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STRUCTURE OF A SOUND CONSTRUCTION DEFECT CLAIM

CONSTRUCTION

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Whether one is working with an expert for a plaintiff or a defendant on a construction defect claim[1], the goal of the expert team should be the same — analyze the facts of the case, determine the root cause(s) of the defect(s) being claimed, tie that causation to the responsible parties, and assess the financial impact of the problem. This methodology is also supported, in principle, by the legal process required by statute in a number of states, prior to filing a claim[2]. Most of the statutes require that some notice be provided to the accused parties prior to filing a claim along with a detailed description of the issues, the type and location of all alleged defects, and, in some instances, a description of the damages/dollars that are being claimed.

Although many courts do require that an initial claim is clearly and specifically described, that should not be confused with the additional necessity of supporting a claim that will withstand the scrutiny of opposing experts, attorneys, arbitrators, judges, or juries. While there is always an economic cost associated with developing a claim, the negative consequences of asserting a poorly formed and under-prepared construction defect claim are tangible and may include:

- Failure to meet notice requirements or other legal or contractual stipulations, thus negating the claim partially or entirely
- Loss of early negotiating leverage against defendants
- Risking exclusion of key elements from the claim
- Inattention from defendants, their counsel, and their insurers
- Accusations of claim alteration or inflation

Therefore, it is important to ask what it is that constitutes a sound Construction Defect claim. How much and what type of documentation should be provided to affirm the case? What are the priorities? How does it all get paid for? Are the costs recoverable? These are important questions to ask before proceeding with a Construction Defect Claim.

1. Use of the word "claim" in the context of this article is **not** intended to be a specific reference to any legal documents or filings that are required by a court or by contract – it is understood to include all the materials that form the support for the claim including investigations, expert reports, depositions, photos, interviews, and other resources.
2. e.g. California's Senate Bill 800 (incorporated as Title 7, Part 2 of Division 2 of the California Civil Code) became mandatory in 2003 for certain types of Construction claims in the state; SB800 requires that the affected parties be notified of defects, perceived involvement, and magnitude/cost prior to the filing of a lawsuit or legal claim.

DON'T FORGET STRATEGY

Having been on both sides of the table, assisting in asserting claims and defending against them, there does seem to be a somewhat predictable pattern within claimants' documentation — often it does not effectively support the claims being made, even when there are possibly legitimate defects issues in play.

For example, in a recent Southeastern U.S. case where window installation errors were claimed to be the cause of water intrusion, the water intrusion was apparent in photographs provided yet the cause was never clearly explained in the documentation provided with the claim. Further, the plaintiff made alterations to the original windows, including the finishes and flashings surrounding them, before the defendants and their experts were able to visit the site for an independent investigation. Although thousands of photographs were taken before and after the work was complete, the window locations were not clearly identified and no standardized water testing protocols and documentation of the windows was accomplished prior to their alteration. As a result, the pre-altered conditions could not be independently verified or observed by the defendants and the exact cause(s) of the failures could never be recreated. Ultimately, that portion of the claim was challenged by all of the implicated defendants, leading to resolution in Arbitration for a fraction of the actual cost of the work that was performed.

So why are Plaintiffs' claims sometimes lacking in appropriate support? The reasons vary but may include:

- **Limited financing of the claim** – Costly attorney and expert fees must be paid as the claim is being developed so, even though those costs may ultimately be recovered, unless there is an insurance policy and/or a financially solid entity funding the effort it may be more expense than a claimant can afford.
- **"One against all"** – Since the claim will often include numerous design and contracting entities, an atmosphere of "*one against all*" is somewhat inevitable, with the plaintiff, and its assertion of defects, standing singularly against dozens of defendants.
- **Limited Knowledge and Documentation** – The claimant in a defect case is typically an owner (either a Homeowners Association, Developer, Company, or Government) who may be less informed, with limited institutional knowledge regarding the specifics of the construction, and have limited documentation related to the matter as compared to the design or construction professionals.
- **Accumulative Effect** – Sometimes defects emerge slowly — a leak here, a leak there — until the accumulation of events reveals that a significant problem has emerged. If consideration is not given to these individual events as they occur, and they are not documented using some rigor and discipline, then the useful evidence to support the claim may be gone by the time the need for economic recovery has been identified.

