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What Are Construction Defects?

An I.C.B.O. Symposium

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Part 1: What Are Construction Defects?

During the search for "Affordable Housing" and the advent of "Common Interest Developments" (Condominiums) construction of the California housing market has focused on the development of condominium subdivisions. Subsequently, this market area of construction has been subjected to claims of faulty and "DEFECTIVE" construction which has led to a proliferation of "Construction Defects Litigation" since the "building boom" of the 1980's.

It is for that reason that the subject of this symposium is Construction Defects and the type of construction applicable is Type V, non-rated and Type V, one-hour Construction.

Think about it! Construction Defects! What are they, really?? Are they blemishes? Are they something that's less than perfect? Just what is a defect?

Defect Defined By Webster's Dictionary

Webster's Dictionary defines the word defect: de-fect (de'fekt; also, and for v. always, di fekt') n. [<L.pp. of deficere, to fail < de-, from + facere, to do] 1. lack of something necessary for completeness; shortcoming 2. an imperfection; fault; blemish.

Another term for "Defect" is "Deficiency". Webster's Dictionary defines the word deficiency. 1. State or quality of being deficient. 2. A shortage; deficit.

Webster's Dictionary defines the word "Deficient". 1. To be wanting. 2. Lacking in some quality necessary for completeness; defective. 3. One that is deficient.

Defect Defined By The Law

A Construction Defect, as defined by California Jury Instructions:

> "Failure of the building or any building component to be erected in a reasonably workmanlike manner or to perform in the manner intended by the manufacturer or reasonably expected by the buyer, which proximately causes damage to the structure."

Defects and The Law

The California Code of Civil Procedure, Section 337.15 specifically deals with "Latent Defects" or as used in the Code "Latent Deficiency". As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection. General interpretation holds a latent defect (or latent deficiency) is one that a property owner does not know about and would not be expected to discover through the exercise of reasonable care.

§ 337.15, of the California Code of Civil Procedure provides for a ten (10) year statute of limitation.

Assembly Bill AB 2959

Recent attempts to address the lack of an adequate and legal definition of construction defects by legislative action have been quashed by the California Trial Lawyers Association.

During the last session of the California State Assembly, Assemblyman Scott Baugh submitted AB 2959, which would have provided the first step toward reaching some common sense and sanity in addressing defective construction, had it passed the Assembly.

AB 2959 would have defined a construction defect as that which makes a project dangerous, unsafe or causes real damage to the consumer. According to AB 2959, a construction defect would result from:

1. Defective building materials or components.
2. A violation of Building Codes at the time of construction.
3. Failure to meet professional standards for design at the time plans were approved.
4. Failure to build according to accepted trade standards for good and workmanlike construction.

Business and Professions Code

Recently, the Contractors State License Board adopted the definition of a "Structural Defect", for the purposes of disciplinary action, as follows:

> "For the purpose of subdivision (b) of § 7091 of the Code, "Structural Defect" is defined as meaning:
>
> 1. A failure or condition that would probably result in a failure in the load bearing portions of a structure,
> 2. which portions of the structure are not constructed in compliance with the codes in effect at the time for the location of the structure that,
> 3. such failure or condition results in the inability to reasonably use the affected portion of the structure for the purpose for which it was intended."
>
> § 7091 of the Business and Professions Code, subdivision (b) also provides for a ten year statute of limitation.

Therefore, with both the California Code of Civil Procedure and the Business and Professions Code allowing for a ten year cycle, all construction professionals, contractors, subcontractors, building officials and building inspectors are at risk for any acts of errors and omissions resulting in DEFECTS for a period of 10 years from the date of substantial completion of the development or improvement to real property.

Litigation Effects

Since the "Building Boom" of the 1980's and the advent of the ten year cycle (California Code of Civil Procedure, § 337.15) construction defects claims and subsequent litigation has exploded into horrific proportions.

