Construction Defects

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A book like this doesn't "just happen." It reflects hours of effort by a long list of distinguished attorneys, who may be competitors and rivals in their day jobs, but who selflessly did their part to advance the knowledgebase available to construction professionals.

The idea for a book focused on construction defects . . . .

We extend our thanks to all of our contributing authors. The editors truly appreciate the time, expertise, and scholarship that this talented group brought to bear on this endeavor. We also appreciate their patience, understanding, and good humor as we requested changes to their work.

We are grateful for the patience, encouragement, and guidance we received from Andrew Ness, Carol Patterson, and Harper Heckman who served as Chair of the Forum's Publications Committee during the lifespan of this project.

Individual draft chapters or chapter-sized portions of this book were reviewed by Michael Drew, Mark Herbert, Peter Torcicollo, Deanna Koestel, Damien Santomauro, and Mark Wiechnik, all of whom provided a well-needed "reality check" and helpful criticism and suggestions that improved the end product. In addition, we want to thank other Forum members who put time and effort into this book by providing editorial and other contributions, notably Stephen Hess, Deb Ballatti, and Kathryn Oliver. Having said that, none of these generous colleagues should be held responsible for the final manuscript, which reflects, ultimately, our editorial decisions.

Finally, we thank ABA Publications and acknowledge our editor, Sarah Forbes Orwig, for her consistent encouragement and assistance in bringing this project to completion.

We are honored to have had the opportunity to be part of the editorial team for this book. It has required more time and effort than any of us imagined, but due to the industry, professionalism, and determination of its many contributors, we have finally arrived. In this regard, we particular acknowledge Sue McSorley who, as the publication deadlines loomed, kept the rest of us on course with wit, grace, and—as near as the rest of us could tell—very little sleep.

This book is a paradigm of the Forum and its mission: construction lawyers joining together and contributing to the profession by creating a resource for industry practitioners. We hope that in the years to come this book will prove a useful reference to both lawyers new to the subject as well as those who are "seasoned."

Roland Nikles
Stephen H. Reisman
Richard J. Tyler
Suzanne M. McSorley

INTRODUCTION

The objective of this book is to provide a guide to construction defects law in the United States. This law is not uniform in its particulars throughout the 50 states and is subject to competing strands and doctrines even within individual states. Although this book is not intended to provide a comprehensive state-specific discussion and solution for every construction defect issue a lawyer may encounter, we believe you will find it a useful guide for analysis. These nine chapters provide a thorough discussion of the key issues that specialists in the field of construction law and construction defects have identified as most relevant to the subject. They include lots of helpful material to provide a frame of reference for analysis of any construction defect issue.

The authors of the chapters were selected for their expertise in the subject matters covered by their chapters, as well as for the diversity of the clients they represent. Some of the authors specialize in representing owners and developers, both public and private. Others specialize in the representation of architects, engineers, and other design professionals. Some of the authors focus their practices on construction managers and general contractors, while others typically represent subcontractors, suppliers, and manufacturers. With the notable exception of Chapter 2, a substantial portion of which was written by construction consultants, all of the contributors to this publication are lawyers who are actively engaged in the practice of construction law and who deal with construction defect issues on a daily basis.

The term "construction defect" has a very broad meaning and touches on all aspects of project development, from planning, to design, to construction, to the operation of completed projects. A construction defect may manifest itself in a failure to achieve the intended or required results in terms of performance, aesthetics, cost, or serviceability of a project. It may result in property damage, or it may be manifested in a failure to meet building code requirements or the requirements of plans and specifications. This book presents a rich variation on the full range and breadth of these themes from many angles.

This book is organized to allow the reader to identify a construction defect issue and then follow the trail to meaningful discussion and research in several ways: by type of construction defect; by party; by type of claim; and by theory of liability or defense. It also provides guidance in specific areas of critical concern, such as insurance, limitations defenses, damages, dispute

resolution, and preparing and presenting a case. In addition and on a more proactive level, it includes a discussion of risk management considerations.

The law on construction defects is dynamic and continually evolving. This book is aimed at a national audience, and readers must keep in mind that many aspects of construction law are state-specific. New case law and statutes frequently change the landscape. For example, the law governing insurance coverage for construction defects not only varies from state to state, but new statutes and court decisions will continue to change the law within individual states. Standard insurance policy terms are periodically modified to reflect industry concerns with regard to coverage. Some states have adopted Notice of Claim statutes affecting the construction defect dispute resolution process, while many others have not. The reader will find here thorough discussion of the universal themes as well as representative discussions of particular jurisdictions where there is divergence in the law among jurisdictions; and in many instances there are tables and reference to other publications that provide information on a state-by-state basis. It goes without saying that it is incumbent on the reader to be aware of possible jurisdictional variances and changes in the law and to conduct independent research accordingly. We are confident, however, that the reader will find this resource a solid starting point.

The compilation and publication of this book has been a lengthy process and would not have been possible without the dedicated efforts of the authors who took valuable time away from their busy law practices and personal lives to contribute to the effort. We wish to thank each of them for their commitment, hard work and contribution. We also thank the members of the ABA Forum on the Construction Industry who volunteered (or were volunteered) to act as "reality checkers" as the authors' chapters were being finalized. Finally, we must thank Suzanne McSorley whose relentless discipline kept us on task and pushed us across the finish line. This book is truly the result of a team effort and it has been our pleasure to be a part of the team.

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CHAPTER 9

Preparing and Presenting the Case

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I. Preliminary Evaluation and Analysis

A. In General

Success in construction defect litigation requires an organized game plan to discover and evaluate (1) the nature and extent of defects and deficiencies, (2) the identity of parties responsible, and (3) the amount recoverable for the defective conditions. Toward this end, the attorney should recommend to the client that a professional engineer, general contractor, or other qualified professional be retained to inspect the project and report on all defective conditions.

Presuit notification statutes in many states and prudent practice require that owners allege construction or design defects with a reasonable degree of detail as early as possible. It is imperative, therefore, that the initial inspection be thorough and identify as many of the defects that may exist as possible. Defects should be carefully documented and categorized by building code violations, departures from the approved plans and specifications, or departures from industry standards and other good design or construction practices.

Counsel should evaluate which version of the building code applies, usually governed by the date when a building permit was issued by the municipality or county. For condominium projects or commercial developments consisting of several buildings, or for projects that were constructed in several phases over the course of several years, the edition of the applicable building codes may vary from building to building.[1] The inspecting engineer should rely on the as-built plans, reflecting all changes incorporated and approved by the project's design professionals of record.

Applicable statutes of limitations and repose must be identified. Counsel should be mindful that different statutes of limitations may apply to different parties and causes of action. For example, the statute of limitations may differ depending on whether the cause of action is for breach of contract, negligence, strict liability, indemnification, or contribution.

Consideration should be given to the type and amount of damages that are likely to be recovered in an action. The measure of damages available will affect the types of experts to be retained and where to focus the investigation. For example, will there be evidence of valuation damages that needs to be developed? For a detailed discussion of the theories of liability and damages that may be recovered, review Chapters 3, 5, and 6.

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1. *See* Biscayne Cove Condo. Ass'n, Inc. v. Biscayne Cove Southeastern, Inc., 582 So. 2d 806 (Fla. 3d Dist. Ct. App. 1991) (condominium association claim against developer for noncompliance with building code provisions requiring installation of life-safety equipment barred because specific building code provisions did not become effective until after building permit was issued).

Building department records should be reviewed early in the process. These records can provide valuable insight concerning events that underscored the actual design and construction, including the existence of project "red tags" placed on the buildings by the municipal building department because of lack of building code compliance. They may flag significant departures from the plans and specifications that were highlighted by inspectors and others during construction. They will also identify those persons who participated in the original design and construction of the project. On public projects, available public records can be readily accessed without the necessity of initiating costly litigation and engaging in formal discovery through state-sponsored public records laws or "Sunshine Laws."[2]

B. The Factual Investigation and Report

The engineer or other forensic consultants should be directed to evaluate all components of construction in light of applicable requirements referenced in the contract documents and state statutes, and in light of applicable implied warranties.[3] Some practitioners have found that a reputable contractor with a thorough knowledge of local building codes and industry practices can make a good expert witness, both for investigation of claims as well as for valuation of repairs. A review of the roof, structural, electrical, mechanical, and plumbing components should endeavor to describe each defect and whether the defective condition results from any of the following:

- Building code violations
- Deviation from plans and specifications'
- Life-safety issues
- Lack of maintenance
- Poor workmanship

The report should include a methodology for repairing or replacing each defective condition and a cost estimate for completing the repairs. This information will enable the claimant—whether it is an owner, contractor, subcontractor, or supplier—to evaluate the cost-effectiveness of pursuing resolution through settlement or litigation.

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2. *See, e.g.*, Fla. Stat. §§ 119.01–.15 (Florida's Public Records Act); Ala. Code §§ 36-12-40, -41, 41-13-1, -44 (Alabama's public records law); Ga. Code Ann. §§ 50-18-70, -77 (2009) (Georgia's open records act).

3. *See, e.g.*, Fla. Stat. § 718.203 (Florida's statutory implied warranties of fitness and merchantability from developers, contractors, and suppliers to owners), N.Y. Gen. Bus. Law § 777(5) (McKinney 2010) (New York's statutory implied housing warranty applies to condominiums in residential structures of five stories or less); Nev. Rev. Stat. § 116.4114 (2009) (Nevada's statutory implied warranty of quality is applicable to common interest developments).

The expert report should be accompanied by photographs and or video that usefully illustrates the defective conditions discussed. This will assist the owner in understanding the building problems. Similarly, photographs and video become helpful for illustrative purposes during presuit negotiations, mediation conferences, and trial. In preparing the report, thought should be given to making the report suitable for later conversion into a visual presentation using Microsoft PowerPoint or a similar display for presentation at mediation and trial.

Maintenance problems, if any, should also be identified. If ignored, they could present potential life-threatening safety conditions. Moreover, proper identification of maintenance issues is necessary for a complete and accurate assessment of who bears responsibility for manifest defects.

If the investigation uncovers problems that are degenerative and require present maintenance, these should be called out in the report so the damage can be properly mitigated. If maintenance or repairs are undertaken, all potentially responsible parties should be advised and the work should be carefully documented. Time-stamped photographs or video depicting the defective conditions and all significant conditions exposed during the repair process should be kept. To the extent that remedial work is commissioned by the owner to correct defects, the selected contractor should be required to document the defective conditions discovered during the remediation process along with the cost of repair. Samples of defective material should be retained and protected to establish a chain of custody for future use and to avoid arguments over spoliation of evidence. All contractors performing remedial work should be advised that they might need to testify about their work.

In addition to a forensic physical investigation, the owner should compile a list of potential deficiencies identified by complaints from all sources, including building occupants, commercial tenants, unit owners of residential condominiums, and homeowner communities, as well as building managers. A thorough list of deficiencies can be compiled by submitting a written survey to unit owners requesting a description of known conditions. Frequently, such survey results will identify problems that may have been missed during the engineer's inspection.

The preliminary investigation should conclude with a meeting attended by the attorney, owner, and engineer to discuss findings and identify any additional steps that may be necessary to finalize the report.

C. Practical Considerations Precedent to Suit

The attorney should prepare an analysis for the claimant outlining theories of liability, applicable statutes of limitations, and likely defenses that may be asserted. Most significantly, the cost to correct deficiencies must be realistically assessed. Economics should reign over emotion; it makes no sense to spend two years and $150,000 to pursue a claim worth $100,000. Under these

circumstances, it may be beneficial to attempt to resolve any claims by settling through presuit settlement negotiations or by advising the owner to spend its money to remedy the defective conditions without engaging in litigation.

If the amount of damages justifies litigation, efforts should be undertaken to determine whether potential defendants have sufficient financial resources to satisfy a judgment. An attorney should attempt to ascertain whether defendants have insurance, whether a performance bond is in place, or whether defendants have sufficient personal financial resources to assure a claimant that a judgment will be collectible. In order to pursue a claim against a payment or performance bond, the owner must be listed as a third-party beneficiary on the bond.[4] In sum, it may be advisable for an attorney to acquire credit reports, conduct asset searches, and obtain other information in order to assist the association in its evaluation of whether litigation is justified. In light of the expense of litigation, the relevant contract documents and applicable statutes should be reviewed to determine whether disputes involving construction litigation are subject to prevailing party attorney's fees.

D. Verify if the Dispute Is Subject to Arbitration

The attorney should verify if the applicable contract documents require disputes to be arbitrated and if this presents any difficulty in joining all the required parties. The governing documents for a condominium association or homeowner's community association sometimes include provisions that preclude litigation against a developer without first obtaining 75 percent approval from the unit owners. Similarly, purchase and sale agreements, declarations of condominium, offering circulars, and written warranties may disclaim certain causes of action such as common-law implied warranties, limit the recovery of damages, and impair other available rights to the aggrieved party.

Conducting a presuit analysis will also aid in the owner's compliance with the requirements of any applicable warranties or statutory presuit notice and right to cure procedures. A claim for breach of express warranty should first be addressed in a letter to the person or entity providing the warranty. This letter should contain a list of known or suspected defects along with a demand for repairs. Failure to do so may constitute a defense to a cause of action based on express warranty.[5]

4. *See* Beach Point Condo. Ass'n, Inc. v. Beach Point Corp., 480 So.2d 239 (Fla. 4th Dist. Ct. App. 1985).

5. *See* Cal. Com. Code §2607 (West 2011).

E. Notice and Right to Cure Acts

Currently 33 states have adopted Notice and Right to Cure statutes.[6] In some states, presuit notice requirements are briefly stated in a new-home warranty act or in a contractor-licensing act. In other states, such as California, Nevada, and Texas, the procedures are more complex.[7] Depending on the jurisdiction, these statutes may apply to construction defects involving residential property, commercial property, or both.[8] A property owner's failure to comply with presuit notice and right to cure requirements could impede its ability to perfect a construction or design defect claim.

In short, notice and right to cure schemes require claimants to provide notice of construction defects and to provide contractors with an opportunity to cure the defect before litigation can be initiated.[9] These statutes may apply to developers, subcontractors, and even design professionals.[10] In some jurisdictions, the procedures may be waived or altered by written, mutual agreement of the parties, but only after the owner's initial notice has been served.[11] If a lawsuit is filed before such notice is given, the lawsuit may be abated or dismissed.[12] The contractor is given a specified number of days to respond to the notice by offering to inspect the alleged defect, offering a monetary settlement, or disputing the claim.[13] The contractor may also be required to provide its own notice of the owner's claim to other potentially responsible parties, such as subcontractors and design professionals.[14]

While most presuit notice statutes provide for an opportunity to inspect the premises, there is no duty to give the recipients of the notice a guided tour of the premises. Some statutes, however, require that the inspections be

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6. *See, e.g.*, Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 Real Prop. Tr. & Est. L.J. 729 (2009); Stuart Harris, *Residential Construction Defects: Prelitigation Statutes and Arbitration Update*, 2 Ohio Constr. & Code J. 57 (2007); G. William Quatman & Heber O. Gonzalez, *Right-to-Cure Laws Try to Cool Off Condo's Hottest Claims*, 27 Constr. Law 13 (2007). The list includes California, Colorado, Florida, Georgia, Kansas, Missouri, Nevada, New Hampshire, Ohio, South Carolina, Washington, and Wisconsin, to name a few.

7. *See* Cal. Civ. Code §§910-945.5; 1375–1375.1 (West 2007) (combining procedural requirements with a statutory warranty, building standards, a mediation process, and limits on recoverable damages); Nev. Rev. Stat. §§40.600–.695 (2009) (including an option to submit construction defect issues to the state's contractor licensing board); Tex. Prop. Code Ann. §§27.001–.007 (West 2000 & Supp. 2008) (differing procedures for residential property in general and for single-family residences and duplexes).