However, these disadvantages do not have to unravel a justified claim. For example, in the window claim noted above, even if the defendants were not able to make direct observations prior to repairs, the claimant still could have established and followed a pre-repair testing and observation protocol that identified the specifics of the failures at each window and included standardized documentation of the testing and the findings. That would have provided the defendants with a much clearer understanding of their potential liability, rather than leaving them guessing. Compared to the cost of the repair work, sensible and pragmatic documentation would have required a small advance investment and would likely have paid for itself in the form of a larger award or settlement.

Further, the Claimant may have a few circumstantial advantages over the Defendants' including:

- Access to the site for repeated observations and investigations over time
- Time with the building occupants for their reporting and mapping of leaks, MEP functionality, noise, etc.
- Access to building records and maintenance workers who may have other useful information or observations about the alleged defects

The key to preparing a sound Construction Defect claim is to be thoughtful and strategic with the effort. Think about how the claim might be defended against and then consider what additional information could be added to legitimately reinforce the extent or gravity of what is being claimed.

UNDERSTAND THE CLAIM

In order to properly assert a construction defect claim, there must be some legal, statutory, and/or contractual basis for doing so. Although this determination is ultimately the responsibility of the attorney who files the case, it is also beneficial for the expert to have knowledge regarding the basic legal arguments. This knowledge may help to clarify the attorney's action, or inaction, on particular issues in the claim and it also puts the expert in

a better position to tie the factual findings in the case to any viable claims as they emerge through document review and investigation. In some instances, even experienced and skilled attorneys benefit from reminders that keep them focused on areas of strategic importance. Good questions to ask counsel may include:

- **What is the venue or what will the venue be?** – Is the case in State Court, Federal court, Private Arbitration, Dispute Resolution Board, etc.? The answer may help to inform what rules of evidence may be applicable and ultimately what reports, testimony, or presentations may be required to convey the issues.
- **Are there any statutes of limitation or repose that apply to the claim?** – While this is a legal question to be interpreted by Counsel, it is sometimes a key point that may dramatically alter the focus of the investigation if particular areas of the claim are precluded from recovery by law. Typically the limitations are set by the State and/or court that the claim is filed in. For example, in California, there are two general categories of limitations — a four year statute of limitations on patent defects, or those "*readily discoverable or apparent by reasonable inspection*"[3] and a ten year statute of limitations on latent defects, defects that are hidden or not otherwise observable or known by the damaged parties. Additionally, California has specific standards for new condominium construction which sets lower minimum standards for noise, drainage, and product warranty claims (one year) and for landscaping and wood post decay (two years) but extend a ten year statute of limitations to most other claims, regardless of their observability.[4]

  While a ten year statue is a typical maximum throughout most of the United States, there are certain circumstances where these limits may be exceeded, creating extended defect liability. One recent illustration of this is in Connecticut where a 2012 Supreme Court decision determined that statutes of limitation do not apply to claims initiated by the State for state facilities.[5] For private arbitrations, statute of limitations and repose are not necessarily applicable but there are circumstances where they would apply including when the parties' Contract expressly provides for it or where a state statute expressly or implicitly provides for their application.[6]
- **Are there any other statutes that apply to the claim?** – For residential construction claims, there are customarily "*right to repair*" regulations which are currently applicable in dozens of states and place certain limitations on a home owner's ability to sue a contractor for construction defects. The regulations typically require home owners to provide the contractor notice of the alleged defect and an opportunity to repair the faulty work prior to filing a lawsuit. Even for Plaintiff claims there is a real benefit to establishing an independent and comprehensive assessment of the extent of defects prior to entering into a repair procedure, particularly in California where that process may take six or more months each time a new defect is identified.[7]
- **Have all the defendants been identified?** – This information should be made available at the time of the expert's retention, for the purposes of completing a conflict check, but it may also evolve while trade work scopes are identified in relation to defect conditions. While knowing who is involved will not affect the facts or the independent position that an expert will take in regards to the claim, it may help to determine where to focus limited time and financial resources while developing a claim or while responding in defense.