According to many articles that have recently appeared in the San Diego Union-Tribune, the La Jolla Light and the Los Angeles Times, "The proliferation of construction defects litigation has devastated the California economy by drying up the availability of affordable attached housing, depressed the job market and driven multi-residential builders and their insurance carriers out of the State of California, or out of existence all together".

In addition, individual home owners who have been involved by their Homeowners Association bringing forward construction defect litigation have reportedly lost equity in their property. Many have reportedly "walked-away" from their mortgages and lenders have shied away from providing loans to prospective buyers of "Common Interest Developments" in California.

Recently California lawyers have been preparing to spread out of California by seeking licensing in the states of Nevada and Arizona. Nevada, in particular, has been enjoying a building boom for approximately the last ten years. With the proliferation of new Las Vegas casinos, new housing, schools and allied support businesses and industry ... it looks like Nevada is next!

So ... What Constitutes A Construction Defect?

The following are factors commonly used to determine whether a particular problem constitutes a construction defect:

1. The buyer's "reasonable expectations".
2. The compliance or noncompliance with the minimum requirements of applicable building code(s) and/or construction standards, as established by:

    a. The Uniform Codes,
    b. The building product manufacturer's installation recommendations and specifications,
    c. The "Approved" construction plans and specifications for the project,
    d. The "Accepted" customs and practices pertaining to the proper use of building materials and quality of workmanship and,
    e. The Local Ordinances.

3. Whether the construction was performed in a good workmanlike manner.
4. Whether materials and building products used were suitable for their intended purposes.
5. Whether or not the design intent of the project architect, the structural and other consulting engineers was adhered to.
6. Whether there was any premature deterioration of the building materials.
7. Whether or not the original project's plans and subsequent changes were plan checked and approved by the Building Department.

It is imperative that the homeowners of Common Interest Developments be keenly aware that the homes they live in were designed and built as "PRODUCTION HOUSING" and not necessarily "CUSTOM-BUILT HOMES".

This simply means that these Condominiums were intended to provide "AFFORDABLE" housing, that they were "MASS-PRODUCED" and that some degree of blemishes and irregularities are bound to occur. Therefore, it is important that the expectations of the buyer/homeowner be realistic.

Practically speaking, construction defects are, a very real problem. In many of the legal cases brought into litigation, the alleged defects actually do exist in whole or in part. When they do in fact exist, there can be no other course of action than to make the homeowner whole. Repair or replace the work that is "TRULY SUBSTANDARD", in accordance with those Standards that were applicable at the time they were originally built.

However, until the time comes when we have a REASONABLE and LEGAL DEFINITION of "WHAT A CONSTRUCTION DEFECT REALLY IS", indiscriminate and frivolous defect litigation will continue to proliferate and remain deleterious to our economy and the availability of affordable home ownership.

How would you define a CONSTRUCTION DEFECT?

Part 2: What Can We Do To Prevent Them?

1. BE A PROACTIVE MEMBER OF THE CONSTRUCTION TEAM.
2. WE ARE ALL THE FIRST LINE OF "DEFENSE" FOR THE CONSUMER.
3. PROMOTE AND SUPPORT EDUCATION AND TRAINING.
4. PROMOTE QUALITY CONTROL PROGRAMS.

Quality Control

Quality Control, also known as "Construction Quality Control", or "C.Q.C.", is the process in which the quality of the many products used, and the methods for their use, which comprise the total building project, are scrutinized under a conservative control process, or program.

Building Materials

Before building materials can be used in any building, they are first run through a highly complex and extensive engineering, testing, and review process. This review process is usually conducted by a vast number of independent testing laboratories and the results are reviewed by many professional committees, such as the American Society for Testing and Materials, (A.S.T.M.) and the International Conference of Building Officials, (I.C.B.O.).

Reports of the testing results and the Professional Societies' findings are published and updated regularly. These reports, often referred to as A.S.T.M. Standards, I.C.B.O. Reports, and Uniform Building Code Standards, state the minimum recommended standards for the use of the materials.

