

## What Every Plaintiff in a Construction Defect Case Should Know (a Municipal Perspective)

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### “The Roof is Leaking”

- ...or any other construction related defect you can think of.
- Either way, it isn't something a city or any building owner wants to face.
- The purpose of this presentation and the paper is to discuss some (but not all) of the legal issues a city, as a building owner, should be familiar with and consider before and during construction defect litigation.

## Disclaimers

- Assuming that litigation is allowed under your contract.
- Principles apply to vertical and horizontal construction.
- Look at your specific contract language.
- Would advise to always consult outside legal counsel with experience in this type of litigation.

## Who done it?

- Will need to determine, as much as possible, the cause of the defect:
  - Design defect → architect or engineer?
  - Construction defect → general or sub contractor?
  - Faulty product → manufacturer or supplier?

## Certificate of Merit

- Tex. Civ. Prac. & Rem. Code 150.002.
- A certificate of merit must be filed in any case against a licensed architect or engineer, registered landscape architect, or registered professional land surveyor.
- The certificate of merit must set forth the damages sought, the negligence or other action, error or omission of the defendant.

## Certificate of Merit, Cont.

- The expert you hire to provide the certificate must:
  - Be competent to testify;
  - Hold the same professional license or registration as the defendant;
  - Be knowledgeable in the same area of practice and offer testimony based on the person's:
    - Knowledge, skill, experience, education, training, and practice.
  - Be licensed or registered in Texas; and
  - Be actively engaged in the practice of architecture, engineering or surveying.

## Certificate of Merit, Cont.

- A certificate of merit is VERY important. Section 150.002 allows the court to dismiss your case if the certificate is not provided or does not meet the requirements of the section. That dismissal can be **with prejudice**.
- File the certificate of merit with the original petition.
- File a certificate for each defendant that is a licensed or registered professional.

## Statute of Repose

- § 16.061 Civ. Prac. & Rem. Code – city is not barred by two and four year SOL.
- § 16.008 – applies to claims against architects, engineers, interior designers, and landscape architects – 10 year SOR.
- § 16.009 – applies to claims against persons who construct or repair an improvement to real property – 10 year SOR.
- § 16.012 – applies to claims against a manufacturer or seller – 15 year SOR.

## Mitigation & Betterment

- Failure to mitigate damages - the argument that plaintiff didn't do enough to minimize its damages.
- Betterment – the argument that plaintiff did too much.

## Role of Original Contractor and Design Professional?

- Should the original contractor and design professional(s) be contacted?
- Probably, but always hesitate before signing a release...

## Potential Claims – Breach of Contract

- **Elements of the claim:**
  - The existence of a valid contract;
  - The plaintiff tendered performance or was excused from doing so;
  - The defendant breached the terms of the contract; and
  - The plaintiff sustained damages as a result of defendant's breach.
- **Third party beneficiary** – a tough argument, but something to keep in mind.

## Potential Claims - Negligence

- **Elements of the claim:**
  - Existence of duty;
  - Breach of that duty; and
  - Damages proximately caused by the breach.
- **Chapter 33 of the Tex. Civ. Prac. & Rem. Code**

## Potential Claims – Breach of Warranty

- Express vs. Implied Warranties
- Warranties found in the Uniform Commercial Code:
  - § 2.313 – Express warranty
  - § 2.314 – Implied warranty of merchantability
  - § 2.315 – Implied warranty of fitness for a particular purpose

## Potential Claims – Products Liability

- Governed by Chapter 82 of Civ. Prac. & Rem. Code.
- A products liability claim – any action against a manufacturer or seller for recovery of damages caused by a defective product.

## Economic Loss Rule

- **What is it?**
  - “A judicially created limitation on the recovery of economic damages in some form of tort actions.”  
Jim Wren, *Applying the Economic Loss Rule in Texas*, 64 Baylor L. Rev. 204, 208 (Winter, 2012).
  
- **When does it apply?**
  - Products liability claims
  - When economic loss is to subject of the contract
  - And?

## Hiring Outside Counsel

- Find someone with experience in construction defect litigation.
  
- Consider hiring a coverage attorney.
  
- Also look for a mediator with experience in construction defect cases and insurance coverage issues.



## Recoverable Damages

- Actual Damages
  - Direct vs. Consequential
  
- Measure of damages
  - Lesser of reasonable cost of remedying the defects or difference in value of the structure contracted for and the value of the structure in its defective condition.
  
- Attorney's Fees and Court Costs

## Insurance – What is Really Covered?

- Are you dealing with a “wasting” or “eroding” policy?
  
- Do you have “property damage?”
  - A construction defect alone does not qualify as “property damage.”

## A True Story



Questions?