ESTABLISH A BASIS

Whether or not it is required by statute, to be effective a construction defect claim should provide a clear description of all of the known deficiencies at the subject project along with all of the available support for each of them. Understanding that the applicable court may have basic requirements for how the legal portion of the claim is filed, there is usually quite a bit of variation as to how the basis for the claim has been derived. Sometimes general dissatisfaction with a project or project participants will trigger the desire to assert a claim but more often there is a significant issue affecting building functionality or performance such as leaking or thermal discomfort which it is believed will require a costly remedy to cure. Regardless of the impetus, all claims will need to be factually supported and will need to stand up to rigorous professional and legal scrutiny.

3. California Code of Civil Procedure § 337.1(e).
4. California Senate Bill 800: Chapter 2: "Actionable Defects" Civil Code Section 896.
5. State v. Lombardo Brothers Mason Contractors et al., 2012 Conn. LEXIS 443 (Conn. Nov. 1, 2012).
6. "When Do Statutes of Limitations Apply in Arbitration" David A. Weintraub, Florida Bar Journal, Oct. 2007, Volume 81, No. 9.
7. Claim Development Timeline – SB 800, Miller Law Firm on Miller Law www.constructiondefects.com.

APPLY INDUSTRY STANDARDS

While there is no absolute, universal standard for supporting every type of construction defect claim there are some good models set forth by respected industry groups to use as a basis. The American Society for Testing and Materials (ASTM) collaboratively authors numerous investigation standards that can be used to confirm, or disprove, certain alleged defective conditions. While most of these are tests that validate a specific condition or feature of a material or building component, some also provide some general insight into the process that should be used while performing an investigation that will ultimately become part of a claim.

One example is the ASTM E2128-12 "*Standard Guide for Evaluating Water Leakage of Building Walls*" which provides a step by step guideline for how to identify and verify leak sources in buildings.[8] The process described in the E2128 can be summarized as:

- In advance of a field visit, review of project documents and applicable codes/standards for the project
- Evaluation of the building components' design concept
- Determination of the building's service history
- Inspection and Investigative testing and data gathering, including participation by potential defendants
- Analysis of findings
- Report preparation

The logic behind this process is fairly straightforward. In order to substantiate a claim, as well as any of the defects that underlie it, one first has to understand the original as-designed configuration of the building as well as its expected performance. These expectations can then be evaluated against what was ultimately constructed and how that configuration is actually performing. For example, if a wall system was properly designed and constructed to resist 100 mph winds and a certain level of annual precipitation, but experienced more due to a hurricane event, the observed failures may not be due to design or construction error but instead a force majeure weather event. In fact, it is quite unreasonable to expect all buildings or building systems to resist all environmental conditions. This is why it is important to limit the evaluation and critique to those conditions that the code and the code-complaint design would reasonably anticipate.