8. *Id.*

9. Fla. Stat. §558.004(1) (claimant has 60 days before filing any action or 120 days before filing an action involving an association representing greater than 20 units to serve its written notice of defects).

10. *See, e.g.*, Fla. Stat. §558.002.

11. *See, e.g.*, Fla. Stat. §558.005(4).

12. Fla. Stat. §558.003.

13. *See, e.g.*, Fla. Stat. §558.004(5).

14. *See, e.g.*, Fla. Stat. §558.004(3).

coordinated to minimize the number of inspections. Often, the inspections must take place within a specified number of days.[15] If the contractor desires to conduct destructive testing, it must obtain the owner's express permission to conduct such testing.[16] Written requests for testing should be given to the owner, describing who will be performing the testing, the anticipated damage, the time needed to perform the test, who will perform any repairs necessitated by the testing, and who will assume financial responsibility to cover the cost of those repairs.[17] If the owner refuses destructive testing, the owner may forfeit a claim for damages that could have been avoided or mitigated; factors may include whether a reasonable remedy could have been properly implemented if destructive testing had been allowed when requested.[18]

The attorney will often be called upon to assist the owner in preparing the necessary responses and negotiating and drafting settlement documents if this voluntary procedure is successful. If a contractor offers to pay or repair under a right to repair scheme but then fails to follow through on that commitment, the owner may sue the contractor for breach of contract and damages. Case law, however, is unclear on whether the owner's damages become capped to enforcing the benefit of the bargain of the settlement agreement or whether an owner may proceed with its remedies on the defects without regard to the settlement agreement.[19]

II. Identifying Parties to the Suit

In this chapter we focus specifically on the process of identifying particular parties to a suit. For specific theories and causes of action, including limitations imposed by privity of contract issues, see the discussion in Chapter 3. For further discussion on the rights and liabilities of specific parties, see Chapter 5.

A. Plaintiffs

1. Homeowners

Individual private homeowners have the ability to assert construction defect claims. Generally, homeowners are free to pursue claims for breach of express or implied warranties against developers, builders, subcontractors, suppliers, and others.[20]

15. *See, e.g.*, Fla. Stat. §558.004(2).
16. *Id.*
17. *Id*
18. *Id.*
19. *Compare* Wischer v. Mitsubishi Heavy Indus. Am., Inc., 2005 WI 26, 279 Wis. 2d 4, 51, 694 N.W.2d 320, 344 *with* Waehner v. Frost, 1 Misc. 3d 893, 770 N.Y.S.2d 596 (N.Y. Sup. Ct. 2003).
20. *See, e.g.*, Fla. Stat. Ann. §558.004.

2. Condominium Associations and Homeowners Associations

Condominium associations and homeowners' community associations are creatures of statute. The associations have powers and duties as set forth in bylaws, declarations of condominium or declarations of covenants, and state statutes. In many states, condominium associations have standing to assert class actions on behalf of the unit owner members for certain matters of common interest, including the common elements.[21] In some states, however, in the absence of a direct ownership interest by the association in affected condominiums, a condominium association does not have standing to sue as a real party in interest to recover against a developer and contractor for construction defects and errors.[22] It is important for an attorney to be well versed in the limits of statutory and common-law rights of individual owners and associations. Even without a statutory grant to associations to assert claims on behalf of individual homeowners, a class action may be appropriate to recover damages for defects that are prevalent throughout a building or development and that affect multiple owners.[23]

The attorney should always research whether case law has imposed any limitations on the ability of an association to pursue particular claims. For example, fraud claims frequently arise when condominium unit owners claim that certain features such as golf course putting greens, cabanas, or gazebo structures, as described in published brochures, were omitted from the actual construction of the condominium. Whether an association may assert such fraud claims may vary depending on the jurisdiction.[24] For more on this topic, see Chapter 3.

3. Commercial Property Owners

Owners of commercial property are generally not required to provide a statutory presuit notice prior to initiating an action for construction defects. Commercial property owners are able to pursue many of the same causes of action available to residential owners, such as breach of contract, breach of common law or statutory warranties, violation of building codes, negligence, and fraud.

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21. *See, e.g.,* Fla. Stat. Ann. §558.004(5) (claimant has 45 days to respond to contractor's offer in any action; association claimants representing greater than 20 units have 75 days to respond).

22. *See, e.g.,* Lakeview Townhomes Condominium Ass'n, Inc. v. East Florida Development Corp., 454 So. 2d 576 (Fla. 3d DCA 1984) (association may not assert an action in its own name for alleged fraud on its individual members). *But see* Residential Bd. of Managers of Zeckendorf Towers v. Union Square-14th Street Associates, 190 A.D.2d 636, 594 N.Y.S.2d 161 (1st Dep't 1993), *related reference,* 196 A.D.2d 947, 603 N.Y.S.2d 251 (1st Dep't 1993) (condominium board has standing to make a claim of fraud in the sale of condominium units on behalf of the individual condominium unit owners).

23. *See, e.g.*, Gentry Constr. Co. v. Superior Court, 212 Cal. App. 3d 177, 260 Cal. Rptr. 421 (1989).

24. , 123 Nev. 349, 355, 167 P.3d 421, 426 (2007).

One major distinction is that most courts have refused to extend the doctrine of strict liability to purchasers of commercial property.[25] For additional discussion, see Chapter 3.

4. Developers

The developer is the person who creates a residential or commercial property or who offers those parcels for sale or lease in the ordinary course of business. Until the parcels are sold, the developer is also the owner of property and thus has many of the same rights available to other residential and commercial property owners. Moreover, depending on the jurisdiction, developers of condominiums may have the same claims for statutory implied warranties against the project's contractors, subcontractors, and suppliers as homeowners do.[26] Timely exercise of those rights by a developer before a project is sold can be important. The attorney should recommend that problems associated with defective construction be remedied while the developer still retains warranty rights against those who participated in the defective construction. This becomes especially important in the condominium context, because the developer still has the freedom, while in control of the association, to correct the condition in any manner it sees fit without the intervention of the association.

B. Defendants

1. In General

All potentially solvent defendants should be identified before a lawsuit is filed; however, not all should necessarily be named. Frequently, the owner or developer may elect to name all responsible parties as defendants to the lawsuit, but this approach could increase the cost of litigation and may delay resolution. Accordingly, when the developer is financially solvent, the most practical approach may be for the owner to sue the developer alone because this could simplify the litigation. If the developer elects to bring in other parties (i.e., general contractors, design professionals, or subcontractors) by initiating a third-party complaint, it may be beneficial for an owner to have the various defendants point fingers at each other. Where the developer is the owner, the most likely targets are the contractor and design professionals of record.

2. Corporate Shells

Developers often attempt to shield themselves from liability by forming corporate shells for each development project. Alternatively, developers may elect to dissolve a corporation that is subject to claims and transfer the assets to a

25. *See, e.g.*, *Gentry Constr. Co.*, 212 Cal. App. 3d 177, 260 Cal. Rptr. 421 (1989).

26. *See* Rashdan v. Sheikh, 706 So. 2d 357 (Fla. 4th DCA 1998); Mason v. E. Speer & Associates Inc., 846 So. 2d 529 (Fla. 4th DCA 2003); Chicago Title Ins. Co. v. Alday Donalson Title Co. of Florida Inc., 832 So. 2d 810 (Fla. 2d DCA 2002).

newly formed corporation. In certain instances, the developers can be reached by piercing the corporate veil or by rescission of a fraudulent transfer, or the court may fashion an appropriate equitable remedy to afford a judgment creditor the most complete relief possible, including finding a new corporation liable for a judgment against the creditor's predecessor corporation.[27]

The California Supreme Court has distinguished between construction defect claims involving dissolved corporations and those seeking damages from the shareholders of a dissolved entity. In *Penasquitos, Inc. v. Superior Court*,[28] homeowners sued the developer to recover damages for construction defects discovered four years after developer's corporation had statutorily dissolved. The California Supreme Court concluded that section 2010 of the *California Corporations Code* allows parties to sue dissolved corporations. The court also held that the owners may sue a dissolved corporation for damage or injury caused by predissolution activities that were discovered after the entity had been dissolved.

On the other hand, Washington courts have limited an owner's ability to assert claims against dissolved corporate entities. There, in *Ballard Square Condominium Owners v. Dynasty Construction*[29] an association sued the condominium's developer, a dissolved corporation, for breach of contract after construction defects caused water damage to the building's exterior walls. The court of appeals found no statutory basis to allow a postdissolution claim to proceed where the developer had already been administratively dissolved for seven years when the association filed its case. Because *Washington's Business Corporation Act* did not provide for the survival of any other postdissolution claims, the court applied the common-law rule that all claims against a corporation terminate upon its dissolution.[30]

3. Developers

Developers may be organized as any one of a number of legal entities, including individuals, general partnerships, joint ventures, limited liability companies, limited partnerships, and corporations. Frequently, a project is developed either by a corporation engaged in the business of developing real estate or by a corporation formed to develop one project or venture. In the latter case, by the time the project is sold, there may be few, if any, assets remaining in the corporation.

From a practical standpoint, factors the attorney should analyze include the following:

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27. *Id.*

28. 53 Cal. 3d 1180, 812 P.2d 154, 280 Cal. Rptr. 135 (1991).

29. 126 Wn. App. 285, 108 P.3d 818 (2005), *aff'd on other grounds*, 158 Wash. 2d 603, 146 P.3d 914 (2006), *superseded on other grounds*, Chadwick Farms Owners Ass'n v. FHC, LLC, 139 Wn. App. 667, 199 P.3d 984 (2007).

30. *Id.*; for more on this topic, see Chapter 2.

- Potential amount of liability
- Assets of the developing entity
- Ability of the developing entity to effectuate a cash or in-kind settlement
- Ability of the developing entity to finance a protracted and expensive defense
- Ability of the developing entity to direct liability toward third parties responsible for the original design and construction of the condominium
- Client's general attitude toward settlement

Counsel should also evaluate the potential liability of the principals of the development entity.[31] Where a parent company holds itself out as the developer of a project or directly participates in or otherwise asserts control in the planning, design, construction, marketing, sale, or operation of a development, an argument can be made that the parent company may be liable for design or construction defects.[32] Directors, officers, and stockholders of the development entity may lose their insulation from liability for corporate acts if they engage in criminal activity, fraud, willful misconduct, self-dealing, unjust enrichment, or betrayal of trust.[33]

Developers may be liable to owners for breach of contract, violation of building codes, or negligence. Additionally, developers may be liable to condominium unit owners for faulty construction based on implied or express warranties as well as statutory causes of action arising from violation of the state minimum building codes.[34]

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31. Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007).

32. *Id.*

33. *See, e.g.*, Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114 (Fla. 1984) (corporate veil may be pierced only on a showing of improper conduct). *Compare* Perlow v. Goldberg, 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997) (individual condominium association directors immune from liability for negligence even when action clearly wrong) *with* Adams v. Meyers, 250 Ill. App. 3d 477, 620 N.E.2d 1298 (Ill. App. Ct. 1993), *distinguished by* Natural Organics, Inc. v. Nat'l Nutritional Foods Ass'n, 302 Ill. App. 3d 858, 706 N.E.2d 975 (Ill. App. Ct. 1998) (condominium association's declaration may expressly provide that the members of the board shall not be liable for any mistake of judgment or omissions except for acts or omissions that constitute gross negligence or fraud). *See also* Reedeker v. Salisbury, 952 P.2d 577 (Utah Ct. App. 1998) (generally individual officers of a condominium association acting in that capacity are not personally liable in contract to either the condominium association or the owners).

34. For more on this topic, please see Chapter 3. Depending on the jurisdiction, the statute of limitations to enforce the developer's obligations to an association may not begin to run until the developer relinquishes control of the association to the unit owners (i.e., the unit owners have elected a majority of the board that represents them). Fla. Stat. §718.124. *See* Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condo. Ass'n, Inc., 658 So. 2d 922 (Fla. 1995) (running of the statute of limitations in construction suit is deferred until control of the association is turned over from the developer to the unit owners). This tolling provision prevents developers from retaining control over an association until the

4. Contractors and Subcontractors

In some states, the contractor, subcontractors, and suppliers of condominium projects grant statutory implied warranties of fitness to the developer and to the purchaser of each condominium unit as to the work performed or materials supplied.[35] On the other hand, the attorney should be mindful that in some jurisdictions, the statutory implied warranty extending from the developer to the association may be broader in scope.[36]

Aside from liability based on the statutory implied warranties, contractors and subcontractors have also been held liable to property owners for damages based on contractual third-party beneficiary rights,[37] common-law causes of action,[38] negligence, and violations of applicable building codes.[39]

5. Individual Qualifiers of Contractor

An owner may be able to recover from a negligent qualifying agent under a common-law theory of negligence in the event of personal injury and property damage or through appropriate administrative remedies.[40] Moreover, if the qualifying agent performs work on the relevant project, the agent may be *individually* liable for damages based on a private cause of action initiated by the aggrieved party.[41]

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statute of limitations expires, thereby barring the claim that the unit owners otherwise might have been able and willing to pursue. However, the tolling provision makes no distinction between actions brought by a condominium association on its own behalf and those brought on behalf of unit owners.

35. *See* Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995) (contractor warranted to developer that contractor would furnish work and materials necessary to complete project in good workmanlike manner); Roach v. West Wabash Constr., 838 S.W.2d 447, 448 (Mo. Ct. App. 1992) (evidence sufficient to establish that construction company breached its express warranty that work on construction of house would be completed in a workmanlike manner).

36. *See Leisure Resorts, Inc.*, 654 So. 2d at 914 (distinguishing that developers provide a separate "warranty of fitness or merchantability for the purposes or uses intended").

37. *See* Plantation Pipe Line Co. v. 3-D Excavators Inc., 287 S.E.2d 102 (Ga. App. 1981) (contract providing that contractor would be responsible for all injury to persons or property on account of execution of work, and that it would adjust all claims or suits arising from same gives rise to contractor's liability to damaged pipeline owner as a third-party beneficiary); Coley v. Cohen, 9 N.Y.S.2d 503 (N.Y. 1939) (contract containing indemnity provision by contractor to owner rendered contractor directly liable to property owner as third-party beneficiary for damages caused by contractor's blasting operations).

38. *See* Biscayne Roofing Co. v. Palmetto Fairway Condo. Ass'n, Inc., 418 So. 2d 1109 (Fla. 3d Dist. Ct. App. 1982) (subcontractor who breached the express and implied warranties of fitness and merchantability by substituting roof materials without authorization was found to be liable to the condominium association for damages).

39. See also Chapter 3.

40. *See, e.g.*, Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994).

41. *See, e.g.*, Evans v. Taylor, 711 So. 2d 1317 (Fla. 3d Dist. Ct. App. 1998).

6. Surety

If a surety issued a bond guaranteeing the performance of the contract, the owner may have a claim against the surety for damages associated with the cost to correct deficiencies, whether patent or latent. In Florida, such a claim may only be asserted for five years after completion of construction.[42] In general, claims against performance bonds have strict notice requirements, and time limitations may be much shorter than the general statutes of limitations. However, whether an owner has a cause of action against the surety will depend on the actual language of the bond[43] and whether the owner is a named obligee or intended third-party beneficiary to its terms. Some pre-suit notice and cure statutes also serve to toll the statute of limitations against sureties.[44]

If a performance bond makes a construction contract part of the bond, the bond's requirement that the contractor promptly and faithfully perform the contract could impose liability on the surety for the contractor's breach concerning latent defects.[45] If a construction contract is not part of the performance bond, the surety under the performance bond will be relieved of any further responsibility on substantial completion of a building.[46]

7. Construction Managers

The construction manager is generally an agent of the owner and is the "manager" of the entire building process. The construction manager's functions frequently include advising and consulting with the design professional concerning costs, methods, and materials. Further, the construction manager assists the owner by advising the owner on the selection of contractors and method of awarding contracts, scheduling, and coordination, and supervision of construction activities. Courts typically consider construction managers to be professionals, like architects and engineers, and they may have a fiduciary duty toward the owner.[47] A construction manager may be exposed to liability in all of these basic areas of responsibility. The legal basis for an action against a construction manager on behalf of the owner will generally be found in the contract between the owner and the construction manager, outlining the

42. *See* Fed. Ins. Co. v. Sw. Fla. Ret. Ctr., Inc., 707 So. 2d 1119 (Fla. 1998).

