

ANATOMY OF A CONSTRUCTION DEFECT CASE

PRESENTERS-

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TODAYS OBJECTIVE

Discuss current state of Multi-party Litigation in Texas

Overview of the challenges to resolution from the perspective of:

Defense (and Plaintiff)

Coverage

Expert

Alternative processes by which the litigants can frame the litigation goals, investigate, present, communicate, and resolve Multi-party cases in an expedited, and efficient manner, for the benefit of the litigants, the carriers, counsel, and experts.

Efficiency and results = satisfied clients= client loyalty



CHALLENGES IN MULTI- PARTY CD LITIGATION

Pleadings

Discovery

Coverage

Experts

Destructive Testing

Uncertain impact of Ewing

Bringing multi-party litigants to the table in a timely manner

Effectiveness of Mediation as a solution



ESSENTIAL ELEMENTS IN MULTI- PARTY SUITS

Defining the step by step strategy to satisfy your clients objective,

A realistic assessment of the assets and liabilities of you case as early as possible in the process.

Communication- Communication- Communication: Early and often, with:

Client

Carrier (s)

Opposing counsel

Expert

Mediator



DESIGN A SOLID FOUNDATION

Slow Down

Investigate

Parties

Policies

Occurrence (s)

Damages

Expert retention: Qualify, Interview, and retain the right expert (s) and integrate early as a team resource and establish budgetary expectations.

Understand

Theories- not just legal, but technical issues

Time is Money: Slow down and get all the available data and information. Identify parties and data that will not likely be available and make a plan to deal with it.

Set Realistic (but aggressive) timetables to investigate and discover at the onset of the case.

BUILD A SOLID FOUNDATION

Complaints: Analyze and breakdown the complaint/ allegations by 1) legal, 2) technical issues (workmanship, design, code, etc...)

Parties: Identify all parties (including manufactures, suppliers, vendors, designers) and incorporate that data with the Complaint list.

Notices/Tenders:

Policies:

Discovery:

Initial Expert Investigation

Inspection and Testing – How much is enough?

Developing Expert Hypothesis and Testing

Daubert/ Robinson



EXPERTS ARE KEY IN DESIGNING THE FOUNDATION AS PART OF THE TEAM

Identify the type of expert (consulting/ testifying) needed as early as possible.

Vet Experts: Different cases need different expert skills, beyond just technical expertise.

Expectations: Identify the parameters required of an expert before beginning the vetting process. Communicate these to potential experts at the onset, including things such as:

Knowledge of Robinson/ Daubert

Established/ accepted standards of investigation & methods

Ability to provide a detailed Phased Scope of Work from initial investigation through Findings, with valid budgets or ranges.

Proper Licensure, qualification, and demonstrated experience in the field of expertise for the specific type of project in suit.

Realistic Budgets!

Apportionment



INVITE EVERYONE TO THE PARTY

Design Team

Subcontractors

Suppliers

Vendors

Carriers



MEDIATION- THE LAST BEST CHANCE(S)

Picking the RIGHT Mediator

NO SURPRISES

Coverage Considerations

Multiple Mediations?

- Carriers

- Contractors

Mediating with Plaintiffs

Be prepared to persuade at Mediation

- Death by PowerPoint

- Demonstrative Evidence

Experts at Mediation

Adjusters at Mediation: Who is the audience ?



CASE STUDY – ONE DAY SUCCESSFUL MEDIATION

- Green Construction
- One day successful mediation





















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CASE STUDY- ONE DAY SUCCESSFUL MEDIATION – HOW?

Accept the GC's "Captain of the Ship" role

Verify all insurance/coverage issues ...or lack thereof

Clear understanding of the legal and technical issues

Integrate experts in the process

Develop and obtain agreements

Allow for time for reporting

Select appropriate mediator

Preheat



INSURANCE ISSUES – SAMPLE

Insurance Issues

	Indem. Tender	A/I Tender	Carrier	Policy	Policy Period	Response	Adjuster
Client	n/a	n/a	A	GL 534352 GL 562148 GL 517052 GL 646082 GL 688381	9/13/03-04 9/13/04-05 9/13/05-06 9/13/06-07 09/13/07-08	See ROR dated 1-11-11	
Client	n/a	n/a	B	42-0420001347-03-00,01,02	09/14/08-09	See ROR dated 7-20-11	
Client via tenders to A	No contract found	8-17-11	C	CLP8456390	9/01/07 -09	None yet	
Client via tenders to B	11-08-11	8-17-11	D	FMTX003379 FMTX004753	10/02/07-08 10/01/08-09	None yet	
Client via tenders to C	11-08-11	11-08-11	B	Policy 65 SBA TZ4588	07/05/07-08	None yet	
Client via tenders to D	11-7-11	11-7-11	A	DGL081500	08/17/07-	None yet	
Client via tenders to E	No contract found	11-9-11	E	BK00953690381 BK00853472086	10/24/07-09 05/02/07-08	None yet	