INVOLVE DEFENDANTS IN THE PROCESS

A typical element of a construction defect claim is inspection(s) of the Project — either visual, destructive, or both — that are performed to provide some proof or evidence of the alleged defects. While inspections can be useful in revealing more detail about an issue or, in the case of destructive testing, offering a view into the underlying construction assembly and/or material degradation, the methods used in determining the appropriate locations to review and the necessary steps to take during an inspection are often contested, even when a seemingly scientific process is applied. This is why the ASTM E2128 recommends reaching an "*agreement on testing methods and interpretation of results … before testing begins.*" That inclusion may involve:

- allowing defendants a first-hand view of the conditions being claimed
- accepting input from defendants as to the number of locations to be destructively investigated
- agreeing to a testing methodology as well as criteria for conducting and "*passing*" a test in advance of the test being performed; as well as others

There are certainly circumstances where defendants cannot or will not be involved in an investigation. In those circumstances every effort should be made to provide reasonable documentary support for the claim by seeking and collecting useful, unbiased data that can be relied upon by others in the future. If not, the claim may simply be disregarded and any hope of settlement or economic recovery may be compromised.

In one recent case a claim was being made for the replacement of all of the windows in a condominium complex.[10] The complex had over 400 windows with over 1000 individual glazing panels, some of which were experiencing water intrusion during rain events, coupled with interior condensation in the winter. Before the claim was developed, a few windows were photographed and diagnosed as possibly defective. By the time the claim was filed, the alleged defective units had never been observed by the defendants, only a few had been water tested by the claimants, and none of the testing had been performed by an independent and reliable testing service. The defendants implicated in the window claim refused to make any offer of settlement until sufficient and proper testing, observation, and documentation was provided to support the defect claim. How much was

8. ASTM E2128 "Standard Guide For Evaluating Water Leakage of Building Walls", Current version 2012 (http://www.astm.org/Standards/E2128.htm).
9. ASTM E2128-12 "Standard Guide For Evaluating Water Leakage of Building Walls" pg. 8, 10.2.7.
10. SAN JOSE BRICKYARD HOMEOWNERS ASSOCIATION v. T: FAIRFIELD BRICKYARD PLACE, LLC, et al.

deemed to be sufficient and proper? In that case, plaintiffs and defendants negotiated the quantity, type and criteria of additional testing and ultimately settled all claims, including the windows, prior to trial.

DOCUMENT STRATEGICALLY

The extent of documentation required to demonstrate a defect can be subjective. Consider the example mentioned previously where 1000's of photographs were taken of various defective conditions. While that quantity might seem to be sufficient, without precise context the photos did not serve the purpose of demonstrating anything in the claim. In that case, locations where water intrusion at the wall was alleged, there were never any photographs pairing an interior leak with the associated defective exterior condition of the wall at the same point in time. In other words, it was not possible to see if the wall was as-built, or partially deconstructed, or if the sealants, flashings, or finishes were incomplete in that location or were causal to the infiltration. The Plaintiff managed to photograph a leak but didn't take any steps to explain the causation as to why it was occurring. This approach was not convincing to the defendants, who refused to settle, nor to the Arbitration panel who denied most of the claims.

This approach also flies in the face of the industry standard recommendations stated in ASTM E2128. ASTM recommends providing documentation sufficient for other professionals to understand the locations where problems are occurring as well as the specific mechanisms of failure. These methodologies may include:

- Mapping photo locations on elevations
- Keying photographs to locations and to diagrams showing as-designed and/or as-built assemblies
- Logging photos by day, time and location
- Sketching assemblies, conditions, water pathways, etc. as they are observed including any important data on them (e.g. material thickness or conditions, gaps, angles, decay, rust, etc.); many conditions are visible in photographs but less meaningful without some commentary or explanation
- Retaining as "*evidence*" any removed portions of the building that are associated with some type of claimed failure

Moreover, ASTM provides additional standards — E1188 and E860 — describing the recommended process for collecting, preserving, and retaining physical evidence, particularly when defendants have not had an opportunity to participate in its testing and/or removal from the Project.