43. Beach Point Condominium Ass'n, Inc. v. Beach Point Corp., 480 So. 2d 239 (Fla. 4th Dist. Ct. App. 1985).

44. *See, e.g.*, Fla. Stat. §558.004(10).

45. *See* School Board of Pinellas Cty. v. St. Paul Fire & Marine Ins. Co., 449 So. 2d 872 (Fla. 2d Dist. Ct. App. 1984).

46. *See, e.g.*, Fla. Bd. of Regents v. Fidelity & Deposit Co. of Md., 416 So. 2d 30 (Fla. 5th Dist. Ct. App. 1982). *But cf.,* Fed. Ins. Co. v. Southwest Retirement Center, Inc., 707 So. 2d 1119 (Fla. 1998).

47. *See, e.g.*, Caldwell v. Bechtel, Inc., 631 F.2d 989, 998 n.12 (D.C. Cir. 1980) ("Architects, engineers and construction managers have been treated similarly for purposes of assessing duty").

construction manager's duties, functions, and obligations. The construction manager may also be liable if it is negligent in the performance of contractual obligations.[48] Liability will vary among jurisdictions.[49]

8. Governmental Bodies

A number of governmental entities are involved in the development and construction process of any project. In particular, counties and municipalities generally undertake certain duties relative to zoning, issuance of permits, plan and specification approval, inspections, and issuance of certificates of occupancy. For a governmental entity to be liable in tort, there must be an underlying common-law or statutory duty of care with respect to the negligent conduct. However, there has never been any common-law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. Furthermore, in most states, there is no statutory duty on the part of governmental entities to inspect construction projects for the protection of individual citizens or the general public.[50]

The attorney should also be mindful that many states apply the principles of sovereign immunity to protect public officers and employees, such as building officials and other "authorities having jurisdiction" who negligently misinform members of the public about the issuance of a building permit, provide the wrong information regarding the requirements for federal flood insurance, negligently issue a building permit,[51] or negligently perform a discretionary act without malice or an intent to injure.[52]

9. Design Professionals

Architects, engineers, planners, and other professionals undertaking design or planning functions are generally involved pursuant to a direct contract with the developer or a contract with the general contractor. If the general contractor has complied completely with plans and specifications and the

48. *See, e.g.*, Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc., 619 So. 2d 6 (Fla. 5th Dist. Ct. App. 1993); Alaska Dep't of Natural Res. v. Transamerica Premier Ins., 856 P.2d 766, 772 (Alaska 1993); Keel v. Titan Constr., 639 P.2d 1228, 1232 (Okla. 1981).

49. See discussion in Chapter 3.

50. *See, e.g.*, Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985) (municipal building departments are not liable for the negligence of their building inspectors in failing to enforce building code provisions). *But cf.* Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985).

51. *See* Storm v. Town of Ponce Inlet, 866 So. 2d 713 (Fla. 5th Dist. Ct. App. 2004).

52. Holloman v. D.R. Horton Inc., 241 Ga. App. 141, 524 S.E.2d 790 (1999), *cert. denied* (Apr. 28, 2000), and *cert. denied* (May 5, 2000) (finding no evidence that city community development director acted with malice in preparing a defective inspection of plaintiff's home).

defect still exists, in all likelihood, the defect is associated with an error in the design.

Some statutory implied warranties require only contractors, subcontractors, and suppliers to grant to the developer and purchasers of condominium units an implied warranty of fitness for work performed or material supplied. A majority of courts have refused to apply these statutes to design professionals, architects, and engineers.[53]

However, a minority of states allows claims against design professionals for implied warranties for design defects.[54] An aggrieved party may also recover damages from a design professional based on negligence, in the absence of contractual privity.[55]

Owners may also pursue a design professional for violation of the applicable building code.[56] For further treatment of this cause of action, see the discussion in Chapter 3.

53. Fla. Stat. §718.203(2). *See, e.g.*, Bruzga v. PMR Architects, P.C., 693 A.2d 401, 405 (N.H. 1997) (the generally accepted view is not to impose liability on architects based on implied warranty of adequacy of design); Kemper Architects, P.C. v. McFall, Konkel & Kimbell Consulting Eng'rs, 843 P.2d 1178, 1186 (Wyo. 1992) (engineer or architect does not warrant that its services are fit for a particular purpose); Donnelly Constr. v. Oberg/Hunt/Gilleland, 677 P.2d 1292, 1297 (Ariz. 1984) (design professionals, in the absence of an express guarantee, do not warrant that their work will be accurate).

54. *See, e.g.*, Beachwalk Villas Condo. Ass'n v. Martin, 406 S.E.2d 372, 374 (S.C. 1991) (allowing breach of implied warranty of design to homeowners); Tamarac Dev. v. Delamater, Freund, & Assocs., 675 P.2d 361, 365 (Kan. 1984) (allowing a breach of implied warranty of workmanlike performance action against an architect).

55. *See e.g.*, Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999) (engineers inspecting a home); Robert & Co. Assocs. v. Rhoades Haverty P'ship, 300 S.E.2d 503 (Ga. 1983) (lack of privity did not shield engineer from liability to foreseeable prospective buyers); Eastern Steel Constructors, Inc. v. City of Salem, 549 S.E.2d 266 (W.Va., 2001) (notwithstanding absence of privity between contractor and design professional, due to the special relationship existing between the two, contractor may recover economic damages in professional negligence action against design professional); A.E. Inv. Corp. v. Link Builders Inc., 214 N.W.2d 764 (Wis. 1974) (under Wisconsin negligence law, architect may be liable to third parties with whom they are not in privity of contract). *But compare* Terracon Consultants Western, Inc. v. Mandalay Resort Grp., Inc., 206 P.3d 81 (Nev. 2009) (declining to extend holding in *Moransais*) *with* Thompson v. Gordon, ___ N.E.2d ___, 2011 WL 190290 (Ill. 2011) (engineering firm that performed its services in accordance with the terms of its contract could not be liable for failing to do more than the contract required). For more on this topic, see Chapter 3.

56. *See, e.g.*, Fla. Stat. §553.84.

III. Pleading Causes of Action

A. In General

Once the preliminary investigation and analysis has been completed and the appropriate parties have been identified, counsel must decide on a theory of the case in pleading appropriate and sufficient causes of action. Applicable contracts, case law, and statutory authorities establish the substantive rights that are available to each of the parties, but picking a successful theory of the case requires a thorough understanding of the facts, an understanding of all possible available causes of action, and sensitivity to which combination of facts and legal theory will permit the telling of a compelling story. For a detailed discussion of the legal theories of liability and defenses that should be considered, see the discussion in Chapter 3. Below, we focus on the practical implications of selecting different theories while preparing and presenting the case.

B. Implied Warranties

1. Common Law (Developers and Contractors)[57]

Unless implied warranties are expressly disclaimed in the project contract, courts generally find that developers and contractors implicitly provide several kinds of common-law warranties. In addition, some courts have been reluctant to enforce disclaimers of common-law implied warranties.[58] To be enforced, the developer or contractor's disclaimer of an implied warranty must be (1) bold and conspicuous, (2) known to the buyer, and (3) specifically bargained for.[59] Therefore, in preparing its theory of the case, the attorney should always look whether implied warranties are conspicuously disclaimed, and, if not, consider asserting the appropriate implied warranties in

57. In addition to the implied warranties discussed in this section, some courts may impose on the developer or contractor the responsibility to construct improvements: (1) in compliance with the applicable building codes (Drexel Prop., Inc. v. Bay Colony Club Condo., Inc., 406 So. 2d 515 (Fla. 4th Dist. Ct. App. 1981), *disapproved in part* Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc. 620 So. 2d 1244 (Fla. 1993)); (2) in compliance with the plans and specifications on file with the local building authority (David v. B & J Holding Corp., 349 So. 2d 676 (Fla. 3d Dist. Ct. App. 1977)); and (3) in compliance with the condominium restrictive covenants (Robinson v. Palm Coast Constr. Co., 611 So. 2d 1351 (Fla. 5th Dist. Ct. App. 1993)).

58. *See, e.g.*, Burbo v. Harley C. Douglass, Inc., 125 Wn. App. 684, 106 P.3d 258 (2005) (contractor had sought to enforce a disclaimer in the contract, but court held that the disclaimer was inadequate).

59. *Id*. Belle Plaza Condo. Ass'n, Inc. v. B.C.E. Dev., Inc., 543 So. 2d 239 (Fla. 3d Dist. Ct. App. 1989) (recognizing that express and implied warranties can effectively be disclaimed by use of a bold and conspicuous disclaimer).

any action that is filed. Implied warranties, when available, can support an appealing narrative readily understood by a jury.

a. Implied Warranty of Workmanship or Workmanlike Construction

Some states have held that when a contractor holds itself out as specially qualified, there is an implied warranty that the work will be done in a workmanlike manner.[60] This implied warranty of workmanship applies to commercial property as well as residential[61] and is distinct from the implied warranty of habitability.[62] When available, an implied warranty of workmanship goes to the heart of the contractor's obligations and is easily explained to a jury.

b. Implied Warranty of Habitability

The implied warranty of habitability says that a new building should be fit to live in. When it is not, there is a very strong theory that permits the plaintiff to easily convey the essence of an action to a jury. An implied warranty of habitability claim requires (1) a plaintiff who is the first purchaser of (2) a new home from (3) a defendant whose business is building homes, and (4) defects that render the home unfit for its intended purpose. This claim is available to all buyers of new homes from merchant builders unless specifically disclaimed.[63] However, the attorney should be mindful that the implied warranty

60. *See* Kennedy v. Columbia, 384 S.E.2d 730 (S.C. 1989) ("a builder who contracts to construct a dwelling impliedly warrants that the work will be performed in a careful, diligent, workmanlike manner"). *Id.* at 736.

61. *See, e.g.*, Lewis v. Anchorage Asphalt Paving Co., 535 P.2d 1188, 73 A.L.R.3d 1196 (Alaska 1975) (asphalt paving over fill); Davis v. McCall, 568 P.2d 956 (Alaska 1977) (cabinet work); Parsons v. Beaulieu, 429 A.2d 214 (Me. 1981) (septic system problem; contractors do not guarantee their work will be perfect, but they do warrant that what they build will be constructed in a reasonably skillful manner); Kubby v. Crescent Steel, 105 Ariz. 459, 466 P.2d 753 (1970) (dictum); McIntire v. Muller, 522 N.W.2d 329, 332 (Iowa Ct. App. 1994) ("[w]hen a contractor agrees to build, there is an implied agreement the building or work performed will be sufficient for the particular purpose desired or to accomplish a certain result"); Parker v. Thornton, 596 So. 2d 854, 857 (Miss. 1992) (defect in subsoil); Kirk v. Ridgway, 373 N.W.2d 491 (Iowa 1985) (peeling paint); Hennes Erecting Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 813 F.2d 1074 (10th Cir. 1987) (construction of power plant).

62. Kennedy v. Columbia, 384 S.E.2d at 736.

63. *Burbo*, 125 Wn. App. 684, 106 P.3d 258 (2005); Lucas v. Canadian Valley Vocational Technical Sch., 824 P.2d 1140 (Okla. Ct. App. 1992) ("When a builder-vendor sells a new home, there is an implied warranty, as a matter of law, that the home is or will be reasonably fit for occupancy as place of abode").

of habitability will not apply to every defective condition.[64] Moreover, not every state accepts the doctrine of implied warranty of habitability.[65]

c. Application of Implied Warranties to Latent Defects

Implied warranties of habitability generally protect new purchasers who discover latent defects in their home.[66] In many jurisdictions, the implied warranty of habitability imposes strict liability on contractors.[67] When available, this presents an obvious benefit to claimants because no proof of a failure to use due care is required. However, in some jurisdictions, implied warranties may not apply to latent defects when the contractor had no knowledge of the defect, acted in good faith, and exercised reasonable care and skill.[68] Therefore, before asserting any claim, the facts and possible defenses must be scrutinized.

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64. *See, e.g.*, Bd. of Dir. of Bloomfield Club Recreation Ass'n v. Hoffman Grp., Inc., 186 Ill. 2d 419, 238 Ill. Dec. 608, 712 N.E.2d 330 (1999) (homeowner's association could not recover under warranty of habitability for defects in recreational building that is a nonresidential building); Samuelson v. A.A. Quality Constr., Inc., 230 Mont. 220, 749 P.2d 73 (1988) (warranty of habitability limited to defects that preclude using the dwelling as a residence); McJunkin v. Kaufman and Broad Home Sys., Inc., 229 Mont. 432, 748 P.2d 910, 5 U.C.C. Rep. Serv. 2d 1341 (1987) (warranty of habitability does not provide remedy for minor defects). *Compare* McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283, 1293, 16 A.L.R.4th 1227 (1979) (inadequate water supply breaches warranty of habitability because usable water is an absolute essential utility to a dwelling house).

65. *See, e.g.*, P. B. R. Enterprises, Inc. v. Perren, 158 Ga. App. 24, 279 S.E.2d 292 (1981) (caveat emptor applies to sales of real property; thus the law implies no warranties as to the quality or condition of an existing new house in favor of a purchaser); Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182 (Utah 1996) (Utah law only recognizes an action for implied warranty of habitability with respect to residential leases and not with respect to residential sales); O'Connor v. Scott, 533 So. 2d 241 (Ala. 1988) (Alabama retains the rule of caveat emptor for the sale of used residential real estate).

66. *See, e.g.*, *Lucas*, 824 P.2d 1140 (Okla. Ct. App. 1992); Pontiere v. James Dinert, Inc., 627 A.2d 1204 (Pa. 1993).

67. *See, e.g.*, Becker v. Graber Builders Inc., 561 S.E.2d 905 (N.C. App. 2002) (warranty of habitability for a home arises by operation of law and imposes strict liability on the builder-vendor); Medlin v. Fyco Inc., 534 S.E.2d 622 (N.C. App. 2000); Wall v. Foster Petroleum Corp., 791 P.2d 1148 (Colo. App. 1989) (warranty of habitability has been likened to strict liability for construction defects, and proof of a defect due to improper construction or design is sufficient to establish builder-vendor's liability).