Architects and engineers refer to these "Standards" and specify them in their plans and specifications. Once these specifications are made part of the construction documents for a building project, it is incumbent upon the general contractor, all of the specialty contractors, and all of the materials suppliers to comply with the specifications.

Plans and Specifications

In almost all contract formats the term "Per Plans and Specifications" is used extensively. Architects and their consulting engineers will almost always go to some length to specify the products they expect to be used, and the methods to be incorporated for their use either on the drawings or in a separate book of specifications.

Often, the specifications will require that the contractor furnish "Submittals" and "Shop Drawings" to the architect for his or her review and acceptance.

Submittal Review Process

This is an area of quality control, that very often goes amiss, and may directly lead to defective construction.

All too often the contractor and his or her subcontractors do not place enough importance in this process, and the Submittal is either lacking important information needed or is not complete. Often, the items being submitted on are substitutions of that which was originally specified, on the pretext that the product(s) either are no longer available, or the subcontractor may not be an "Approved Fabricator" or a manufacturer's "Certified Applicator", or they can simply purchase this substituted product cheaper than the product which was originally specified.

The Submittal and shop drawing review process, whether required by the contract or not, remains an extremely vital function to controlling quality, and avoiding claims. Whether required or not, it is crucial that the contractor get it all on the record and maintain their records for a minimum of five years, in accordance with §7111 of the Business and Professions Code. A minimum of ten years could help in their defense when they are brought into litigation!

The following are recommended procedures for the:

Submittal and Shop Drawing Review Process

1. In accordance with the contract documents, the contractor should prepare and submit a Submittal schedule for acceptance by the architect, and the owner. The Submittal schedule should be an integral part of the contract progress schedule to ensure the timely approval of Submittals as required by contract progress schedule. The Submittal schedule should include all Submittals required by the contract documents acceptance, the architect should send a copy of the schedule to the owner. Key Submittals need to be entered as activities in the contract progress schedule.

2. All Submittals should be made with a letter of transmittal which shall contain a list of the items from the plans and specifications contained in the Submittal. The letter and items accompanying the letter should be fully identified by listing the project name, the architect's contract number, (if any) the contractor's name, the subcontractor's or vendor's name, and a clear reference to the specification section governing the material submitted, drawing reference, equipment number, and contract progress schedule activity number.

3. Any deviation from specified items should be clearly noted in the remarks section of the Transmittal Letter, with justification for acceptance of this deviation, along with an estimate of cost savings to be experienced with acceptance of this deviation included as part of the Submittal.

4. The Contractor should indicate by a signed stamp on all submittals that he has checked the Submittals, and shop drawings and that the work shown is in accordance with the contract requirements and that he has checked for dimensions and relationships with the work of all other trades involved.

5. When Submittals, and shop drawings are received at the architect's office, they will usually be entered into a Submittal log maintained by the architect. I recommend that the contractor maintain a similar log so the contractor can track the timely review of all Submittals. The architect may reject a Submittal immediately if he notes that it is incomplete and may return all copies to the contractor with reasons noted.

6. The architect should, within time limits as specified in the approved Submittal schedule, return said Submittal after his review, with the results of his review clearly noted.

7. The architect's review and/or approval should not relieve the contractor from responsibility for deviations and alternatives from contract plans and specifications, nor should it relieve him or her from responsibility for errors in Submittals. No progress should be accorded for installation of nonconforming items or installation of any item which requires a Submittal which has not been fully reviewed, and accepted.

Contractor's Responsibilities

It is the duty of the contractor to complete the work covered by his or her contract, in accordance with the approved plans and specifications. The contractor must carefully study the approved plans and specifications and should plan their schedule of operations well ahead of time.

If at any time it is discovered that the work which is being done is not in accordance with the approved plans and specifications, the contractor should immediately correct the work.

In order to assure that the work being done is in accordance with the approved plans and specifications, the contractor must provide for and furnish adequate, experienced, competent supervision, and coordination of all of the work he or she is contracted to perform.