CITE TRUE CODES AND PROVE DAMAGES

Alleged Building Code violations are common within construction defect claims. They are often used in an attempt to exert more force and credence to the claims being asserted. In some jurisdictions, it is a requirement to cite the codes that have allegedly been violated as part of the claim. That said, building code violations alone do not make for the strongest and most defensible claim. To be an effective component of a construction claim, the cited Code should be:

- As adopted by the building department/authority having jurisdiction (AHJ) at the time the Project was permitted and inspected. It is not uncommon for an issuance of the construction documents to have one or more codes incorrectly stated on the cover sheet, compared to the actual requirements at the time, and sometimes these false requirements are then repeated incorrectly in the claim.
- As interpreted by the building department/authority having jurisdiction at the time the Project was permitted and inspected; the authority that controls the permitting and allows the occupancy of the building ultimately decides on the specific interpretation of the published code.
- Not repeatedly cited as the primary reason for the claim; there should be other tangible damages, patent (visible) or latent (concealed), to support a claim, not just technical code violations.
- Connected to a failure that has been conclusively demonstrated to have occurred due to original design or construction configurations, not for other reasons; a leaky building, or another performance failure, does not necessarily equate to a construction claim
- Tied to specific damages and attributed to specific defendant(s)

In a recent claim involving numerous alleged defects in a high-rise apartment building, the construction defect report included in the claimant's materials made use of extensive citations of alleged code violations. An initial analysis of the report found that over 25% of the code citations did not apply to the system noted, did not apply to the timeframe that the project was completed, or were not related to the specific defect alleged.[11] Although there may have been valid defects and damages also represented in the report, this is an example of how the imprecise use of code citations can actually undermine the effectiveness of a claim and additionally highlight the importance of accuracy.

11. The case is confidential and pending and therefore cannot be cited.

Even if the cited codes are correct and appear to be associated with damaging defects, it is still important to prove that connection. In a 2013 construction defect case in Kentucky, a contractor defendant admitted to several building code violations but ultimately the jury and Court did not require the contractor to pay for any of the required repairs. According to a summary of the ruling, in that case "*...the homeowners failed to show that the admitted building code violations specifically caused the damages claimed by the homeowners.*"[12] Additionally, the court noted that "*...damages must be proven before they would be awarded.*" In other words, code violations are often not enough; damages must be proven and quantified.

MITIGATE AND MAINTAIN

For a variety of reasons, most construction defect claims are not brought forward immediately after construction is complete. In some cases it takes a few years for the problems to manifest themselves and, in other instances the problems are just not pursued as a claim until the statute of limitation nears expiration. This delay in the assertion of a claim brings about a couple of interesting issues including:

- **Mitigation of damages:** If defects are known and are creating collateral damages, such as a leak that is contributing to unabated wood rot and interior drywall damage, then in the eyes of most courts, some measures should have been taken to minimize that damage beginning at the time the issue was discovered.[13] Although not all damages can be effectively mitigated, at the very least some demonstration and documentation of the good faith attempt(s) should be presented along with the claim. This is generally referred to as the claimant's "*duty to mitigate*" and these costs spent mitigating damage can also typically be claimed for recovery.
- **Maintenance:** The preservation and protection of a Project over time (a.k.a. routine preventative maintenance) is often used as an attempt to mitigate the cost or impact of a specific issue by the defendants. For example, if gutters have not been regularly cleaned and water management issues are at play, poor maintenance may be cited as a factor that has contributed to the problems. Also, homeowners associations are often required by their own by-laws to accrue "*reserve funds*" that are earmarked for maintenance and/or replacement of certain systems. These funds may then be cited as a credit against a larger claim in the event that deferred maintenance is associated with a defect. Paint is an example of this. If repainting was scheduled to take place every ten years per the HOA reserve plan and the claim is ten years old, perhaps the cost of painting should not be claimed at all? Defendants certainly make the argument that the painting was already required for maintenance and was already financed accordingly.
- **Useful life expectancy:** The life expectancy of a building type, a building system, or a discrete building material is all highly relevant to a construction defect claim. There is no universal, shared standard for any of these values and they are all related to the perceived performance of the building as represented in the claim. For example, an institutional type building may be contracted to be designed with an expectation to perform for 100 years, assuming and including appropriate maintenance. If that facility is already exhibiting defective conditions at a ten year milestone, it will be more straightforward to assert a claim for those defects given the obvious reduction in useful life expectancy. Specific building materials may be the easiest to evaluate as many of them have warranties and stated lifespans.
- **Force majeure:** Not every deficiency associated with a completed building can be considered to be a construction defect. There are circumstances such as unexpected levels of rainfall, wind, seismic activity — "*superior force*" events — that may cause similarly unexpected failures of building components. Accordingly, give appropriate consideration to ensure that the issues being asserted are not more appropriately claimed against a hurricane, flood, or earthquake insurance policy.