PROTOCOL – SAMPLE

Perform various water tests including but not limited to:

- ASTM C 1601: Standard Test Method for Field Determination of Water Penetration of Masonry Wall Surfaces.
 - This test will evaluate the water resistive characteristics of the building materials.
 - The ASTM C 1601 will require bolting the test chamber to the surface of the wall.
 - Anchor holes will be sealed but the anchor hole patch will not be an exact match to the existing wall and may be noticeably visible.
 - Testing may occur in more than one area

PROTOCOL – SAMPLE (CONT'D)

- ASTM E 1105: Test Method for Field Determination of Water Penetration of Installed Exterior Windows, Curtain Walls and Doors by Uniform or Cyclic Static Air Pressure Difference.
 - This test will evaluate the moisture resistance of various areas of the building envelope.
 - No physical altering to building will occur, however if the building envelope allows water to infiltrate past the surface of the structure, building materials inbound of the exterior surface will likely get wet and may cause damage to those materials

PROTOCOL – SAMPLE (CONT'D)

Removal of up to four wall sections of varying sizes up to 3' wide x 2 tall' that encompasses horizontal and vertical block joints.

- Following visual observations, the samples may be sent to a laboratory where a Petrographic examination would be performed.
- This laboratory examination may include Substantial compliance with ASTM C856 - 11 Standard Practice for Petrographic Examination of Hardened Concrete guidelines
- Repairs to the structure due to the removal of the wall samples will be performed by a professional mason by infilling the voids with block similar to the existing block.
 - XYZ blocks may be used if available at the time of the destructive testing. Otherwise, standard masonry products will be temporarily installed and sealed.

PROTOCOL – SAMPLE (CONT'D)

- Stucco and plaster finishes on the exterior and interior of the home may not match exactly and will likely be noticeable to the eye.
- The source for interior plaster material will need to be supplied by the owner

PROTOCOL – SAMPLE (CONT'D)

- If it is determined that window surrounds are allowing moisture to enter into the building, one or more sections of the window surround may be removed to inspect and evaluate.
 - Repairs to the structure due to the removal of the wall materials will be performed by a professional mason by infilling the voids with block similar to the existing block.
 - Standard masonry products will be temporarily installed and sealed if Flex Crete blocks are not available at the time of the destructive testing.
 - Stucco and plaster finishes on the exterior and interior of the home may not match exactly and may be noticeable to the eye.

PROTOCOL – SAMPLE (CONT'D)

- Inspection of HVAC system.
 - The HVAC system will be tested and inspected
 - This testing and inspection will be non-destructive.
- The foundation will be surveyed and inspected.
 - Benchmarks may be identified and located
 - The inspection will be non destructive.

CASE STUDY- MULTI-FAMILY CONDOMINIUM CASES

Destructive testing issues

- Defendant

- Plaintiff

Have the right expert

Have the right mediator

- Separate Settlements?

Coverage hurdles and work arounds

Make your case!



CS CG 4 Unit 45, Bldg 4 Door CornerBd (2/2)



005121 SV110331 CLG 027



005121 SV110331 CLG 029



005121 SV110331 CLG 031



005121 SV110331 CLG 032

CS CG 4 Unit 45, Bldg 4 Door CornerBd (1/2)



005121 SV110331 CLG 020



005121 SV110331 CLG 023



005121 SV110331 CLG 024



005121 SV110331 CLG 026

CS P-5, Unit 10, Bldg 2 (1/1)



IMG_1831



IMG_1832



IMG_1833



IMG_1834







PHOTO #29. View at NE corner with significant damage to floor and wall framing.



PHOTO # 8. Water damaged OSB along entire horizontal joint from NE corner to east master bedroom window.

SUMMARY

A thorough understanding of the claims, coverage, parties, and obstacles at the onset will reduce or eliminate surprises. Identify deficiencies in your case as early as possible through thoughtful and comprehensive analysis and discovery EARLY in the case.

Identifying the “real claims,” parties, coverage issues, experts, and necessary discovery early in the case will reduce surprises later on, and result in faster and more efficient resolution. Slow down and do this early.

Clear communication and directives between the client, carrier, and legal/ expert team is crucial to a successful outcome and avoiding the time, expense and uncertainty of trial.

The right mediator will impact the ability to settle the case in an efficient and cost effective manner