Inspection is a crucial function that does not start with the building inspector, or the special inspector. Inspection must begin with the project superintendent. It is critically important that the superintendent be thoroughly knowledgeable of each and every trade that he is supervising. This doesn't necessarily mean that he has to be an expert in all trades, but it does mean that the superintendent must be aware of the resources available to him to gather sufficient information to assure that the work is being performed in accordance with the approved plans and specifications, and the manufacturer's recommendations for the use and installation of the material products being used, and that the work is in conformance with the requirements of the codes.

The job of a construction superintendent is an enormous responsibility, and it must not be taken lightly!

In order for the contractor to avoid defects and subsequent litigation, he or she must at all times be vigilant with a well focused eye on, and maintain the following:

1. Always exercise due diligence.

2. Always maintain constant and high levels of "Quality Control" Systems.

3. Always check the contents of all sub-bids to comply with not only quantities, but for the compliance with the requirements of the approved plans and specifications during competitive bidding.

4. Always consider the "pitfalls" of using semiskilled or unskilled labor when considering your "Cost vs. Profit". Skilled labor can get the work done right the first time!

5. Always use Building Materials that are as Specified, and in the Manufacturer's Approved manner.

6. Always follow the "Approved" plans and specifications", or obtain "Approval" for each change to the plans and specifications. The single-most important document that you could have to avoid defects litigation, may very well be a good set of working drawings.

7. Always follow in great detail, the Submittal review process. If there is no official review process in force by the architect, then incorporate one into your procedures.

8. Always provide full-time experienced and knowledgeable supervision for each project.

9. Always provide constant, and thorough inspection of the work. Do not wait for the city building inspector to inspect the work, do it first, do it while the work is in progress.

Part 3: The Litigants and the Building Department The Litigants' Use of Codes and Ordinances

There are numerous codes in application that govern construction. The most commonly applicable is the Uniform Building Code (UBC). The UBC has many versions applied to it, such as the State Building Code Amendments to the UBC.

Many municipalities have adopted amendments to the UBC, such as the City of Los Angeles, County of Los Angeles, County of Orange, and many other governing authorities throughout the state of California. Commonly, the applicable codes are referred to as "UNIFORM CODES":

1. Uniform Building Code

2. Uniform Mechanical Code

3. Uniform Plumbing Code
4. Uniform Fire Code
5. Uniform Housing Code
6. Uniform Code for the Abatement of Dangerous Buildings
7. Uniform Sign Code
8. Uniform Administrative Code
9. Uniform Building Security Code
10. Uniform Code for Building Conservation
11. Uniform Zoning Code

In addition to the Uniform Codes, as described above, the National Electrical Code (NEC), may also be applicable to the issues.

One of the most common mistakes during discovery is the citation and utilization of the wrong code(s), or the incorrect edition of the code, by the litigants. Common practice by the writers of the codes (such as ICBO for the Uniform Codes), is to publish a new edition every three years, with the governing authorities being required by the state to adopt the new edition every three years, following publication.

Therefore, if a project was constructed in 1988, the applicable codes might not necessarily be the 1988 edition, it might be the 1985 edition of the code, depending upon when the code was published and subsequently adopted by the governing authority, as well as the date in which the project was permitted for construction.

Ordinances on the other hand, are regulations which are adopted by the local governing authority, may adopt or modify specific sections of code to apply to a specific application, manner or situation, other than for which it was originally intended for by the code. Therefore, when in discovery, it is important for the litigants not to overlook local ordinances.