SAMPLE AND EXTRAPOLATE

For most claimants it is not practical nor economically feasible to thoroughly inspect, test, or to deconstruct every square inch of a large and complicated Project in order to demonstrate that a problem exists. Therefore, in almost all construction defect cases, a reasonable and logically deployed sampling methodology may be appropriate. Certain exemplar and representative areas are inspected and tested and the results are then assigned to represent typical defects. A common but erroneous method is to identify the most visible damaged areas, investigate and test them, and assert that the findings are typical and widespread even though this can often be proven to the contrary with additional investigation. Unfortunately, this method will rarely produce a representative sample since the areas for investigation have been selected because of a visible defect, not because they have been found to be typical, recurrent construction conditions in type or in quantity.

12. Pg. 8–17 and 8–18, *Construction Law Update* 2014, Neal J. Sweeney, Construction Law Library, Wolters Kluwer.
13. Holland v. Green Mountain Swim Club, Inc., Colorado Supreme Court, 1972.

Representative sample types, sample sizes, and methodologies can be determined through negotiation with claimant and defendants or through industry prescribed methodologies. ASTM E2128 states that "*both typical and atypical conditions should be included … and a sufficient number of inspections locations*" should be selected so as to be applicable to the overall systems being questioned.[14]

There are also experts who specialize in the application of statistical methods applicable to construction defect cases and may be called upon to design the protocols for testing and data extrapolation or, if necessary and possible, to synthesize the investigative work that has already been performed.

THE ECONOMICS

A construction defect claim isn't very useful to a Claimant if it is not accompanied by a viable plan for financial recovery. In other words, the dollars the Claimant is seeking must be tied to quantifiable and legitimate categories of damage all of which should be linked to a fact-based theory of causation and liability. Often times sorting all that out can be complicated. In many instances, the necessity of performing repairs also creates an opportunity to make other Project improvements. These improvements are generally referred to as "*betterment*" and are best clearly delineated and offset from the damage categories in the claim as they are customarily not recoverable.[15]

The types of damages, and consequently dollars, that may come into play in construction defect cases include:

- **Cost to Correct:** This is the value of the work that will be required to correct the claimed defects. It may include design fees, permitting fees, management fees, direct construction cost including material and labor, and any other costs directly tied to the construction work being performed.
- **Loss of Use:** If the building cannot be occupied while the repair work is being performed then that disruption may be included in the claim. For example, if condominium or rental occupants need to be temporarily relocated during repairs, then that cost could be claimable with the potential for recovery.
- **Business disruption:** Similar to loss of use, if there is a negative impact to normal business function then it too may be quantified. For example, in a case involving a parking garage where the required resurfacing of the parking decks caused disruption to its typical use, the value of the unrented spaces that could be shown to otherwise be full under normal use could be included in the economic damages.
- **Diminution of value:** This is the long term impact to the value of a facility based upon the negative impact of the defects and damages that are being asserted.

