

Workshop W3

Wednesday, October 11, 9 a.m.-noon

ANALYZING CONSTRUCTION DEFECT CLAIMS BY COMPARING LAW IN AZ, CA, & NV

Presented by

Rose Marie Orcino Madruga
Vice President
Zurich NA Insurance

Bruno Wolfenzon
Managing Partner, Founder
Wolfenzon Schulman

A construction defect claim is like a living organism that changes over its life cycle. This session takes a two-sided approach to analyzing construction defect claims. First, a qualitative approach examines how claims are born and how they grow and change over time. An actuarial approach reveals insight into the most common types of claims and ultimate cost estimates.

- Examines insurance industry data and claim trends on defective work claims.
- Demonstrates stages of claim development and how to identify opportunities to minimize the ultimate cost of the claim.
- Provides tools for evaluating various coverage options, including retention levels and wrap-up insurance programs.



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in Insurance, Risk Management and Surety

service: (sə-r-vᵻs)

- n.** 1. dedication to a task, timely; see **READY / WILLING / HELPFUL**. 2. the act of being devoted to helping others.
- v.** 1. to meet the needs of.

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Rose Marie Orcino Madruga
Vice President
Zurich NA Insurance

Ms. Madruga is one of the presenters for Workshop W3, "Analyzing Construction Defect Claims," on Wednesday morning. In her role as Vice President and General Manager of Construction & Defect Claim Services for Zurich North American Insurance, she is responsible for directing the activities of Zurich construction claims personnel throughout the United States and developing policies, procedures, and standards for the handling of construction defect claims across all business lines. She works closely with underwriting management to provide evaluations of risk underwriting and to establish global business strategies.

Prior to joining Zurich in 2004, Ms. Madruga worked for Travelers (now St. Paul Travelers), where she was tasked with the design and implementation of a program for the dedicated handling of construction defect claims throughout the United States. Ms. Madruga has supervised technical claim professionals, court and legal support staff, paralegals and attorneys, as well as consultants and experts. She has instituted changes to claim policy and procedure, overseen program development and implementation, streamlined processes, and developed and monitored budgets, all in a continuing effort to achieve timely and cost-effective results.

From 1986 to 1996, Ms. Madruga was a practicing attorney, with an emphasis in insurance defense and construction defect since 1992. She has served as a risk manager, staff research attorney, litigation associate, and insurance staff counsel. Her professional experience includes legal research and writing of court opinions; prosecuting and defending construction litigation; drafting contracts, bids, and proposals; and generally advising clients and the courts on various facets of insurance coverage and construction operations.

Ms. Madruga has also lectured extensively on various construction, insurance, and claim-related topics to attorneys and construction and insurance industry professionals, including the San Diego County Bar Association, the American Bar Association, the Defense Research Institute, Mealeys, and the Casualty Actuarial Society. She graduated from the University of San Diego School of Law in 1984, and received her undergraduate degree with honors in Political and Behavioral Studies from the University of Maryland, College Park, in 1980. She was admitted to the State Bar of Maryland in 1986 and the State Bar of California in 1988.

Bruno Wolfenzon
Managing Partner, Founder
Wolfenzon Schulman

Mr. Wolfenzon is one of the presenters for Workshop W3, "Analyzing Construction Defect Claims," on Wednesday morning. He is the Wolfenzon Schulman firm's founder and managing partner. He is experienced, committed, and respected throughout the Southern California and Nevada legal communities as a capable trial attorney with great integrity.

Mr. Wolfenzon has more than 15 years of experience as a trial attorney. He has successfully defended cases involving casinos, developers, subcontractors, and commercial entities.

He was born in Lima, Peru, South America, and speaks fluent Spanish. He attended McGill University in Montreal. In 1989, he received his Juris Doctorate from the University of San Diego School of Law. He is admitted to practice in Nevada and California.