68. *See, e.g.*, Wood-Hopkins Contracting v. Masonry Contractors, 235 So. 2d 548, 551 (Fla. 1st Dist. Ct. App. 1970) (no breach of implied warranty because contractor unaware of latent defect in bricks); Whaley v. Milton Constr. & Supply, 241 S.W.2d 23, 31 (Mo. Ct. App. 1951) (jury could reasonably find that plaintiff's damage was caused by latent defect in joists unknown to contractor and not discoverable by exercise of ordinary care). *But cf.* Smith v. Old Warson Development Co., 479 S.W.2d 795 (Mo. 1972) (disapproving of *Whaley's* assumption that liability for breach of implied warranty does not lie in the absence of fault or negligence by the warrantor).

d. Application of Implied Warranties to Remote Purchasers

Courts are divided on whether common-law implied warranties also protect secondary purchasers of construction projects. Therefore, the attorney is advised to carefully research the application of these warranties within the relevant jurisdiction. A 1985 North Carolina decision held that the second purchaser of a home could not sue the contractor on a theory of implied warranty.[69] Other jurisdictions have also held that privity is a requirement for enforcement of an owner's implied warranty claims for construction defects.[70] Other cases, however, have held that privity is *not* an essential element for assertion of an implied warranty claim against a contractor. For example, a Wyoming court held that a homebuilder's implied warranty of fitness for habitation extends to subsequent purchasers for a reasonable length of time.[71]

C. Statutorily Imposed Warranties

Statutory warranties can bring the advantage of being broader in scope. They can apply to developers, contractors, subcontractors, suppliers, and design professionals. In some states, they also benefit subsequent purchasers. Statutory warranties can range from a simple implied warranty "of fitness as to the work performed or materials supplied,"[72] to statutorily implied or express warranties of quality. Some states provide both express and implied warranties.[73] For example, Washington's Protection of Condominium Owners Act provides that sellers grant express warranties of quality to unit purchasers.[74]

69. Evans v. Mitchell, 74 N.C. App. 732, 329 S.E.2d 681 (1985).

70. Chubb Grp. of Ins. Cos. v. C.F. Murphy & Assocs., Inc., 656 S.W.2d 766 (Mo. Ct. App. W.D. 1983) (roof collapsed; tenants sued contractor and steel manufacturer); San Francisco Real Estate Investors v. J. A. Jones Constr. Co., 524 F. Supp. 768, 24 Ohio Op. 3d 226 (S.D. Ohio 1981), *decision aff'd*, 703 F.2d 976 (6th Cir. 1983) (leaks in parking structure); Kuswa & Assocs., Inc. v. Thibaut Constr. Co., Inc., 463 So. 2d 1264 (La. 1985) (defective paint used to paint offshore oil platform); Parliament Towers Condo. v. Parliament House Realty, Inc., 377 So. 2d 976 (Fla. 4th Dist. Ct. App. 1979), *disapproved of on other grounds by* Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) (defective condominium units); Brown v. Elton Chalk, Inc., 358 So. 2d 721 (Miss. 1978) (construction defects in home); Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974) (cracks in home); Hicks v. Greenville Lumber Co., Inc., 387 So. 2d 94 (Miss. 1980).

71. In *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979), a remote purchaser alleged the electrical system in the house was improperly constructed. *See also* Groppel Co., Inc. v. U.S. Gypsum Co., 616 S.W.2d 49, (Mo. Ct. App. E.D. 1981) (implied warranty of merchantability of fireproofing materials was held to apply without privity).

72. *See* Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995).

73. *See* Nev. Rev. Stat. §116.4114 (Nevada's statutory implied warranty of quality from developers or contractors to individual condominium unit owners); Nev. Rev. Stat. §116.4115 (Nevada's statutory express warranties from sellers to purchasers of condominium units).

74. Wash. Rev. Code. Ann. §64.34.443 (West 2010).

This act also specifies that the developer or contractor grants implied warranties of quality to individual unit purchasers (that the unit will be in good condition at the time of delivery or possession) and to the association (that the common areas will be "suitable for the ordinary uses of real estate of its type").[75] California specifies detailed standards for original construction intended to be sold as an individual dwelling unit.[76] Common-law implied warranties may or may not be superseded by the statutory warranty.[77]

Typically, the developer will have a direct contractual relationship with a general contractor, as evidenced by a written construction contract providing for specific indemnification of the developer for the actions of the general contractor. Additionally, the general contractor has contractual duties that are outlined in the project plans and specifications and in other contract documents. These documents usually contain certain express warranties that run in favor of the developer. In some jurisdictions, the developer of a condominium may also recover from the contractor for breach of the statutory implied warranties.[78]

In most construction contracts, the contractor expressly or impliedly will warrant to the developer, among other things, that the project is constructed in a good and workmanlike manner, using new materials and proper techniques, and in compliance with applicable plans, specifications, building codes, and standards of the industry. A contractor has a duty to perform construction in accordance with the skill and care associated with that work, notwithstanding the absence of an express contractual obligation.[79] To the extent that a condominium developer has been damaged and has expended sums for repair and replacement of defective items, it may pursue an action for breach of statutory implied warranties against the contractors, subcontractors, and suppliers unless specific disclaimer language appears in the contract.

In the absence of privity of contract, claims against subcontractors, material suppliers, and manufacturers will often rely on statutory implied warranties. The attorney is advised to verify the specific types of warranties provided within his or her jurisdiction. For a comprehensive discussion of the legal aspects of statutory implied warranties and its application to potential defendants, see Chapter 3.

D. Building Code Violations

Building code violations present another distinct advantage for the prosecution of construction defect claims. In some jurisdictions, code violations may

75. Wash. Rev. Code. Ann §64.34.445 (West 2010).
76. Cal. Civ. Code §895 (West 2007).
77. *See, e.g.*, Greenburg v. Johnston, 367 So. 2d 229 (Fla. 2d Dist. Ct. App. 1979).
78. *E.g.*, under Fla. Stat. §718.203(2).
79. Manufacturers Cas. Ins. Co. v. Intrusion-Prepakt, Inc., 264 F.2d 758 (5th Cir. 1959).

form the basis for a statutory cause of action[80] or a claim of negligence per se against the violating party.[81] Typically, the plaintiff/claimant must show that the defendant violated a statute, ordinance, or regulation, resulting in damages or injury to the plaintiff, whose individual right of action arising from the violation was intended by the legislature.[82] The attorney is advised to research whether his or her state provides a statutory civil remedy against persons or parties who violate the state building codes, in addition to other available remedies.

The attorney must also identify the appropriate defendants and determine how to overcome any restrictive language in the statute. Did the developer, contractors, subcontractors, or design professionals participate in monitoring, inspecting, supervising, or engaging of construction activities that involve a building code violation? If so, they may be liable for violating building code provisions. Material suppliers may be governed by building codes.[83]

However, the identification of proper defendants is not always straightforward. Some jurisdictions only impose liability for violation of building codes on the person or party that actually committed the violations.[84] Accordingly, a developer who hires a general contractor to construct a condominium without engaging in any actual construction, supervision, or monitoring activity may not be liable for a violation of building codes committed by the construction team.

Liability against design professionals may be established when the design professional knew or should have known that its design violated the building code.[85] A theory that design professionals have violated applicable building codes is particularly critical in those jurisdictions where design professionals have no implied warranties. Generally, design professionals have a duty to prepare the plans and specifications in compliance with the building codes and to ensure that construction would comply with the code.[86] Counsel may

80. *E.g.*, Fla. Stat. §553.84.

81. *Compare* Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985) (contractor's building code violations constituted negligence per se) *with* Moore v. McCarty's Heritage Inc., 16 Ohio Op. 3d 219, 404 N.E.2d 167 (Ohio Ct. App. 1978) (contractor's violation of city building code was negligence as a matter of law).

82. Shirley v. Glass, 241 P.3d 134 (Kan. App. 2010), *citing to* Pullen v. West, 92 P.3d 584 (Kan. 2004).

83. *See, e.g.*, St. Joseph Hosp. v. Corbetta Constr. Co., Inc., 316 N.E.2d 51 (Ill. App. Ct. 1974) (hospital entitled to recover from manufacturer for damages sustained as a result of use of paneling that did not comply to code).

84. *See* Sierra v. Allied Stores Corp., 538 So. 2d 943 (Fla. 3d Dist. Ct. App. 1989) (landowner not liable for injuries resulting from alteration of property by independent contractor in violation of building code).

85. *Id.*

86. *See* Seibert v. Bayport Beach & Tennis Club Ass'n, Inc., 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1991); Robsol, Inc. v. Garris, 358 So. 2d 865, 866 (Fla. 3d Dist. Ct. App. 1978); Straus v. Buchman, 96 A.D. 270, 89 N.Y.S. 226 (1st Dep't 1904), *aff'd*, 184 N.Y. 545, 76 N.E. 1109 (1906).

be able to argue that architects and engineers are presumed to know the building codes in the jurisdiction of the project and are required to conform their design to the current building code. Keep in mind that some states require a certificate of merit in order to initiate litigation against design professionals.[87]

E. Negligence (Developers, Contractors, Subcontractors, Suppliers, Architects, and Engineers)

When considering a common-law negligence cause of action, keep in mind that in many jurisdictions, negligence principles of recovery face a particular hurdle with the economic loss rule.[88] The economic loss rule is a court-created doctrine that prohibits recovery in tort when no personal injury or damage to other property exists and the claimant's losses or damages are only economic in nature.[89] However, the application of the economic loss rule is inconsistent. In some jurisdictions, an owner can bring a negligence claim against a general contractor for damages suffered because of the actions or inactions of the contractor.[90] Some jurisdictions have allowed owners to recover economic losses

87. *See* Nagim v. New Jersey Transit, 369 N.J. Super. 103, 848 A.2d 61 (N.J. Super. Ct. Law Div. 2003).

88. See discussion in Chapter 3.

89. For example, in *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc*., 620 So. 2d 1244 (Fla. 1993), a condominium association initiated a lawsuit against a concrete supplier based on a negligence theory for furnishing defective concrete for a condominium project. As a result of the defective product, steel supports rusted and cracked. The Florida Supreme Court applied the "economic loss doctrine" and specifically found that negligence causes of action could not be maintained in construction defect claims against developers, contractors, or material suppliers. The court reasoned that this type of injury should be pursued on a contract theory, which is designed to enforce the expectancy interests of the parties. *Casa Clara* held that damage caused to the building components itself did not constitute damage to "other property" to permit recovery of economic loss damage based on a negligence theory. *But cf.* Hewitt-Kier Constr., Inc. v. Lemuel Ramos & Assocs., 775 So. 2d 373 (Fla #th Dist. Ct. App. 2002). Negligence action for poor plans and specifications causing economic loss to contractor allowed. Florida recognizes a common-law cause of action against professionals based on their acts of negligence even in the absence of a direct contract between the professional and the aggrieved party. Factor was § 522, Restatement of Torts, "special relationship."

90. *See, e.g.*, Arden Hills N. Homes Ass'n v. Pemtom, Inc., 475 N.W.2d 495, 499–500 (Minn. Ct. App. 1991) (tort liability allowed after noting that "a contractor has a duty, independent of the contract itself, to erect a building in a reasonably good and workmanlike manner"); Kennedy v. Columbia Mfg. & Lumber, 384 S.E.2d 730, 736 (S.C. 1989) (if builder violates only a contractual duty, builder's liability is contractual only; but if builder violates legal duty, builder may be liable in tort); Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988) (lack of privity no defense to negligence claim by second purchasers against contractor); Simmons v. Owens, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978) (*disapproved of by* Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993))

in tort actions against developers.[91] Other jurisdictions have also established liability in favor of aggrieved parties damaged as a result of design professional negligence despite a lack of contractual privity.[92] Other courts have awarded damages for economic losses where the aggrieved party was the victim of fraud.[93] Therefore, careful examination of the economic loss rule, as it applies to the facts of the case and the jurisdiction, is essential before asserting a negligence cause of action.

F. Strict Liability in Tort

Some state courts have failed to specifically address whether theories of strict liability would apply to construction defect litigation because strict liability is a tort theory with roots in products liability law. Usually, strict liability in tort holds that a manufacturer is liable for personal injury and property damage caused by a defect in its product, even if the product was produced without negligence. Some jurisdictions have extended this concept to apply to developer-builders or mass producers/mass homebuilders, general contractors, and material suppliers.[94] Although generally courts do not hold general

(negligent contractor who failed to comply with city building code found liable to remote purchaser for latent defects).

91. *See* Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1st Dist. 1984), *disapproved on other grounds of by* Aas v. Superior Court, 24 Cal. 4th 627, 12 P.3d 1125 (2000) (remote owner may recover economic loss caused by negligence of developer's violations of building code).

92. *See, e.g.*, Moransais v. Heathman, 744 So. 2d 973, 984 (Fla. 1999) (allowing for a common-law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party). Based on *Moransais*, an owner would also be permitted to maintain a negligence cause of action against both the design firm and the individual design professional who participated in the design of the project. *See also* Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8 (2d Cir. 2000) (economic loss rule does not bar owner's professional malpractice claim against engineer where damages arise from a harm distinct from the contract). *But cf.* Thompson v. Gordon, 2011 WL 190290 (Ill. 2011) (engineering firm that performed its services in accordance with the terms of its contract could not be liable for failing to do more than the contract required).

93. *See* Holloman v. D.R. Horton, Inc., 241 Ga. App. 141, 524 S.E.2d 790 (1999), *cert. denied* (Apr. 28, 2000) and *cert. denied* (May 5, 2000) (economic loss rule inapplicable to cases involving passive concealment or fraud).

94. *See, e.g.*, Bay Summit Cnty. Assoc. v. Shell Oil Co., 51 Cal. App. 4th 762, 59 Cal. Rptr. 2d 322 (Cal. Ct. App. 1996) (strict liability claim against supplier was not precluded as a matter of law). *But cf.* Sunset Point Partnership v. Stuc-o-flex International, Inc., 954 P.2d 1156 (Mont. 1998) (stucco applied to condominium exterior was not defective as required to support strict liability claim against supplier where application, not the product itself, was defective); Gem Developers v. Hallcraft Homes of San Diego, Inc., 213 Cal. App. 3d 419 (Ca. 4th Dist. Div. 1, 1989) (pleadings raised factual issue as to whether developer could have been strictly liable to condominium owners).

contractors or design professionals strictly liable for their work,[95] some courts have treated the mass production of homes as the same as the mass production of other consumer products. Therefore, depending on the jurisdiction, attorneys should be mindful that developers and builders of mass-produced housing may be subject to strict liability.[96]

In some states, strict liability is only available where the legislature has provided for it or where common law has imposed such liability and the legislature has not changed it.[97]

The attorney should also be mindful that many courts have refused to extend strict liability to commercial real property.[98] The attorney should also remember that strict liability and negligence theories may be subject to a different measure of damages. In some states, an owner may not recover economic damages under a theory of strict liability but may do so under a negligence theory.[99]

G. Express Warranty

In evaluating a construction claim, the attorney should also review the prospectus, purchase and sale contract, offering brochures, and any other developer publications to determine if any express warranties have been furnished to the owner in connection with the marketing and sale of a project. If affirmative representations are contained in the developer's documents, this may give rise to a cause of action for express warranty against the developer. Other

95. *See, e.g.*, Jackson v. City of Franklin, 554 N.E.2d 932, 939 (Ohio Ct. App. 1988); Bruzga v. PMR Architects, P.C., 141 N.H. 756, 693 A.2d 401, 405 (1997) (architects and contractors provide professional services and therefore cannot be held liable under theory of strict liability); Huang v. Garner, 203 Cal. Rptr. 800, 804 n.5 (Ct. App. 1984) (strict liability action against engineer barred because it is a "well settled rule" that California does not apply the doctrine of strict liability to the sale of services that is no way analogous to placing products on the market); City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978) (architects should not bear same burden of liability for their products as that imposed on manufacturers). *Compare* Hyman v. Gordon, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (2d Dist. 1973) (strict liability applied to home design-builder).

96. *See, e.g.*, Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1st Dist. 1969) (builder who mass produced housing held strictly liable); Patitucci v. Drelich, 153 N.J. 177, 379 A.2d 297 (1977) (construction of just six homes in one development was sufficient to consider developer a mass-producer of homes); Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co., 123 Cal. App. 3d 898, 911, 176 Cal. Rptr. 886, 893 (1981) (developer of 192 condominium units considered a mass-producer of housing).

97. Bruzga v. PMR Architects, P.C., 141 N.H. 756, 693 A.2d 401, 405 (1997).

98. *See, e.g.*, Gentry Constr. Co. v. Superior Court, 212 Cal. App. 3d 177, 260 Cal. Rptr. 421 (1989).

