

Practical solutions for preventing construction defects lawsuits

By Kim Jackson

While builders hope that the state legislature will ease off on its appetite for new bills that continue to kick builders in the ribs, it's likely that a construction defects issue or two will make its way through a legislative vote. Regardless, it will almost assuredly pay to stay ahead of possible lawsuits by tightening up your own contracts.

Before writing a contract, check out the site

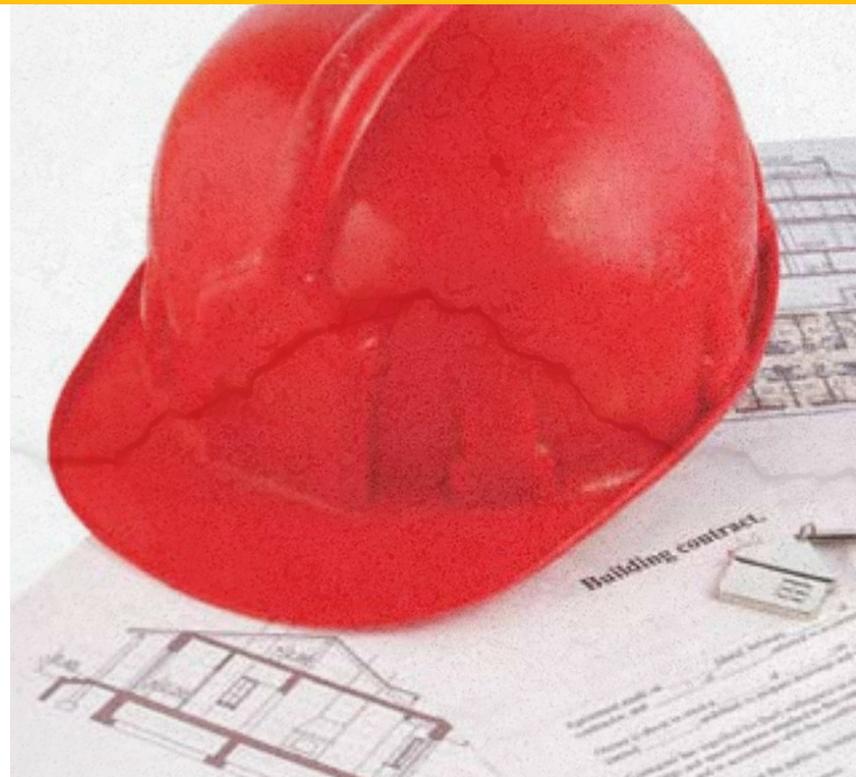
Yet before you even reach the contract phase, make sure a prospective building site is viable or if the risk to build there is too high. David McLain, partner with Higgins, Hopkins, McLain & Roswell, explained that in your due diligence process, have a candid talk with a soils engineer about the soils profile. "If we can't cost effectively mitigate the risk of building on expansive soils, are these soils that you want to build on?" he asked

During the construction drawing phase with your design professional McLain advised having a peer review. "We see a lot of businessmen who hire the engineers and architects, and rely on them, which is fine," McLain said. "I think if you were risk averse, you would have a second set of eyes look at the designs to see if there were any red flags, by going through that peer review process."

Get rid of construction hot buttons

Third-party quality insurance companies can help protect builders during the construction process. "Obviously, builders typically have their own superintendents who do a good job on the site. But often, they don't look at a specific check list for specific problems on a recurring basis."

As an attorney with experience in construction defect litigation, McLain has even gone so far as to have a roundtable discussion with the builder and a third-party inspection service to discuss the recurring defects that repeatedly come up in construction defects cases. "If you can put that list together of what those issues are," he noted, "then it makes sense to build an inspection process around those. We'll make sure we're inspecting for — and eliminating — problems that we know to be a hot button in each construction defect case."



He added, "By and large, you see the same recurring problems over and over. If a builder educates himself about what those issues are and takes proactive steps to eliminate those problems, he's acting reasonably in terms of protecting himself from a suit."

Update your home owner contracts

According to Ryan Warren, Of Counsel with Hensley, Kim & Holzer, builders are well served if they make sure both their contracts with home owners and subcontractors are up to date with the current law. In their home owner contracts, Warren said, "Builders need to make sure they have some detail in them and to the extent that it's permitted, their contracts should shift the risk from the general contractor over to the subcontractors. That's not an 'end all' answer to construction defects, but it can help."