Mr. Wolfenzon was a partner with a firm before he formed The Wolfenzon Law Group, which is now Wolfenzon Schulman, and continues to practice in these same areas. Most of Mr. Wolfenzon's cases involve complex litigation. Mr. Wolfenzon has litigated a number of construction cases, some of which involve mold tort claims as well as general negligence, casino security, wrongful termination, premises, and products liability matters. Mr. Wolfenzon has successfully argued before the Ninth Circuit Court of Appeals and the California Fourth District Court of Appeals.

Mr. Wolfenzon has tried several cases in California and Nevada, with impressive defense results. In several of those jury trials, Mr. Wolfenzon obtained monetary awards against plaintiffs and in favor of his clients. Mr. Wolfenzon is quite familiar and experienced with the California and Nevada courts.

Mr. Wolfenzon uses the expertise acquired in the defense of these entities to help clients develop risk management and prevention programs. By working closely with clients, Mr. Wolfenzon assures all of their current and future legal needs are met. The risk management and prevention programs developed by Mr. Wolfenzon range from small seminars for risk managers to companywide presentations at annual meetings. Mr. Wolfenzon frequently lectures to audiences in the areas of construction defect litigation and the hotel and casino industry.

Mr. Wolfenzon is also a member of the American Bar Association, the Clark County Bar Association, and the American Inns of Court, Associate Member of the Louis M. Welsh Chapter. He also serves on the Board of Directors of a large local community nonprofit organization.

ANALYZING CONSTRUCTION DEFECT CLAIMS BY COMPARING LAW IN AZ, CA, & NV

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What to Look for in CD Claims

- 3 states to compare and contrast
- Who is party
- What is the property
- Basis of Liability
- Limiting Liability
- Spreading Liability among Defendants
 - Joint and Several Liability
 - Indemnity
- Damages
- Right to Repair

Top 10 Builders in the United States in 2005:

1. [D.R. Horton](#) – 51,383 Homes
2. [Pulte Homes](#) – 45,630 Homes
3. [Lennar Corp.](#) – 42,359 Homes
4. [Centex Corp.](#) – 37,022 Homes
5. [KB Homes](#) – 31,009 Homes
6. [Beazer Homes](#) – 18,401 Homes
7. [Hovnanian Enterprises](#) – 17,783 Homes
8. [Ryland Group](#) – 16,673 Homes
9. [M.D.C. Holdings](#) – 15,307 Homes
10. [NVR](#) – 13,787 Homes

CALIFORNIA

- Who is the Party
- What is the Property
 - Entire project
 - Indemnity
 - Defense
 - Building
 - Indemnity
 - Defense
 - Unit

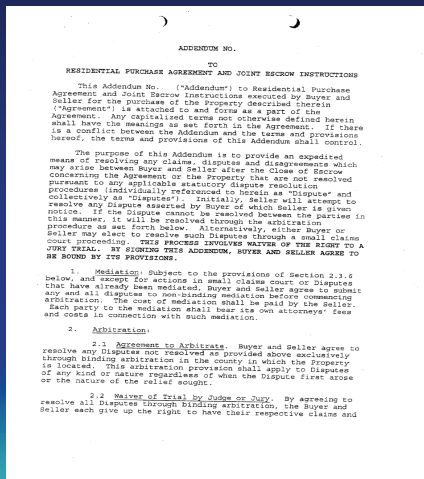
CA Basis of Liability

- Negligence
 - *Aas v. Superior Court*, 24 Cal. 4th 627 held no tort recovery (negligence/strict liability) for construction defects that have not actually caused property damage
 - even when the defects violated provisions of the building codes intended to prevent harm to life, health and property
- Strict Liability
 - If you mass produce and you mass sell
 - No need to show builder fell below standard

CA Basis of Liability

- Contractual
 - *Hicks v. Superior Court*, 89 Cal.App.4th 908 (2001), the court concluded that proof of breach of warranty does not require proof that the product malfunctioned but only that it contains an inherent defect that is substantially certain to result in malfunction during the useful life of the product.
 - Plaintiffs contended that the concrete foundations on a residential project were inherently defective product, which was substantially certain to lead to foundation failure.
 - The court effectively held that the absence of current property damage did not bar the breach of warranty claim

Limiting Liability even under SB800



- Separately Signed Addendum to Contract
- Mediation
 - Non-binding
 - Paid by Seller
- Arbitration
- Waive trial by Judge or Jury

Limiting Liability

organisation as most knowledgeable, or an individual officer or employee of an entity or organisation, shall count as the deposition of a party which is not a natural person;

(c) **Deposition of Expert Witnesses.** The right to take the deposition of each expert witness designated by an opposing party for up to 4 hours.