Discovery Items

Other items for consideration by the litigants during discovery may also include the following:

1. Original Construction Drawings and Specifications
2. Approved Change Orders
3. Architects' or Engineers' Clarifications
4. Construction Exception Reports, Correction Notices, etc.
5. Construction Schedules and Revised Updates
6. Contracts: Prime and Subs (All that are applicable)
7. Correspondence and Memorandums
8. Field Notes by the Architect and Consulting Engineers
9. Logs

10. Project Meeting Notes or Meeting Minutes

11. Reports:

    a. Daily Reports

    b. Applicable ICBO Reports

    c. Applicable Manufacturers' Specification Sheets and Test Reports (Construction Specifications Institute [CSI] and Sweets Catalog Sheets)

    d. Applicable Manufacturers' or Producing Mills' Certifications (Mill Certifications)

    e. Applicable Results of Soils and Materials Testing Reports

12. Requests for Information and Answers

13. Revision Sketches and Drawings

14. Submittals and Shop Drawings

15. "As-Built" Drawings

Once the defense attorneys have diligently reviewed the complaint, reviewed their clients' contract, defined their scope of work and to which phase or phases their work was performed, and have garnered applicable case law, it is now time for them to focus on the actual nature of the plaintiffs' list of alleged defects and determine whether or not their client is potentially liable.

It now becomes absolutely crucial that all alleged defects be defined as clearly as possible, as to exactly what is truly defective, where each defect may actually exist and under which "Established Standard(s)" the design or work is in violation of. This, in my opinion, is the true heart of the case.

Here, it becomes very important to separate the alleged defects into these three basic categories:

1. "Design Issues"

2. "Construction or Workmanship Issues"

3. "Landslide and Earth Settlement Issues"

Destructive Testing

Commonly destructive testing is performed by plaintiff in order to establish the actual existence of the defects, as alleged, and to provide "ironclad" documentation of their existence. This is an opportunity that demands the presence of both defense counsel and their experts to witness and provide thorough documentation of these tests and findings.

It is also very important for the litigants to be cognizant of the means and methods utilized by the plaintiffs experts while conducting these destructive tests. It is a common occurrence for the plaintiffs' experts to cause more damage than may actually exist. For example, when removing stucco in order to expose the lath, nailing and flashing paper surrounding windows and doors, the materials are damaged in the process, thus rendering false or "tainted" findings. Unless the damage, or alleged defect, can be proven to have existed prior to the time of the destructive test, it can be easily lost in the convenient interpretation of the plaintiff expert.

In the event that defects are factually identified, there is no escaping the next phase of the defense attorney's task. That task is to establish a clear and reasonable repair methodology and factor accurate and realistic costs for repairs or replacement. Caution is recommended here, because sometimes the "cure is worse than the disease". Good old-fashioned common sense is in order at this juncture.

Ever heard the old Army adage?
"There's the right way ... the wrong way ... and the Army way!"

Simply stated, the Army (according to the "old adage") only cared for things to be done their way, and no other way! However, there are many solutions and options available to resolve and mitigate the problems of defective construction. Determining the scope and extent of the defective work are the crucial factors to consider.

With the present nature of construction defects litigation, being proffered by innuendo and insinuation (the proverbial "Smoke and Mirrors"), it is often most difficult or even impossible to pin down the plaintiffs' experts to prima-facie facts. Yet this must be done! Defense counsel should use their experts to assist them with forming specific questions to ask plaintiffs' experts during deposition, mediation or even trial (if it goes that far).

The Building Department

The building department is an important resource, which is commonly overlooked by many of the litigants. In many cases, building departments will maintain records pertaining to the project in their files, or the records may have been reproduced on microfilm, and archived. Commonly, the records may (but not always) consist of some of the following:

1. Building Department set of the Approved Construction Drawings
2. Permit Applications (Grading, Building, Electrical and Mechanical)
3. Permits (Grading, Building, Electrical and Mechanical)
4. Plan Check Documents
5. Inspectors' Field Notes
6. Inspectors' Correction Notice(s)
7. Notice of Completion and Certificate of Occupancy
8. Testing Laboratory Reports
9. Special Inspector Reports

Since the statute of limitation is for a period of ten years, from the date of substantial completion for any construction project, it therefore, becomes a vital and crucial function for all building departments to make thorough and detailed records and maintain them in archive for at least a ten year period.

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