He emphasized how important it is to include an arbitration clause in your home owner contracts, too. "I can't believe the number of builders' contracts that don't have an arbitration clause," he said. "The last thing you want to do as a builder is stand in front of a jury that's filled with home owners or people who really want to be home owners."

Be specific with subs' contracts

Contracts with subcontractors should include performance to specific standards. Warren said that builders can contractually specify ways the subcontractor must perform the work, and that a subcontractor must use a certain type of product that's installed exactly in conformance with the manufacturer's installation requirements. "Now those manufacturer's requirements are already there," he conceded, "but all you can do is keep trying. Keep trying to get the very best subcontractors you can. Keep good relationships with your subcontractors, so they come out when the home owner has a problem. A good subcontractor can save a contractor's backside."

If you haven't had your contracts reviewed by an experienced construction litigation attorney since last year, McLain suggested



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getting it done now. “Talk to an experienced attorney to make sure you do not run afoul of the Home Owner Protection Act or the Subcontractor’s Anti-indemnity legislation that was passed last year. It’s a good time to reform your purchase, sale and subcontract agreements, to make sure they contain as much language as possible to protect you.”

Beyond contracts, Warren added that builders need to focus on communication, as much as they focus on good building practices. “Respond when the home owner complains about something,” he advised, “which gets incredibly frustrating for the builder, but frankly, that’s what he has to do — even if it’s a call about dried caulk four and a half years after the house was finished,” he said. “I would imagine that a builder reading this would say to himself, ‘This isn’t

what I signed up for; I shouldn’t have to do that.’ And he’s right. A builder shouldn’t, but in today’s environment, it’s kind of what he signed up for.”

Third-party home owner warranty program can help mitigate the volume of calls to a builder. “Home owners have many different roads they can take — all at the same time — to come after a builder,” Warren noted. “One of those roads is breach of your warranty contract. A third-party warranty company usually photographs absolutely everything. As a lawyer, we love that if a claim does occur, we can take a look at the photos.” A warranty company also provides a warranty booklet, so a home owner can pull it out and see what it says about, say a crack in the concrete. “When the book says it’s not a construction defect,” Warren added, “a significant portion of home owners will put the warranty book back in the desk and won’t push the subject.”

Notice of claim: Do it right

Yet if you do get a notice of claim, McLain explained that the first step to take is to notify your insurance company. “What you don’t want to do is not inform the insurance company, then make an offer, which the company later deems to be voluntary payment, or deny the claim somehow.”

Next, contact an experienced construction defects litigation attorney and put a plan in place to respond to the notice of claim. At the outset, McLain said, “that may entail reaching out to attorney or the home owners directly if they’re not represented by counsel to get more time to respond. The statute provides that the parties can, by written agreement, extend the deadlines within the statute. In scenarios involving more than one home or a home owner’s association, one of the first things we do is reach out to the home owners, to their attorney, and get more time to do the inspections and make an offer.”

During this time, you’ll want to evaluate the home owner’s concerns. Look at which design professionals or subcontractors, if any, are responsible for the problem and put them on notice of the potential claim. Then, “ideally, work with the design professional or subcontractors to make a joint response to the home owners,” McLain said. “The times we’ve seen the notice of claim process work most effectively to prevent or

shut down a lawsuit are those where the builder, along with the insurance companies, subs, design professionals and attorneys look at a house, figure out what the real problems are and take a real-world view of what it’s going to take to fix those problems. We’ve seen numerous situations where the home owners can see that the builder is making a good-faith response through the notice of claim process — and are satisfied with that response.”

McLain said that when the plaintiffs’ attorneys are trolling for new business, “they’re looking for a case that has big, glaring problems, the low-hanging fruit, so to speak. It’s an easier case for that attorney to prove and there are things that builders could — and should — do. By putting in place quality construction policies and procedures will help prevent that builder from being that low-hanging fruit, making him a less-desirable target.”

He added, “The builders that are taking these proactive steps to elevate the quality of the design and construction that they’re building are making themselves a less desirable target. We’ve seen plaintiffs’ attorneys turn cases down, because the big glaring problems aren’t there on a house. They actually go back and encourage the home owner to ask the builder to resolve the punch list issues and not sue. If you as a builder are providing a good, quality home, are responsive through the warranty process, and are keeping the home owner happy, it’s likely the home owner will never have a reason to call a lawyer.” 🏠