99. *See, e.g.,* Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1st Dist. 1984), *disapproved of on other grounds by* Aas v. Superior Court, 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 (2000); Moorman Mfg. Co. v. Nat'l Tank Co., 91 Ill. 2d 69, 61 Ill. Dec. 746, 435 N.E.2d 443, 33 U.C.C. Rep. Serv. 510 (1982).

sources of express warranty are all of the agreements relating to construction. It is important to evaluate all warranties and contracts, to make sure the owner understands and follows any notice and right-to-cure procedures specified therein.[100]

Note that, except in design-build contracts, a contractor's express warranty to the owner as to the material, equipment, and workmanship furnished on a project does not shift the responsibility for design defects onto the contractor. Express warranties merely guarantee that the contractor will follow the project plans and specifications as given to the contractor.[101]

The existence of an express warranty does not automatically nullify an implied warranty and should always be analyzed separately.[102]

H. Fraud, Misrepresentation, and Deceptive and Unfair Trade Practices

In evaluating representations made in marketing, sales, and contract documents, the attorney should keep in mind the possibility of asserting a fraud cause of action. A fraud cause of action can be asserted even when the circumstances surrounding the alleged fraudulent conduct are based on a contractual claim.[103] When appropriate, a fraud cause may be of particular benefit because it may avoid the limitations imposed by application of the economic loss doctrine.[104]

To assert a valid cause of action based on allegations of fraud, the owner must establish: (1) a misrepresentation of material fact or suppression of the truth; (2) knowledge by the representor of the misrepresentation, or representations made by the representor that ought to have been known, if he or she did not know of the falsity thereof; (3) an intention that the representor induced another to act on the misrepresentation; (4) resulting injury to the party acting in justifiable reliance on the representation; and (5) damages.[105]

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100. *See* Simek v. Rocky Mountain Inc., 977 P.2d 687 (Wyo. 1999) (homeowner barred from suing contractor for construction defects where warranty procedure specified in contract allowing contractor an opportunity to cure defects was not followed).

101. *See, e.g.*, Trustees of Ind. Univ. v. Aetna Cas. & Sur., 920 F.2d 429 (7th Cir. 1990), *abrogated on other grounds by* Watson v. Amedco Steel Inc., 29 F.3d 274 (#th Cir. Ind. 1994); Charles R. Perry Constr. v. C. Barry Gibson & Assoc., 523 So. 2d 1221 (Fla. Dist. Ct. App. 1988).

102. Hoagland v. Celebrity Homes, Inc., 572 P.2d 493, 498 (Colo. Ct. App. 1977); Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973).

103. *See, e.g.*, Indemnity Ins. Co. of North Am. v. Am. Aviation, Inc., 891 So. 2d 532 (Fla. 2004).

104. *Id.* Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 535 (W.D. Pa. 2000); Strouth v. Wilkinson, 224 N.W.2d 511, 513–14 (Minn. 1974).

105. Nielsen v. Adams, 223 Neb. 262, 388 N.W.2d 840 (1986).

In some states consumer protection acts or deceptive and unfair trade practices acts may also provide similar remedies.[106] For example, Florida authorizes a cause of action arising out of a developer's failure to perform as represented in the offering prospectus or condominium declaration or to the extent that the developer engages in any sale or advertising promotion that is deceptive or misleading.[107] The benefit of pursuing this cause of action is the plaintiff's ability to recover its attorney's fees.[108] Additionally, the practitioner should note that the economic loss doctrine may not bar a claim brought under these acts in some jurisdictions.[109]

IV. Evaluating the Defendant's Case

A. General

To properly evaluate and prepare a defendant's case in a construction defect action, the attorney should investigate and understand the factual basis of the defects alleged, investigate and understand the client's involvement, determine all potential defenses available in the jurisdiction where the property is located, investigate what insurance might be available to provide a defense and/or pay a judgment, and identify any other parties that might bear responsibility for an alleged defect and/or that might have a duty to indemnify.

Consider the following issues:

- What is the nature of the damages alleged?
- What has the claimant done (or not done) that could have contributed to or caused the alleged damages?
- Who are other potentially responsible parties who should be added to the claim?
- What insurance has been procured by any of the parties involved?
- What insurance policies exist naming your client as the primary or additional named insured? Do they provide your client with coverage and/or a defense of construction defect claims?
- Has the claimant or plaintiff failed to maintain its property?
- Has the claimant or plaintiff failed to mitigate its damages?
- Has the claimant or plaintiff complied with all conditions precedent before bringing its claims, or alternatively have such requirements been waived?

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106. *See, e.g.*, Bd. of Managers of Bayberry Greens Condo. v. Bayberry Green Assocs., 174 A.D.2d 595, 571 N.Y.S.2d 496 (2d Dep't 1991); Klotz v. Underwood, 563 F. Supp 335 (E.D. Tenn. 1982), *and* Holifield v. Coronado Bldg., Inc., 594 S.W.2d 214 (Tex. Civ. App. Houston 14th Dist. 1980).

107. *See* Fla. Stat. §§501.202(2), 203(7)–(8).

108. Fla. Stat. §501.2105.

109. *E.g.*, Samuels v. King Motor Co. of Fort Lauderdale, 782 So. 2d 489 (Fla. 4th Dist. Ct. App. 2001).

- Did the claimant or plaintiff provide timely notices of defects per any applicable presuit notice statutes or per the requirements of any written contracts or warranties?
- Were any building codes violated? By whom? Should your client have known of the code requirements?
- Are there any flaws in the design plans or manufacturer's specifications?
- Who reviewed and approved of the project plans and shop drawings?
- Who signed and sealed the permit plans and submittals?
- Are there any written contracts? If so, what do they require your client or other parties to do? Has the plaintiff or claimant met its contractual obligations?
- What written, express, or implied warranties exist? Have they expired or been voided?
- Do the contract documents include a waiver of consequential damages?
- What agreements exist to indemnify, hold harmless, and defend your client?
- Has your client agreed to indemnify, hold harmless, or defend others?
- When do the applicable statutes of limitations expire?
- What tolling agreements or statutes of repose apply?
- When do any applicable statutory implied or express warranties expire?

Understanding the nature of defects reported is not always straightforward.[110] For example, a claimant may allege water infiltration in rooms, apartments, or units, but locating the source of leaks can be difficult. It is possible for water to penetrate several floors and a considerable horizontal distance from the source of a leak. Locating the defective component may require some investigation.

Any investigation should address cost-effective corrective measures. Counsel will need to evaluate whether a particular repair is feasible, and whether a repair might expose the client to additional claims. In evaluating the feasibility of possible remediation measures, consider:

- What are the costs of materials, staging, manpower, governmental fees, and taxes?
- What are the costs to investigate, test, and design a repair method?
- What are the security costs to protect affected property from theft or vandalism?
- What happens if the finishes cannot be matched to an owner's satisfaction?
- How will the defendant address cost escalations?
- How will the defendant address upgrades and changes that may be required by the current applicable building code?

110. For a discussion of different types of defects, see Chapter 2.

- Are there any insurance policies that may cover the claimed damages?
- What limitations or exclusions do these policies contain with regard to collateral or consequential damages?

Only after considering these and other issues may counsel begin to devise a defense strategy for his or her client.

B. Lack of Privity and the Economic Loss Rule

Is a claimant seeking to recover purely economic damages caused by a defective product that injures only itself? If so, consider whether the economic loss rule applies to preclude recovery. Ask whether the claimant can assert personal injury or physical damage to property other than the damage to the product itself. See discussion of the economic loss rule in Chapter 3. Remember that application of the economic loss rule varies substantially in different states, so a detailed examination of the facts and the law must be undertaken to evaluate its applicability in a given case.[111]

C. Misuse or Abuse

Did an owner discover a defect? Was it aware of the danger posed by the defect, and did it somehow unreasonably proceed to use the product in the

111. *See, e.g.*, Indemnity Ins. Co. of North Am. v. Am. Aviation, Inc., 891 So.2d 532, 543 (Fla. 2004) (economic loss rule does bar a claim for negligence involving professional services when there is no privity between the parties). *Compare* Delaware Art Museum v. Ann Beha Architects, Inc. 2007 WL 2601472 (D. Del. 2007) (museum's negligent misrepresentation claim against engineer was barred by economic loss rule); 2000 Watermark Ass'n, Inc. v. Celotex Corp., 784 F.2d 1183, 42 U.C.C. Rep. Serv. 1608 (4th Cir. 1986) (court barred association's negligence action against manufacturer of asphalt shingles for purely economic losses without personal or property injury); Wausau Paper Mills Co. v. Chas. T. Main, Inc., 789 F. Supp. 968, 971 (W.D. Wis. 1992) (economic loss doctrine barred paper mill owner's tort claims where only injury is a loss in expectations for the performance of a product; remedies unavailable for persons whose only injury is a loss in their expectations for a product); Jordan v. Talaga, 532 N.E.2d 1174 (Ind. Ct. App. 4th Dist. 1989) (economic damage to homes not recoverable under negligence theory); Blahd v. Richard B. Smith, Inc., 141 Idaho 296, 108 P.3d 996 (2005) (developer and engineer not liable for homeowner's economic loss); Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145, 2 U.C.C. Rep. Serv. 915 (1965) (homeowners associations and individual homeowners do not have a private right of action in negligence against developers, general contractors, and subcontractors for recovery of economic losses). *But see* Pisano v. American Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77, 36 U.C.C. Rep. Serv. 1153 (1st Dist. 1983) (court allowed recovery on a negligence theory for economic loss where the plaintiffs and the defendants were parties to a contract).

face of the danger?[112] If so, an argument may available that the owner misused the product or assumed the risk of a defect.[113]

D. Acts of God

Was damage caused by an efficient, overwhelming natural force, without the interference or intervention of human activity?[114] If so, these conditions may serve as intervening causes to mitigate or otherwise defeat a claim for damages for defective conditions. Force majeure conditions can include hurricanes, tornados, and earthquakes.

E. Damages Caused by Third Parties over Whom Defendant Has No Control

Did a developer rely on the contractor and architect? Did a contractor rely on the architect, engineer, and developer? The answers to such questions may give rise to various legal theories, including contractual indemnity, equitable indemnity, and statutory remedies. See discussion in Chapter 3.

Sometimes a party may claim it relied on the approval of plans or the granting of a certificate of occupancy by a city or other governmental entity. Such arguments invariably fail for two reasons. First, municipal building departments have been absolved from liability for negligent issuance of a building permit or certificate of occupancy to the developer.[115] Second, this argument ignores the common building code provision that code compliance is the responsibility of the developer—notwithstanding issuance of a permit and granting of a certificate of occupancy. If there is any presumption of the

112. *See generally* 63A Am. Jur. 2d. *Product Liability* §954 (1984 & Suppl. 1995).

113. *See, e.g.*, Wangsness v. Builders Cashway Inc., 779 N.W.2d 136 (S.D. 2010); Reott v. Asia Trend Inc., 7 A.3d 830 (Pa. Super. 2010).

114. *See* Concrete Const. Co. v. City of Atlanta, 176 Ga. App. 873, 339 S.E.2d 266 (1985), an explosion occurred during a severe ice storm when electricity discharged through an underground conduit that came in contact with a gas line. The installer had negligently installed the lines next to each other, in spite of knowledge that proper engineering practice required at least a six-inch separation. *Id.* The defense that the accident occurred because of an act of God, the ice storm, was inappropriate since the contractor's negligence was the actual cause of the damage. *Id. See also* Enid Corp. v. Mills, 101 So. 2d 906 (Fla. 3d Dist. Ct. App. 1958) (settlement of street was an expected condition, not an act of God, where contractor previously warned owners of risk of constructing streets in accordance with the owner's directions).

115. *See* Thomas E. Hoar, Inc. v. Jobco, Inc., 30 A.D.2d 541, 291 N.Y.S.2d 380 (2d Dep't 1968) (dissenting opinion argued that prior governmental approval is no defense to an action for negligent design); Johnson v. Salem Title Co., 246 Or. 409, 425 P.2d 519 (1967) (building department's failure to discover defects in plans prepared by the architect does not absolve the architect from responsibility, nor does its approval foreclose the issue of whether the plans complied with the requirements of the building code).

correctness attaching to the action by a public official, it is merely a rebuttable presumption "[u]ntil the contrary appears,"[116] or "unless the contrary be shown."[117]

F. Failure to Perform Routine Maintenance

Did an owner's lack of proper maintenance cause an alleged defective condition? If so, this may provide a valid defense, particularly when the defective condition is degenerative (e.g., roofing components). The issue may turn on who had the duty to maintain the property after completion of construction, the type of maintenance that was specified, and what type of maintenance should reasonably have been performed under the circumstances. For example, in condominium cases, a condominium association may initially be controlled by the developer who appointed the first board of directors. As such, the developer may have the initial duty of maintaining the property. Some statutorily implied warranties are conditioned upon routine maintenance being performed. Very often, statutorily implied warranties are voided or the warranties never arise because an association cannot prove that all reasonable maintenance has been undertaken.[118]

When dealing with a statutory scheme, did a legislature establish a condition precedent to a warranty action?[119] When a statutory duty to maintain is present, a claimant may have the burden of pleading and proving that it was not guilty of the failure to maintain.[120] In general, however, a failure to maintain must be asserted as an affirmative defense to a cause of action for breach of the statutorily implied warranty.[121]

Attorneys for claimants and defendants alike should focus their respective expert consultants on the questions of whether the improvement was

116. Miami Retreat Found. v. Ervin, 66 So.2d 667, 669 (Fla. 1953), *aff'd*, 77 So. 2d 787.

117. Clements v. Starbird, 152 Fla. 555, 12 So. 2d 578, 581 (1943). *See* Green Springs, Inc. v. Calvera, 239 So. 2d 264, 265 (Fla. 1970) ("[O]ne who owns real property which is being developed by the construction of homes for resale has a non-delegable duty to see that the residence is so constructed as to be reasonably free from dangerous latent defects which will cause harm to those who foreseeably will come onto the property after the construction has been completed and the property resold").

118. *E.g.*, Fla. Stat. §718.203.

119. *Id.*

120. *See, e.g.*, Stroshein v. Harbour Hall Inlet Club II Condo. Ass'n, Inc., 418 So. 2d 473 (Fla. 4th Dist. Ct. App. 1982) (the District Court of Appeal affirmed the trial court determination that the defect resulted from the original construction, not from a failure to maintain; nevertheless, the factual situations in which this defense is available are almost limitless). *See also* Delicious Foods Co. Inc. v. Millard Warehouse Inc., 244 Neb. 449, 507 N.W.2d 631 (1993) (court held that damages suffered by lessee of commercial property were not the result of a design or construction defect but rather were caused by a failure to maintain refrigeration system on property).

121. *Id.*

maintained properly and whether a failure to do so may have contributed to an observed defect.

G. Failure to Meet Conditions Precedent and Abatement

Did the plaintiffs fail to comply with any mandatory statutory presuit notice and right to inspect or cure procedures? If so, this may result in abatement of the lawsuit until such requirements have been met.[122]

H. Failure to Allow Testing or to Mitigate or Cure Defects

Did an owner fail to mitigate damages by failing to perform needed maintenance, by altering existing construction, by installing inappropriate landscaping, by failing to maintain and collect adequate assessments or reserves, or by failing to make timely and correct repairs?[123] Owners may be reluctant to perform exploratory testing of defects or to perform repairs to reported defects on account of the expense involved. The procedure set forth in many presuit notice and cure statutes may only compound an owner's indecision. In some states, the presuit requirements limit the kinds of repairs an owner may perform once a defect claim has commenced.[124] In order to give the contractor an opportunity to investigate and correct defects, owners may be limited to performing only routine maintenance and emergency repairs and mitigation of any defects that may endanger the health, life, safety, or welfare of the owner or other parties. It follows that an owner's discretionary performance of more substantive repairs to defects without complying with the statutory scheme could jeopardize his or her claim.