These damages can be economically valued in a variety of different ways as well, each with its own advantages. A few methods of valuation include:

- **Conceptual Estimate:** This may also be called an "*order of magnitude*" estimate and may be based upon known values from other similar Projects or unit pricing assumptions tied to a conceptual repair scope.
- **General Contractor's Estimate:** This method employs a General or Specialty Contractor in the preparation of the repair estimate. The costs included in this estimate may be more reflective of actual economic expectation given the estimation is being conducted by a professional who has experience with pricing such work and who is therefore more likely to include appropriate consideration of the complexities of the repair.
- **Bid/Actual Cost:** A bid for the work may be more time consuming to obtain but it also is more likely to ensure that a contractor or subcontractor is in place to actually perform the work based on a defined design and repair protocol. This bid would logically already take into account other variables in pricing such as current market fluctuations, supply issues, access, overhead, and other similar variables.

It is also beneficial to consider what the applicable state, county, court or arbitration venue's position is regarding the potential recovery of attorney and legal fees as these fees can become significant and, if they are not recoverable as a part of a successful construction defect claim, they may erode whatever award may result from a successful claim.

14. ASTM E2128-12 "Standard Guide For Evaluating Water Leakage of Building Walls" pg. 5, 9.5.1.
15. Grossman v. Sea Air Towers, Ltd., 513 So. 2d 686 - Fla: Dist. Court of Appeals, 3rd Dist. 1987.

The ability to recover any funds may also be dependent on the presence of applicable insurance or, if insurance does not apply, the solvency of the responsible parties. For this reason, it is prudent to understand what money may be available to compensate for the damage. Once causation and responsibility has been preliminarily assessed, the type and extent of insurance may help Counsel determine what merit there is in pursuing a claim. In some cases, particularly those where economic recovery is unlikely, a business decision may be made to invest available funds in directly in the repairs instead of in litigation. This evaluation may include consideration of:

- **Owner/Contractor Controlled Insurance Policies:** OCIPs are increasingly common today. If there is an OCIP policy in place which consolidates the defense counsel and expertise, claims may be more efficient to pursue, have less finger pointing, and may have greater freedom to pay claims as long as the responsible parties are under the "*umbrella*" of the policy and there are no gaps.[16]
- **Multiple Defendants:** In cases where each defendant is insured separately, asserting the claim may become more challenging as the involvement of more attorneys and more experts will inevitably create a desire to shift liability to others and, as a result, may call for more evidentiary support for each of the defects and its causation.
- **Wasting Insurance:** Defendants with "*Wasting*" policies in which defense costs are deducted from the value of the policy, may be early settlement targets for Counsel as the longer the litigation and/or settlement process lasts, the smaller the remaining policy balance will be to fund repairs.
- **Self-insured Parties:** Some design and construction professionals choose to insure themselves or, in other words, to pay for all claims out of pocket. This scenario may create a different environment in regards to legal representation and retention of experts.

CONCLUSION

A sound construction defect claim is the by-product of a strategic approach that clearly identifies:

- Design and construction problems/defects
- Practical remedies to those defects
- Other Impacts related to the Defects and their corrections
- All Costs associated with the problems/ defects; and
- Responsible party attribution (and their insurance carriers, if any)

Claims should begin with a solid, supportable fact basis and not be tied to anecdotes, improper samples, or unverified testing. Claimants should make use of whatever information or documentation is available regarding the building, its use (or misuse), and its condition over time to identify all of the potential claims and to rule out others, such as betterment, that may raise questions as to the claim's overall veracity. Additionally:

- Parties to the claim, as well as their insurance and resources, should be identified early in the process as the nature and focus of investigations and recovery may be influenced by that information.
- Don't assume that litigation will pay for all economic damages such as required corrective work, litigation expenses, and others as it typically falls short due to rebuttal positions related to betterment, poor maintenance, and useful life among others.
- Consider selecting an expert who is cognizant of statue, contract, and notice requirements as well as the relevant technical and professional aspects of the dispute.

The only construction defect claim truly worth pursuing is one that has sound, factual and legal support as well as a viable basis for financial recovery.

16. "Construction Defects," pg. 248 Roland Nikles, Stephen Reisman, Suzanne McSorley, Richard Tyler, ABA Publishing 2012P.