



STRATEGIES FOR MANAGING YOUR RISK

WHEN THE TOPIC OF CONSTRUCTION DEFECT litigation comes up, I often think of the joke about the two campers out in the woods who saw a bear coming their way. The first camper dropped his backpack, retied his shoes, and told his friend he was going to run for it. His surprised friend said, “You can’t outrun a bear.” The first camper replied, “I don’t have to outrun the bear. I just have to outrun you.”

It goes without saying that there is no such thing as perfect construction. To believe that it’s possible to construct a perfect home is unrealistic. To prevent the big, ugly construction defect lawsuits, you don’t need to build a perfect house, you just have to do a better job managing your risk than the next guy. If you spend time and attention focusing on risk management tools discussed here, you can protect yourself from being targeted by plaintiffs’ attorneys.

Planning and preconstruction phase

During the planning and preconstruction phase of a project, focus on contract integration and coordination, insurance coverage, and third-party plan review. Discuss with your attorney whether to include arbitration provisions in your purchase and sale agreements, as well as

in contracts with your subs. Contracts should also be reviewed to ensure that they provide as much protection from construction defect litigation as permitted under Colorado law, and in particular, the Homeowner Protection Act of 2009. Finally, all contracts used should be reviewed to ensure that they are consistent and fully integrated. It does you no good when you are finally able to get a homeowner’s claim into arbitration, only to discover that you have no right to force your subcontractors, design professionals and/or vendors into that same arbitration.

With your insurance, work closely with your attorney and insurance agent to ensure your insurance provides coverage for the claims most likely to be brought by homeowners. With the recent *General Security* case and *Greystone* decisions, carriers are taking more restrictive coverage positions. Assuming that you can obtain meaningful coverage from your own carriers, also make sure that you obtain additional insured certificates from your subcontractors — for both ongoing and completed operations — and that you keep those certificates (along with the entire construction file) through the statute of repose for eight years. This is especially true in the event that your own insurance policy contains a subcontractor insurance warranty.

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Finally, have your plans and specifications reviewed by a third party. This is particularly important for projects in which you use the same designs multiple times. The most difficult cases I have defended have stemmed, in large part, from design flaws. The cases were made difficult not because the repairs were tough to make, but because the design flaw had been incorporated into hundreds and hundreds of homes, transitioning from a problem on paper to a problem in constructed homes. It would have been nice if someone had caught the problem in the design phase, while it was still on paper.



Construction phase

During the construction phase of a project, I encourage you to retain a competent third-party inspection service. While the cost of hiring such outside services may be disturbing, it is certainly money well spent if it can prevent, or minimize, construction defect claims.

A few years ago, I received a telephone call from a plaintiffs' attorney who reported that he was investigating homeowner complaints at one of my clients' projects. He reported that the window flashing on the homes within the project was the best he had ever seen. Since window flashing is one of the cornerstones of most construction defect lawsuits, the attorney knew that this project did not represent a pot of gold at the end of the rainbow. We were able to address the homeowners' legitimate concerns quickly and avoided a long, drawn-out lawsuit.

When we went back to determine what made this project different from others, we discovered that this is one of the first projects on which our client used a third-party inspection service. When using such a service, sit down with the inspection company, its design professionals and

its attorneys to ensure that the items being inspected — and their frequency — reflect the severity and frequency of the issues that show up in construction defect lawsuits.

Also be sure to document any anomalies during the construction phase. This will help prevent construction defect lawsuits, or at the very least, minimize their severity if they do happen. By that, I mean that it is not uncommon for questions to arise during construction that do not seem like a big deal at the time; they get resolved, and the project proceeds.

One example is a situation where a soils report calls for ten percent fall away from buildings for ten feet from the foundation, yet the buildings on site are less than 20 feet apart. In this situation, we frequently see that the subcontractor and/or builder will identify the issue, talk with the engineer, obtain a resolution, implement it and move on.

Years later, during their depositions in a construction defect lawsuit, no one can remember what happened, who approved what, or how the project got built. Instead of letting this happen, we encourage builders to document, in writing, how issues like these were resolved. It's much better in defending a case to have a stamped engineer's letter acknowledging the issue and providing guidance on how the project should be constructed.

Post-construction/warranty administration phase

Happy homeowners don't sue their builders — and there's no such thing as a perfectly constructed house. That's why most builders offer limited warranties. It is these warranties that provide builders their best and last chance to forestall a statutory notice of claim and subsequent lawsuit. By properly administering its warranty program, or outsourcing the process to a company that specializes in the field, builders can keep their homeowners happy and simultaneously learn before it's too late that there is a problem in a house. It is during this process that a builder can step up, take care of the problem and keep its homeowners happy and as a result, unrepresented by plaintiffs' counsel. ■■

David M. McLain is a founding member of Higgins, Hopkins, McLain & Roswell, LLC, a law firm that specializes in representing general contractors and developers in a variety of construction matters, including implementation of risk management strategies and defense of complex construction defect claims. As a special benefit to Builder Members of the Colorado Association of Home Builders, Mr. McLain has agreed to meet with you for an hour to provide a complimentary risk management analysis. Please contact him at mclain@bhmlaw.com or 303-987-9813.