Therefore, from the outset of the construction defect claim, the attorney must explain these repair distinctions to its clients. The attorney also may have to walk a fine line between necessary mitigation and providing the contractor an opportunity to investigate and make repairs. Similarly, the attorney should be mindful that, in the event an owner fails to or refuses to agree to allow the developer, contractor, and other potentially responsible parties to perform destructive testing, the owner may have no claim for damages that

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122. The requirement that plaintiffs follow the procedures for notice and an opportunity to inspect or cure per any applicable presuit statutes is further discussed in _____ and ____.

123. *See, e.g.*, Weill Const. Co., Inc. v. Thibodeaux, 491 So. 2d 166 (La. Ct. App. 3d Cir. 1986) (ice rink owner's failure to minimize or prevent seepage of water, notwithstanding early detection and recommendations by the architect that could have prevented the damage, was deemed a failure to mitigate defects). *Compare* Montefusco v. Cecon Const. Co., 74 Ill. App. 3d 319, 30 Ill. Dec. 235, 392 N.E.2d 1103 (3d Dist. 1979) (owner has no duty to mitigate damages when it is misled, by assertions of the contractor, to believe that damages will not be suffered).

124. *See, e.g.*, Fla. Stat. §558.004(9).

could have been avoided or mitigated had destructive testing been allowed when requested and a reasonable remedy been properly implemented.

I. Statute of Limitations

Was a claim asserted timely? Statutes of limitations may be a trap for the unwary plaintiff's lawyer and claimant. When in doubt, file first and figure out the statute of limitations later. Although most statutes of limitations begin to run when the cause of action accrues, often this is deemed to be when the injury is or should have been discovered through reasonable inspection. The attorney must be mindful that this is a complex area of defense for which there are no simple answers. The limitations period may vary widely depending on the date of occupancy, the completion of the building, or the date the negligent act occurred. It may also be different for each cause of action alleged. Courts may have a hard time deciding which statute of limitation applies when both a contract claim and a tort claim are alleged. When in doubt, the attorney should always assume that the shorter statute of limitations applies.

Further complicating matters, some states have enacted statutes of repose, whereby the right to bring an action for latent defects is cut off forever after a set number of years. For example, in Florida, when there are latent defects (and latency itself is a question of fact), the time begins to run from the date when the defect was—or in the exercise of due diligence reasonably should have been—discovered, but this discovery must take place within the 10-year time frame from the issuance of the building's certificate of occupancy, or the claimant is out of luck.[125]

Attorneys asserting claims for latent defects should also be mindful that jurisdictions may have different ways of determining the "trigger date" for when the applicable statute of limitations begins to run.[126] When in doubt, the attorney should always use the earliest potential trigger date to calculate the statute of limitations.

For additional information on statute of limitations issues, see the discussion in Chapter 4.

125. *See* Fla. Stat. §95.11(3)(c). *See also* Cal. Civ. Proc. Code §337.15 (prescribing a 10-year period within which actions based upon latent defects must be commenced).

126. *See, e.g.*, Performing Arts Ctr. Auth. v. Clark Constr. Grp., Inc., 789 So. 2d 392 (Fla. 4th Dist. Ct. App. 2001) (holding that when there is an obvious manifestation of a defect, notice will be inferred at the time of manifestation regardless of whether the plaintiff has knowledge of the exact nature of the defect). *But see* Wishnatzki v. Coffman Constr. Inc., 884 So. 2d 282 (Fla. 2d Dist. Ct. App. 2004); Snyder v. Wernecke, 813 So. 2d 213 (Fla. 4th Dist. Ct. App. 2002) (when the manifestation is not obvious but due to other causes, notice as a matter of law may not be inferred).

V. Preparing the Case

A. Timing of Retaining Experts

Expert witnesses (e.g., engineers, architects, contractors, and laboratory technicians) should be involved as early as possible to assist both the claimant and the attorney.[127] In any case, experts should be selected as soon as the claims have been identified and the lawsuit has been filed. It is essential for the construction litigator to thoroughly understand the materials, elements, and type of construction at issue, including its terminology, materials, test methods, and construction methods. Timely retention of an appropriate expert can help the attorney gain the necessary knowledge.

Early retention of experts can also assist with the timely evaluation of the merits of a case. Early involvement is critical for both documenting and discovering defects, as well as pointing out technical issues of which neither the attorney nor the client may be aware. Experts can also help the attorney identify other potential defendants who may be responsible for the defects. They can also assist the attorney in answering interrogatories propounded by the defendant, reviewing the defendant's documents produced in discovery, and preparing a deposition.

B. Finding and Retaining Experts

While economy is a consideration in any litigation, an investment in the best-qualified expert available in a particular field is always money well spent. A qualitative difference among experts can be outcome determinative. An expert should have specialized knowledge about the defect in question, and he or she must become well versed on the cause of the defect, the scope of the defect, and the steps necessary to remedy the defect.

A qualified expert should be able to provide assistance by:

- inspecting, documenting, and photographing the defective condition;
- interpreting plans and specifications;
- obtaining samples and laboratory testing;
- obtaining test data, manufacturers' literature, and industry standards;
- researching and applying building codes;
- locating and evaluating authoritative texts and articles as well as additional experts; and
- preparing for depositions and direct and cross-examination at trial.

1. Sources for Locating Experts

There is a wealth of resources available to help attorneys locate the right expert. First, the client and other attorneys may be a resource. There are also

127. Many developers will have had waterproofing experts and other consultants involved during construction of the project.

publications such as the *Lawyers Desk Reference* that contain listings of experts and sources of experts in building construction and safety. State construction industry licensing boards, local colleges or universities with architecture or engineering programs, and local trade organizations or publications can also provide a source of local expertise. National trade associations and publications may also be consulted. Many of these organizations, such as the National Fire Protection Association, the American Concrete Institute, or the American Society of Heating, Refrigerating and Air Conditioning Engineers, can be found on the Internet. A general listing of the professional and trade associations throughout the United States can also be found in the *Encyclopedia of Associations*. Jury verdict sheets may also be utilized as a source of expert resources. Sometimes the verdict summaries will include listings of experts along with an explanation of the type of case, the result, and the attorneys involved.

2. Standards of Care

Admissibility of the expert's opinions is best established through the expert itself. For example, the plaintiff's expert may back up his or her opinion testimony regarding the standard of care by referring to specific codes, statutes, licensing regulations, or standards promulgated by relevant organizations and associations. Nevertheless, the attorney must examine which versions of those standards of care were followed by the expert. All opinions predicated on an inapplicable or outdated standard of care are subject to challenge.

In jurisdictions patterned after the *Frye*[128] test, in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

In *Daubert*,[129] the United States Supreme Court replaced the 70-year-old *Frye* "general acceptance" test with a judicial "gatekeeper" standard that many lower courts perceived to be applicable only to scientific testimony.

In jurisdictions following the *Daubert* standard, the judge makes a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology can be applied properly to the facts at issue.[130] In order for the reasoning or methodology to be properly applied, it must be reliable. A judicial determination of reliability under *Daubert* must consider several factors, including (1) whether the theory or technique presented as expert testimony and evidence can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the technique's operation, and (5)

128. Frye v. United States, 292 F. 1013 (D.C. Cir. 1923).
129. Daubert v. Merrill Dow Pharm. Inc., 509 U.S. 579 (1993).
130. *Id*. at 592–593

"general acceptance" under *Frye*. These "reliability" factors are not intended to be either exhaustive or necessary.[131]

Moreover, the *Daubert* "gatekeeper" standard is to be applied to all types of experts, regardless of whether the testimony is based on scientific or technical knowledge or other specialized experience.[132] The court also held that the *Daubert* reliability factors were not a definitive test, but that one or more of the factors "may," at the court's discretion, be considered when determining the admissibility of expert testimony.[133] In other words, the reliability test is flexible, and the *Daubert* factors do not necessarily or exclusively apply to all experts or in every case.[134]

Accordingly, attorneys in construction disputes need to be aware of these differing gatekeeper standards when offering expert testimony. Further, the attorney should work with the expert to ensure that the methodology supporting the expert's opinions will satisfy the *Daubert* reliability factors and the court's gatekeeper role long before offering the expert's testimony. The attorney must understand how the methodology is used to support the expert's conclusions, and also must be able to demonstrate that an adequate factual basis exists to support those conclusions, to be able to refute any challenges to the expert testimony in jurisdictions adopting the *Daubert* and *Kumho* standards.

Because an in-depth, state-by-state analysis of the differing gatekeeper standards for offering expert testimony is beyond the scope of this chapter, the attorney is encouraged to review the specific discovery requirements of his or her jurisdiction.

3. Selection Process

After determining the sources and the standards of care for various experts, the attorney should prepare a list of potential experts based upon whether the expert will be used as a consultant or as an expert testifying at trial. For example, the expert an owner retains to investigate its property for defects may not be the same expert it retains to testify at trial. As a claim progresses, additional issues may be discovered that may require the owner to retain an expert who has a particular expertise, is licensed in a particular jurisdiction, or is better accustomed to providing testimony. Therefore, an owner's needs before litigation may change considerably once the owner makes the decision to litigate its defects claims. Counsel should consider retaining the expert directly to protect all findings from disclosure to other parties based on the work-product privilege doctrine.

131. *Id*. at 594.
132. Kumho Tire Co. Ltd., v. Carmichael, 526 U.S. 137 (1999).
133. *Id*.
134. *Id*.

At a minimum, the expert's qualifications must meet those specified per any applicable evidentiary codes within the jurisdiction. The expert witness's knowledge, skill, experience, training, or education must help, not hinder, the fact finder's understanding of the facts and evidence for the claims at issue. Juries are more inclined to believe the testimony of an expert who can plainly explain the causes of the defects without resorting to technical jargon.

Some of the matters attorneys should consider when selecting an expert include the following:

- What is the expert's educational and professional background and references, especially lawyers for whom or against whom the expert has worked?
- How credible is the expert? Does the expert appear to be completely objective and impartial?
- What kind of impression will the expert make testifying before a jury? Can the expert communicate complicated technical concepts in clear, understandable language suitable for laypersons?
- What opinions has the expert expressed in prior testimony, books, articles, or speeches? Do these opinions conflict with or contradict the opinions to be expressed in this matter?
- How familiar is the expert with the actual project?
- Will the expert have the time and ability to assist counsel in the pretrial stages, including preparation and discovery?
- How familiar is the expert with local and industry customs, practices, codes, and standards?
- Is the expert currently licensed in the area in which he or she will be asked to render an opinion? Is the expert certified in the venue in which he or she will testify?
- How much testimony has the expert given in other cases? On whose behalf? How much field experience does the expert have?
- Where, when, and how often has the expert been published? How reputable are those publications?
- In what committees, professional organizations, or associations does the expert participate? Has the expert ever held a leadership role in those organizations?
- Is the expert a professional witness or has the expert participated in actual design and/or construction?

4. Licensing of Experts

In some states, an expert need not be licensed to testify at trial.[135] States vary regarding the required qualifications for expert testimony, so check the rules

135. *See, e.g.*, Thompson v. Gordon, 851 N.E.2d 1231 (Ill. 2006) (a witness's compliance with licensing requirement is not a prerequisite to admissibility of a witness's expert testimony and instead is merely a factor to be weighed in considering if a witness is qualified

of evidence, case law, and local rules of court in your jurisdiction and venue before retaining an expert for trial.[136]

5. Qualifying an Expert to Testify

Before selecting an expert for trial, the attorney should ask the following questions:

- What subject matter may be appropriate for the use of expert testimony?
- How will the use of an expert assist the trier of fact in understanding evidence or determining a fact issue?[137]
- What is the expert's knowledge, skill, training, experience, or education about the subject matter?[138]
- What studies or research has the expert performed independent of the litigation?
- What publications has the expert authored or relied upon?
- How well regarded is the expert by peers?
- Has the expert ever given any contradictory testimony on the same subject matter?
- How many times has the expert testified in depositions and at trial?
- Is the expert's expected testimony credible and reliable?
- Will the expert's testimony conflict with the court's applicable standard of care?[139]

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as an expert). In *Owens v. Payless Cashways, Inc.*, 670 A.2d 1240, 1244 (R.I. 1996), the plaintiff, injured by an aluminum extension ladder, sued the manufacturer and distributor for negligence and product liability. In support of his claims, the plaintiff presented the testimony of an engineering expert who held a PhD in ocean engineering. The expert testified that he had attended seminars in the structural-analysis field and had taught in that subject. The appeals court reversed the trial court's ruling that the witness did not qualify as an expert because he was not licensed in the state on the grounds that there is no language in the engineering licensing statute that mandates registration as a prerequisite to expert witness qualification. Even if there was such a mandate, the Court reasoned Rule 702 of the Federal Rules of Evidence takes precedence over any contradictory laws. Under Federal Rule 702, the qualification of an expert is within the sound discretion of the trial court and will not be overturned absent a clear abuse of discretion. "The controlling inquiry is whether the proffered expert is qualified by virtue of his or her 'knowledge, skill, experience, training, or education' to deliver a helpful opinion to the jury."

136. *See, e.g.*, Martin v. Barge, Waggoner, Sumner and Cannon, 894 S.W.2d 750 (Tenn. Ct. App. 1994) (testimony of qualified expert could not be excluded simply because he practiced in a different state); Walker v. The Bluffs Apartments, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1996) (licensed residential builder and inspector was not qualified to testify as expert in professional negligence case).

137. *See* Fed. R. Evid. 702.

138. *Id.*

139. *See* ____.

The attorney should also investigate whether that person meets the court's definition of an "expert." Depending on the jurisdiction, the definition of just who qualifies as an expert, and what they can attest to, is subject to many different interpretations. For example, the Utah Supreme Court held that the trial court has considerable discretion in determining whether an expert is qualified to give an opinion on a particular matter.[140]

Some courts have held that experience alone is an insufficient basis for an expert opinion,[141] while other courts have held that a person may testify as an expert despite a lack of formal education or experience.[142]

There is a limit to what experts can say in court. For example, in some jurisdictions, experts are precluded from testifying as to how a building code is to be interpreted or what the code means.[143] The meaning of a particular building code provision may be considered an issue of law, which is the court's responsibility to determine. However, in some jurisdictions, when the building official specifically interprets a building code provision, that interpretation will not be disturbed unless the interpretation is clearly erroneous.[144]

6. Expert's Documentation of Project Defects

An expert should document defects with photographs and videotape recordings as soon as possible once defects are discovered. The expert should generate an ongoing written record of defects inspected and discovered during all site visits. The expert's preliminary report should include the nature and extent of the defects, potential causes, damages resulting from the defects, and recommendations for repair. Thereafter, the report should be updated as necessary when additional defects are discovered or when previously reported conditions have deteriorated.

Videos should be edited to clearly and succinctly outline the aspects of the case that need to be explained. The final video should include a clear, nonrepetitive, factual narrative with appropriate context. This is where an expert's technical knowledge and skill is invaluable. An expert's narration of a videotape of the defects can provide jurors with a much-needed audio-visual tour of the construction site and can greatly aid their understanding of the nature and extent of the defects and any resulting damages. Later on, the attorney can even incorporate portions of the videotape into PowerPoint presentations to be used at trial. For strategy purposes, it may be best for the

140. Wessel v. Erickson Landscaping Co., 711 P.2d 205 (Utah 1985).

141. Hoy v. DRM, Inc., 2005 WY 76, 114 P.3d 1268 (Wyo. 2005).

142. *Compare* Talbott v. Miller, 232 Va. 289, 350 S.E. 596 (1986) *with* Friendship Heights Assocs. v. Vlastimil Koubek A.I.A., 785 F.2d 1154 (4th Cir. 1986) (holding that education alone without practical experience is sufficient to qualify as expert witness).

