair the defects and when the contractor came to inspect the foundation was level. The Appellate Court dismissed the homeowner's claims with prejudice holding that the decision to repair the alleged defects before affording the contractor the opportunity to inspect his work was ground for dismissal.

In *Story v. RAJ Props, Inc.,* 909 So.2d 797, 805 (Ala. 2005), plaintiff claimed that the exterior insulation system ("EIFS") allowed moisture to enter and damage other components of the structure. Plaintiff's claim was dismissed because the damage was repaired before notification to the builder. The Court found that even though an active litigation had not been commenced, plaintiff was contemplating litigation and should not have made repairs without notice, thus depriving the defendants of a chance to inspect and analyze the alleged defects. Plaintiff's complaint was dismissed. *See also Harborview Office Ctr., LLC v. Camosy, Inc.* 712 N.W.2d 87 (Wis. Ct. App. 2006) (Plaintiff had initially sued the contractor claiming water infiltration at windows was the problem but failed to inform the contractor that it suspected an alternative source of water infiltration (i.e. cracks in the EIFS) and did not notify contractor before inspecting and making subsequent repairs. The Court dismissed the Complaint).

5. Fact Depositions

Generally speaking because there can be as many as thirty-forty defendants in construction defect litigation the insured's and their insurers sometimes seek to move the case into mediation before the expense of fact depositions take place. If, however, an early settlement cannot be effectuated, the parties must gear up for multiple days of fact witness depositions. In addition to overcoming the hurdle of scheduling the depositions at the convenience of multiple schedules, counsel may also need to overcome the obstacle of the court system whose goal it is to move case forward at any cost. Counsel for the design professional must ascertain what fact witnesses are relevant to the defense of their case. The developer would be considered a relevant party as well as other parties. Since the fact witnesses are not design professionals they will likely hide behind the fact that they performed their work exactly as the plans and specifications called for. Thus, it is important, to identify the agreements, relevant change orders, any Requests for Information, or other information that can be used as a defense. In addition to deposing entities who are not considered professionals, counsel for the design professional may also have the opportunity to depose design professionals who were named as co-defendants. Counsel deposing these co-defendant design professionals have the opportunity to obtain important fact testimony in a case from a design professional.

6. Expert Report and Expert Depositions

In construction defect cases expert reports and expert deposition are important in proving or defending a design professionals' case. An expert report should reach the necessary conclusions but must clearly lay out the fact information and industry standard that led to this conclusion. Expert reports that do not include a citation of the fact information and industry standard but instead reach an unsupported conclusion could lead to having the expert report being dismissed

as a net opinion. Not all states allow for expert depositions prior to trial, but in those states where expert depositions can take place before trial it is important to flush out all relevant information as to how the expert reached its conclusion. Deposition testimony of experts can be used to attack the credibility of any expert at the time of trial.

7. Mediation

Large construction defect lawsuits will go through many rounds of mediation. There will typically be many parties, many carriers, and side issues such as indemnities, additional insureds, contractors having multiple policies and coverage disputes.

Strategy at mediation has to be discussed with the carrier. On the one hand, as discussed above, the design professional can become the main target due to insurance. On the other hand, its policy may be depleting so it may want to settle quickly. Usually, those who settle first get the best deal, although sometimes sticking to the end and fighting makes a difference.

Another issue to consider is statutory offers. They work differently in different states but the gist is that they may shift the prevailing party (a prevailing plaintiff recovering less than the offer may not be considered prevailing). This may shift the entitlement to costs and fees (if there is an attorney's fees agreement). Making an offer before mediation sometimes raises the floor at negotiations since the expectation is that defendant will start where his offer was made.

Moreover, plaintiffs often make policy limits demands which should be closely evaluated by the carrier, as they may expose the carrier to excess damages under some circumstances.