143. *See, e.g.*, Seibert. v. Bayport Beach & Tennis Club Ass'n, Inc., 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1990) (court acknowledged the authority of building officials to interpret the code).

144. *Id.*

expert to refrain from narrating the video in order to preserve flexibility for what is shown or may become important at the trial.

Digitally dated photographs should be included in the expert's report whenever possible. Like videotapes, photographs can provide jurors with a clear illustration of the nature and extent of the defects and any resulting damages. Photographs can also be enlarged and incorporated into PowerPoint presentations for use at trial.

When there are numerous defects, a project matrix is a useful tool for keeping the attorney and the expert organized. The expert's report can be generated into a spreadsheet, listing the defect items, locations, causes of the defect, and recommendations. Columns can be added to include responses from adverse parties during presuit negotiations and through litigation. The matrix can be easily updated to reflect any changes in the claim, such as warranty repairs performed to eliminate certain defects or to add new defects that may be discovered. For more complex projects, separate matrices can also be prepared for each category of defect, such as the roof, electrical, mechanical, plumbing, and concrete.

7. Expert Testing Laboratories and Analysis

Experts are often called upon to explain the methodologies and results of different tests performed to defective areas. Sometimes the expert may also be the person who took the samples and performed the actual lab testing and analysis of those components. Testing is often used to determine the causes of various types of defects and deficiencies such as

- stucco;
- pipe contamination;
- wood composition;
- roof moisture;
- structural failures;
- soil movement;
- mold;
- poor air quality; and
- Chinese drywall.

C. Preparing Cost Estimates and Measures of Damages

Damages in construction cases are often the subject of expert testimony. The analysis of repair costs, diminution in value, economic waste, and other measures of damages are beyond the common experience of jurors and are thus the proper subject of expert testimony. The recommendations contained in the expert's preliminary report, and subsequent findings, may be sufficient for the expert or a construction contractor to prepare cost estimates for the proposed repairs. The preparation of cost estimates provides the owner, attorney, and consultant with a general idea of the cost of repairs. As more information

about the defects is discovered, the scope of repairs may need to be revised accordingly, and the estimates costs could also fluctuate.

In some situations, there may be more than one acceptable way to repair a particular defect that could also impact the estimated costs. In construction defect disputes, the standard to be applied is very often one of reasonableness instead of perfection.[145]

D. Use of Discovery to Prepare the Factual Foundation of the Case

The acts that give rise to a construction lawsuit occur over a long period of time. The attorney becomes an investigator, using experts to figuratively take apart and reconstruct the building in question. The construction case itself is like a puzzle that must be put together piece by piece. All available methods of discovery may be helpful.

A wealth of information can be obtained by contacting individuals who were associated with the development or construction of the project. During the time that parcels are being sold, the developer will frequently have an individual charged with handling unit owner complaints. These complaints should be documented throughout the sales process. This person should be interviewed to determine his or her knowledge of the name of the complainant and the extent of various defects. If there was a management contract for the property, the firm or organization providing management services should be consulted about the specific defects alleged and remedial work already undertaken. These individuals may have relevant firsthand knowledge of the problems, and their input can be extremely valuable to the determination of liability and the nature, extent, and duration of the defective condition.

General contractors, subcontractors, and other personnel who performed either the original construction or warranty and remedial tasks should be consulted. Contractors' job logs, architects' inspection reports, and reports by inspectors employed by lenders may contain a wealth of information. In short, all available sources for information relevant to the alleged problems should be explored fully to provide the attorney with the broadest possible information base for the litigation decision-making process.

1. Predeposition Disclosures and Compliance with Federal Rule 26

Discovery procedures in construction litigation are governed by the rules of civil procedure enacted in the various states. Several states have adopted the substance of the Federal Rules of Discovery as the controlling rule in the state courts.[146]

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145. *See* Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749, 753 (1969).

146. *See, e.g.*, Ariz. R. Civ. P. 26.1; Utah R. Civ. P. 26; Colo. R. Civ. P. 26; Wash. Ct. R. 26, Part IV, Subdivision 5.

In states with rules patterned after the Federal Rules of Discovery, parties are required, without awaiting a discovery request, to make certain initial disclosures such as the name of individuals likely to have discoverable information, and the subject of that information, that the disclosing party may use to support its claims or defenses, as well as (1) copies of all documents, electronically stored information, and tangible things that the disclosing party has in its custody or control that may be used to support that party's claims or defenses; and (2) computations of each category of damages and supporting documents for those amounts.[147]

In the federal model, Rule 26 now also requires parties to disclose the identity of any witnesses it may use at trial to present evidence.[148] Counsel should be aware that expert witness disclosures must be accompanied by a written report containing:

> (i) A complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) The facts or data considered by the witness in forming them;
> (iii) Any exhibits that will be used to summarize or support them;
> (iv) The witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) A statement of the compensation to be paid for the study and testimony in the case.[149]

Usually, parties must make these disclosures on a timeline agreed to by stipulation or set forth in a court order.[150] Absent a stipulation or court order, the disclosures must be made at least 90 days before the date set for trial or for the case to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the other party's disclosure.[151]

However, even in states that have generally adopted the Federal Rules, variations still exist among the specific provisions of each state's discovery rules. For example, Arizona requires early and continuing disclosure of information generally handled only under the normal discovery rules of other

147. Fed. R. Civ. P. 26(a)(1)(ii) and (iii).

148. Fed. R. Civ. P. 26(a)(2). It should be noted that Federal Rules of Civil Procedure Rule 26(b)4 now only allows for discovery of the facts or data considered by the witness in forming the expert opinion. The amended Rule extends work-product protection to both oral and written communications between experts and the attorneys retaining them, including draft reports.

149. Fed. R. Civ. P. 26(a)(2)(B).

150. Fed. R. Civ. P. 26(a)(2)(D).

151. *Id.*

states; California allows the court, on its own motion or the motion of any party, to refer portions of a construction case to a referee to establish discovery procedures.[152]

Because an in-depth analysis of the rules in each state is beyond the scope of this chapter, the attorney is encouraged to review the specific discovery requirements of his or her jurisdiction.

2. Interrogatories

Interrogatories provide the attorney with an early opportunity to analyze and outline the case. Initially, many of the facts can be supplied by the clients, but resorting to the tools of discovery is usually essential. Interrogatories are a good tool in the early stages for gathering basic information involving names, addresses, and relationships of parties to be deposed, and later on in getting information about the expert witnesses who will testify for the opponent.

3. Requests to Enter Upon Land for Inspection and Testing

Under typical "notice and right to repair" statutes, defendants have the right to access the site as part of the presuit negotiation process.[153] Similarly, in most states, civil discovery statutes or rules of procedure empower defendants to enter upon land to inspect and conduct tests.[154] Such entry and testing may be necessary for the parties and their experts to evaluate claims, possibly through destructive testing. Any inspection should properly document the nature and extent of the reported defects and note any changes in the reported conditions that may have occurred over time. Often, requests to enter upon land for inspection or testing may be handled by stipulation between the parties. Such stipulations can address security issues, noninterference with tenants, and the restoration of the property to its pretest condition if destructive testing is performed.

4. Gathering Records

a. Requests for Production and Inspection of Documents

There is no single discovery device more important than the request for production of documents such as correspondence, change orders, complaint and service logs, and tests. Competent developers and contractors will do most of their business in writing. In fact, the paper on a construction project may be so voluminous that it fills several file cabinets or even several rooms. The attorney should not be daunted by the magnitude of the task. Every document should be viewed. Any significant or possibly significant document should be copied and collated according to defect. The attorney should request documents from all parties involved in the construction. The request for production

152. *See* Ariz. R. Civ. P. 26.1; Cal. Code Civ. P. §639.
153. Fla. Stat. §558.004.
154. Fla. R. Civ. P. 1.280 and 1.350.

should be sufficiently specific to notify the other party of the documents that are being sought and to withstand objection. At the same time, it should be broad enough to ensure that everything that may be relevant will be produced. The attorney for the defense may also use production to get copies of the owner's repair bills, maintenance contracts, photographs, and relevant association minutes.

b. Requests for Admissions

The judicious use of requests for admissions should not be overlooked. After production of documents, key documents should be authenticated through a request for admission. When an attorney finds a document that contains a relevant admission, he or she should authenticate it with a request for admission to narrow issues in the case.

c. Use of Government Resources to Obtain Documents

Documents relevant to the construction claim may be obtained from governmental agencies including local building and zoning departments without the necessity of filing a request to produce or issuing a subpoena. Typical documents may include but are not limited to copies of the permit applications, permitted set of plans and drawings, land surveys, and project inspection reports and approvals issued by the applicable authorities having jurisdiction.

Applicable freedom of information acts may be used to obtain documents regardless of whether the particular agency is a party to the lawsuit.[155] This technique also has the added benefit of allowing an attorney to obtain documents that may be useful in establishing liability of potential defendants with the party's knowledge. Because governmental agencies have no financial stake in the construction process or the litigation, records may be produced that otherwise may have been claimed as privileged or destroyed by those actually involved in the design and construction of the project. State public records acts typically allow for the production of documents from various state, county, and municipal agencies, without the formality of litigation.[156] Attorneys may use state public records acts to obtain documents without issuing a subpoena or filing a lawsuit.[157]

d. Use of Subpoena Duces Tecum to Obtain Documents

A subpoena duces tecum can be used to obtain documents from nonparties such as expert witnesses. The attorney should request that the expert produce each category of documents listed below and mark each as they are produced. This process will help the attorney elicit all facts, opinions, standards, and

155. 5 U.S.C. § 552.

156. *See, e.g.*, Fla. Stat. §§ 119.01, .15 ; Fla. Stat. § 286.011; Ga. Code Ann. §§ 50-18-70, -77; Ala. Code §§ 41-13-1, -44.

157. Fla. Stat. §§ 119.01, .15.

foundation for all opinions formulated by the expert. In the subpoena duces tecum, the attorney should request the following types of documents:

- Written reports
- Physical samples
- Videotapes and photographs
- Time records
- Deposition transcripts of others
- Field notes
- Plans, specifications, and shop drawings
- Contracts and addenda
- Standards and guidelines

e. Identifying Records That Support the Theory of the Case

Relevant records can come from many sources. First and foremost, attorneys should examine the written agreements between the developer and lenders, design professionals, architects and other designers or consultants, and the general contractor, as well as agreements between the general contractor and various subcontractors. These agreements outline the specific undertakings of each of the respective parties.

Attorneys should also identify the appropriate set of plans relevant to allegations made. This requires care. During the course of a construction project, design drawings may be revised many times. Claimants may fail to review and identify the definitive plan set long before a case is ready for trial, therefore, the attorney should have inventoried the plans, specifications, and other documents on file with the building department and in the project files to verify that the relevant documents have been identified. For example, it is common practice within the construction industry to require major subcontractors to submit shop drawings that provide a detailed description of the fabrication of a certain portion of the project or of the actual product that the subcontractor intends to use. These items are submitted for approval first to the general contractor, then to the architect or other owner's representative. The approval by both the general contractor and the architect frequently states that it is not an approval of any deviations from the plans or specifications or an approval of a change order. Liability could be premised, however, on either the general contractor or the architect being negligent in failing to reject an improper method of construction or an improper material.

Relevant manufacturer instructions and literature should be identified. Most manufacturers of mechanical components, building supplies, and materials publish data relevant to their products that include representations about the quality of the products, their proper uses and applications, and their intended purposes. This information is accumulated and distributed to the construction industry, and the expert consultant should have ready access to this type of data. For major defect items, this literature should be consulted and ultimately may determine the source of the problems.

Relevant job diaries should be reviewed. The general contractor and major subcontractors will have supervisory personnel who, on a daily or weekly basis, keep a diary of activities, functions, and major events on a construction project. Many times certain problems occurring during the construction process will be documented in the job log and will not appear in any other form of correspondence. In addition, the architect and the inspectors employed by the lender may be required to give periodic job progress reports noting any deviations or defects in materials and workmanship.

All documents relied upon by experts should be identified. In some jurisdictions, the rules of discovery are rather specific on the production of experts and expert materials, and it is possible that interrogatories or depositions will be needed to obtain the essential information that would be contained in the report.[158] While expert reports are sometimes admitted into evidence, they may be subject to exclusion by hearsay, best evidence, and cumulative objections.[159]

Relevant correspondence should be scoured. All correspondence concerning the original construction should be examined. This may reveal crucial information such as early knowledge of a manifestation of defects or prior remedial measures. The following persons or parties should have generated or received relevant correspondence: developer, association, general contractor or construction manager, design professionals, subcontractors, unit owners, material manufacturers or suppliers, and inspectors.

All change orders should be studied. The generally accepted method of modification of a construction contract is by change order. Most written change orders will reflect the actual change in scope or amount of the contract and frequently will set forth the reasons for a particular change. Change order requests may shed light on an alleged defect, even if not approved. For example, if allegations include failure to provide a specified material, a change order request based on the unavailability of a specified material would be highly relevant.

Certificates of substantial completion, occupancy, and final completion should be located. A certificate of occupancy will often contain the names of the contractors who performed work on the project, as well as the dates that the project's permits were closed. The absence of a certificate of occupancy may also be an indicator to the attorney that certain building components may have failed a final inspection by the local building authorities.

It is important to determine the exact building code version that applied when the project permit was issued and the exact code sections that were

158. *See, e.g.*, Fla. R. Civ. P. 1.280.

159. Fla. Stat. §90.704; Barber v. State, 576 So. 2d 825 (Fla. 1st Dist. Ct. App. 1991); Dept. of Corr., State of Fla. v. Williams, 549 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1989); Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430 (Fla. 2d Dist. Ct. App. 1989); Bender v. State, 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985).

violated. This usually can be accomplished with the assistance of the expert consultant. Attorneys will need to show that the alleged failure to comply with the building code is material and that it resulted in damage to the plaintiff. Noncompliance, in and of itself, may not necessarily be a defect.

Photo or video documentation from the construction should be tracked down and logged. Throughout the course of construction, the project may have been photographed by architects, lenders, contractors, the developer, sales personnel, or perhaps contract vendees. The source of some construction defects cannot be obtained without substantial destruction of the property, and a photograph taken during the course of construction can determine the party ultimately responsible for the defect. An example of this would be a defect in a cement slab caused by misplacement or absence of the structural steel or steel reinforcing bars. Photographs and videotapes demonstrating steel placement immediately before a concrete pour can avoid the need for destructive testing to prove how the steel was installed.

f. Beware of Spoliation of Evidence

Spoliation refers to the "destruction or material alteration of evidence" or "the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[160] Nothing is more important to the construction defect attorney than a properly documented presentation of damages and reoccurring or progressively worsening conditions. Counsel must take steps to ensure that the developer, property owner, condominium unit owner, or association, including any of the owner's tenants, occupants, or property managers, do not repair or otherwise conceal any nonemergency defective conditions.

Once a party or its expert knows or reasonably anticipates litigation,[161] it must suspend its routine document retention or destruction policy and must place a "litigation hold" to ensure the retention of relevant written and electronic documents. The plaintiff/claimant's duty to do so is usually triggered before actual litigation commences, largely because the plaintiff controls the timing of the litigation;[162] however, these requirements are equally applicable to defendants.

In addition to the litigation hold, the attorney must advise his or her client to obtain records from all persons with knowledge of the claims, not just the "key players"; take all appropriate measures to preserve electronically stored information; assess the validity and accuracy of search terms used to locate electronic data; collect records from key players; and collect information from the parties' former owners, property managers, consultants, or employees, as

160. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., No. 05 Civ. 9016, 2009 WL 2876262 (S.D.N.Y. Sept. 4, 2009).

161. Scott v. Garfield, 912 N.E.2d 1000 (Mass. 2009).

162. *Id.*

well as any prior occupants or tenants, as applicable.[163] Any physical evidence relating to alleged defects must be preserved with a proper chain of custody.

A failure to properly preserve evidence could subject the parties to sanctions, including without limitation an order to produce further discovery, imposition of monetary sanctions or fines, delivery of special jury instructions whereby certain facts may be deemed admitted or accepted as true, preclusion of records, or even entry of a dismissal or default judgment.[164] An attorney must therefore take aggressive steps to guard against the intentional or inadvertent spoliation of evidence by any parties or nonparties who have offered to inspect, test, or repair reported defects during the presuit notice and cure process or any time thereafter.[165]

5. Depositions of Lay Witnesses

Instructions about how to take a deposition are beyond the scope of this chapter. It is essential that depositions be taken, and in some cases there will be many depositions. Depositions are most useful after the attorney has done the preliminary investigation, received answers to the interrogatories, and reviewed the documents. A deposition is a good opportunity to learn how much the parties know about the building code, to have the parties explain the plans and deviations from the plans, and to have them explain the documents that were produced. Depositions are also an opportunity to require the defendant to explain and justify affirmative defenses. Likely deponents include the developer and the developer's key employees, the design professionals, witnesses who inspected during construction, contractors, opposing parties' experts, experts and organizations who have performed remedial measures, and the property manager's maintenance personnel.

6. Depositions of Expert Witnesses

Construction litigation often turns upon the testimony of expert witnesses. Generally, admissibility of expert depositions is governed by the same rules that apply to lay witness depositions. Where the Federal Rules of Civil Procedure apply, including state procedural rules in jurisdictions patterned after the Federal Rules, Rule 32 states that a witness deposition may be used by any party for any purpose, but only under certain circumstances.[166]

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163. *Id.*

164. *Id.*

165. *See, e.g.*, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. USB Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

166. F.R.C.P. 32. *See, e.g.*, H.E. Collins v. Wayne Corporation, 621 F.2d 777 (5th Cir. 1980) (expert witness who is hired to testify on behalf of a party is automatically an agent of that party who called him and consequently his testimony can be admitted as nonhearsay in future proceedings). *But cf.,* Koch v. Koch Industries, Inc., 37 F. Supp. 2d 1231 (D. Kan. 1998), *affirmed in part, reversed in part,* Koch v. Koch Industries Inc., 203 F.3d 1202 (10th Cir. Kan. 2000).

Experts may serve as consultant, as expert witness at trial, or both. This dual role is an important distinction which the attorney must understand when timing an expert's deposition. Specifically, before an expert has been disclosed as a witness expected to testify at trial, the attorney's correspondence with the expert may be protected by the attorney-client privilege or work-product privilege. However, attorneys should be mindful that some courts may decline to extend the attorney-client privilege or work-product privilege to expert witnesses, including those who were initially retained to act only as a party's consultant.[167]

a. Preparing your Expert Witness for Deposition

In preparing an expert witness to testify, the attorney must focus on establishing a solid basis for an expert's opinion. The attorney must be thoroughly prepared to challenge his or her expert's opinions consistent with the legal standards that govern the preparation of witnesses and the admissibility of expert testimony at trial. In doing so, the attorney should be mindful to take the necessary steps to ensure that its discussions with the plaintiff's expert may be protected by its jurisdiction's attorney-client privilege and/or work-product privilege. Conversely, the attorney should also be mindful of the limitations of those privileges.

First, depending on the expert's level of experience, the attorney should provide the expert with a general overview of the deposition process. The attorney should also counsel the expert on the proper demeanor, attitude, and manner to exhibit during the deposition.

Second, the attorney should discuss all legal issues and elements of the causes of action relevant to the expert's testimony, as well as all respective burdens of proof of the parties. The attorney should be aware that its discussions with an expert may not be privileged. Moreover, the attorney must be mindful to respect the ethical boundaries as it educates the plaintiff's expert on the facts and major issues of the case. Fundamentally, the attorney must allow the expert to form his or her own opinions about the defects at issue.

Third, if he or she has not done so already, the expert should also inspect all of the reported defects firsthand before being deposed about them.

Fourth, the attorney should be ready to dispel any concerns a potential trier of fact may have about the expert's potential bias, by asking questions that show that the expert's opinions are based on an objective investigation and analysis of the available facts and issues, and that his or her compensation is reasonable for the type of services performed.

167. *See, e.g.*, Synthes Spine Co., L.P. v. Walden, 232 F.R.D. 460 (E.D. Pa. 2005); Western Res. v. Union Pacific R.R. Co., 2002 WL 181494 (D. Kan. 2002).

b. Preparing to Depose the Opposing Party's Expert

The attorney must be prepared to discover and challenge the opposing party's expert's opinions at both deposition and at trial.

Prior to deposition, the attorney should subpoena the expert to produce all documents he or she has relied upon in formulating his or her opinions. The attorney should also conduct a thorough review of what the expert has previously said or written regarding the issues at stake. The attorney should be aware of any contradictory or inconsistent statements that could later be used to impeach the opposing expert witness.

Deposition is sometimes the only means available to obtain complete knowledge of the background and experience of the opposing party's expert witness. Doing so at trial is often too time-consuming. At the outset, therefore, the attorney should ask the expert about his or her qualifications to serve as an expert relative to the issues in the case. Among other things, the inquiry may establish how many times the expert took the qualifying exam to become licensed or certified; whether the expert's license has ever been revoked, suspended, or subject to reprimand by any regulatory agencies; as well as whether the expert has participated in the formulation of national standards for construction, served on any committees, or acted as a member of any local rule-making agencies.

The attorney should establish how much time the expert devotes to active practice in his or her field compared to the time spent preparing and testifying as an expert witness. In some states, an expert may not earn more than 20 percent of his or her annual income from fees generated by providing testimony.[168] In other states, experts must devote a certain percentage of time to field work or else they may not testify as an expert witness.

The attorney should establish how much (or little) time the expert has devoted to investigating the matter on which he or she intends to testify and what additional work the expert may undertake before trial. Additionally, the attorney should be prepared to question the expert about his or her fees, including how much he or she has been paid by the retaining party and how much he or she is usually compensated for serving as an expert in other disputes.

c. Basis for Expert's Opinions

An expert may only rely upon relevant information that would be reasonably relied upon by other experts on the subject at issue.[169] For example, this would include field notes, lab reports, and testing results. In some jurisdictions, an expert in one field cannot testify as to opinions communicated to him or her by another who specializes in another field, because this type of

168. *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc., §3-2A-04(b)(4).

169. *See* Sykes v. Seaboard Coastline R.R. Co., 429 So. 2d 1216 (5th Cir. 1983).

testimony would constitute inadmissible hearsay.[170] In other jurisdictions, expert testimony may be based upon the hearsay evidence of other experts.[171] In either case, counsel should attempt to discover whether the expert is relying upon information prepared by others to form his or her opinion, whether the expert is merely mimicking the opinions of another expert, or whether the expert is relying on his or her own work.

To accomplish this, the attorney should ask the following kinds of questions:

- When and how often did the expert investigate the problem?
- What standards were followed?
- Were any tests done? If so, what kind of testing and why?
- How many times did he or she perform the same kind of test?
- Were repeated tests performed under similar conditions as the originals?
- What were the results for each round of testing?
- Who paid for the tests?
- What is the margin of error for that kind of testing?
- What publications did the expert rely upon?
- When and where were they published?
- Did the expert participate in writing any of the publications he or she is relying upon?

If the basis for the expert opinion is inappropriate, the entire testimony may be challenged either before trial[172] or at trial[173] through a motion in limine.

VI. Presentation of Evidence at Trial

Long before trial, the attorney must decide upon a logical and easily understood approach for how he or she wishes to depict the claims or defenses to the triers of fact. Attorneys should outline their closing argument themes early in the case.

When the time comes to present the case to the trier of fact, a firm control and knowledge of the following tools will be of immense assistance.

A. Summaries

Summaries made in anticipation of litigation are usually not admissible as business records.[174] However, summaries may be an effective tool for present-

170. Bunyak v. Clyde J. Yancey & Sons Dairy Inc., 438 So. 2d 891 (Fla. 2d Dist. Ct. App. 1983).

171. *See, e.g.*, 31A Cal. Jur. 3d. Evid. §622.

172. *See, e.g.*, Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008).

173. *See, e.g.*, Smoot v. Mazda Motors of Am. Inc., 469 F.3d 675 (7th Cir. 2006).

174. *See* Parliament Ins. Co. v. Hanson, 676 F.2d 1069, 10 Fed. R. Evid. Serv. 1308 (5th Cir. 1982).

ing expert testimony and other forms of evidence to the fact finders. In some jurisdictions, the court will allow attorneys to use summaries as long as the underlying documents are also made available to opposing counsel.[175] The attorney should always have the underlying documents placed into evidence before the summaries are used.

B. Charts

Like summaries, charts are another helpful tool for fact finders to review, especially during deliberation. Depending on the jurisdiction, their admissibility may be limited unless the records used to create them have already been placed into evidence.

C. PowerPoint

Charts, photographs, videos, and computer animation can each be incorporated into a PowerPoint presentation along with relevant excerpts from project documents, code provisions, deposition transcripts, or even audio-visual clips of recorded testimony to explain expert testimony, illustrate before and after conditions, or simply clarify or emphasize any issue within the claim. Again, the admissibility of a PowerPoint presentation as evidence may be limited unless the records used to create it have already been placed into evidence. The attorney must lay the proper foundation for the items contained within the presentation before such evidence is presented.

D. Animated Recreation and Admissibility Issues

A picture may be worth a thousand words. The judicious use of digital photographs, videos, or computer-generated models is essential to effectively illustrate and prove construction defects. Animated computer simulations of complex construction processes can considerably aid the jury's understanding. The attorney must consider from the outset how to lay the proper foundation for making an animation admissible as evidence. Animations depicting situations similar to site inspections are not admissible unless the attorney shows that they are a re-creation of actual conditions and are properly authenticated according to the rules of evidence.[176]

However, computer simulations can be costly, and not every case necessitates them. The attorney must also be mindful that animations can become a distraction to jurors if they do not clearly speak to the issue to be decided.

175. Fla. Stat. §90.956; City of Miami v. Fla. Pub. Serv. Comm'n, 226 So. 2d 217 (Fla. 1969); Scott v. Caldwell ex rel. Bay County, 160 Fla. 861, 37 So. 2d 85 (1948); Batlemento v. Dove Fountain, Inc., 593 So. 2d 234 (Fla. 5th Dist. Ct. App. 1992).

176. *See* Powell v. Industrial Comm'n, 4 Ariz. App. 172, 418 P.2d 602 (1966), *vacated on other grounds by* Powell v. Industrial Comm'n, 102 Ariz. 11, 423 P.2d 348 (Ariz. 1967).

When deciding to use an animated re-creation of a defect, the attorney needs to balance the potential benefit to be gained with the potential costs of doing so.

E. Electronic Data Collection and Case Management

Unlike computer simulations, litigation support software may be used for case management, litigation preparation, and even to present one's case at trial.[177]

Litigation support software can provide litigators with the ability to identify, collect, filter, process, search, and analyze their electronic case evidence in multiple formats and languages. Accessing electronic case evidence through document management software can accelerate document processing, allowing the attorney to gain immediate visibility into case facts for early case assessment. Many of these products also offer users an interactive way to analyze and categorize their case data into smaller, more relevant subsets. This technology can also be used to reduce the cost, time, and complexity of managing e-discovery as well.

Software can be used to organize and store an attorney's entire document database, including searchable images of key documents and exhibits, transcripts of key judicial rulings, witness testimony through deposition transcripts, and notes and lists of key people, events, and issues.

Electronic trial presentation software[178] allows attorneys to organize trial exhibits and deposition testimony, prepare their cases for trial, and enhance their case presentations. Attorneys can use this program to organize their potential exhibits for use by witnesses. It also provides the attorney with control to actually present or show exhibits and demonstrative materials. Presentations can be easily manipulated by highlighting or calling out portions of evidence for closer analysis or presenting side-by-side comparisons. One of the advantages of this presentation strategy is that it may keep the jury interested, which in turn, provides a more informed jury. On the other hand, overuse of electronic presentation techniques or presenting too many exhibits in quick succession can be cumbersome and distracting to jurors. The attorney is advised to practice using any electronic trial presentation software long before utilizing it in trial.

F. Demonstrative Evidence at Trial

Some examples of demonstrative evidence that an attorney can use to his or her advantage at trial may include the following items:

- Contracts and warranties
- Project manuals

177. Some examples include Clearwell E-Discovery Platform and Access Data Summation.

178. *E.g.*, inData Trial Director.

- Plans, drawings, and submittals
- Manufacturer specifications
- Testing and inspection reports
- Letters and notices of approval
- Change orders and field orders
- Cost estimates
- Certifications of occupancy or completion
- Applicable code references
- Photos and videotape

Attorneys can use poster boards, PowerPoint presentations, electronic trial presentation software, or any combination of these methods to present relevant portions of these items to the court. Before doing so, however, the attorney should practice with different presentation methods. Doing so can greatly enhance the attorney's comfort level in using new presentation techniques. It is also a way to determine which methods will best showcase the demonstrative exhibits for the court.

The attorney should always be mindful of why a particular demonstrative exhibit is being used. What are the critical facts, and how does the chosen demonstrative exhibit aid the jury's understanding and memory of those facts? Attorneys should also be mindful that demonstrative exhibits generally should not contain legal conclusions.

Sometimes, in their zeal to grab the jury's attention, attorneys lose sight of the obvious. More often than not, less is best. An attorney does not need to bombard the trier of fact with numerous demonstrative exhibits to make a point when only one or two carefully chosen exhibits could convey the same message. The exhibits themselves should be easy to see and understand. If the demonstrative aid contains too many graphics or too much information, the jury may ignore it, or worse yet, misunderstand it.

When used correctly, demonstrative exhibits should

- highlight key issues that support the theme of the case;
- help the jury understand evidence; and
- capture and retain the jury's interest in the subject matter.

For example, video recordings of a construction defect may be used to provide a visual aid to the expert's testimony at trial. Video also allows the attorney to preserve and demonstrate the nature and progression of damage. Additionally, video recordings are being used with increasing frequency in depositions to enhance and impeach the credibility of witnesses, to clarify issues by supplementing written or oral testimony and reports with visual portrayals of the deponent or subject matter, and to illustrate the deponent's demeanor during the proceeding.

Admissibility of videotaped depositions at trial is determined by the rules of evidence and case law, which vary by jurisdiction. For example, video

portrayals of events are admissible in California as long they are relevant, authentic, accurate, and established by laying a proper foundation.

The attorney must lay a foundation of relevance and operator competence to show the court that the probative value of the photograph or video recording outweighs any danger of undue prejudice and to overcome the dangers of inaccuracy and lack of trustworthiness. The attorney can authenticate the recording by having the deponent, the camera operator, and/or an attending expert witness view the tape and affix his or her signature or affidavit to the sealed videocassette. The attorney is also encouraged to provide opposing counsel with an opportunity to view the tape in advance and to cross-examine the party/actor, camera operator, and/or verifying witness about it.[179]

Once the attorney is finished using a demonstrative exhibit to prove a point and the jury has had enough time to absorb it, the exhibit should be removed before it becomes a distraction to the jury.

VII. Conclusion

This chapter has focused on the various steps to follow when preparing a construction defect dispute for litigation. Given the foregoing considerations, the reader should now have a better appreciation for the unique relationship among legal counsel, plaintiff, and expert witnesses and why an early, focused team effort between these parties is so necessary for successfully bringing a construction defect claim through trial.

179. *See,* Grimes v. Emp. Mut. Ins. Co., 73 F.R.D. 607 (D. Alaska 1977).