(d) **Additional Depositions.** The arbitrator shall have discretion to allow additional depositions and longer depositions upon a showing of good cause.

2.5 **FEDERAL APPLICATION AEL:** Buyer and Seller acknowledge that because many of the materials and products incorporated into the Home Air Manufactures in other states, this Agreement evidences a transaction involving interstate commerce and the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) now in effect and as it may be hereafter amended will govern the interpretation and enforcement of the arbitration provisions of this Addendum.

2.6 **AGREEMENT TO ARBITRATION AND WAIVER OF JURY TRIAL:**

A. **ARBITRATION OF DISPUTES.** BY INITIATING IN THE SPACE BELOW, BUYER AND SELLER AGREE TO HAVE ANY DISPUTE DECIDED BY SEVERAL ARBITRATION IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT AND THE CALIFORNIA ARBITRATION ACT, TO THE EXTENT THE CALIFORNIA ARBITRATION ACT IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT, AND BUYER AND SELLER ARE GIVING UP ANY RIGHTS BUYER AND SELLER MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIATING IN THE SPACE BELOW BUYER AND SELLER ARE GIVING UP THEIR RESPECTIVE STATUTORY RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THIS ADDENDUM. IF BUYER OR SELLER REFUSES TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, SUCH PARTY MAY BE COMPELLED TO ARBITRATE UNDER THE FEDERAL ARBITRATION ACT, TO THE EXTENT THE CALIFORNIA ARBITRATION ACT IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT.

- Additional Rights (continued)
- Inspection
- Opponent Deposition
 - Only 1
 - 4 hours
- Expert Deposition
 - 4 hours
- Additional Deposition
 - Arbitrator discretion

CA - Joint and Several Liability

- Joint Liability
 - Responsible to plaintiff for the entire loss regardless of percentage of fault
 - Can seek reimbursement from other at fault parties
- Several Liability
 - Responsible to plaintiff for the percentage of damage you cause, not others
- Subcontractors and Material suppliers can be jointly liable with rights to offsets from settling parties.
 - ...subject to offset by the amount already paid by the other roofing subcontractors.

CA - Contractual Liability: Indemnity No Types

- The courts are moving away from the rigid “Type I, II or III” application ***Continental Heller v. Amtech Mech. Service, Inc.*** (1997) 53 Cal.App.4th 500.
 - The court of appeal held that even a subcontractor whose **work was found not to have fault must provide indemnity** to a general contractor
- See also ***Centex Golden Construction v. Dale Tile Co.*** Commercial setting in CA (General & Sub subject to Negligence not Strict Liability)

Risk Transfer

- Contractual Language
 - Defense and Indemnity
 - Insurance Coverage
 - Excess over all available and collectible other
- Additional Insured Status
 - Completed Ops
 - Certificates vs. Endorsements
 - Primary and non-contributing as req'd by K
- Retentions & Deductibles

MASTER ARCHIVES

Start Your Document Retention Program now Before it is to Late

BUILDER DOCUMENTS	
LAND ACQUISITION	ENTITLEMENTS
1.01 Transaction	3.01 Development Reviews / Status Memos*
1.04 Escrow	3.05 City Correspondence
1.07 Title and Survey	3.04 Zoning Reviews / Fee Hearings*
1.10 Existing Improvements	3.07 Environmental Reviews*
1.13 Seller Property Information	3.10 Development / Third Party Agreement*
1.18 Visuals	3.13 Jurisdictional Waters / FAA*
1.19 Feasibility / Risk Analysis	3.16 Specific Plan*
1.22 Environmental*	3.19 Neighborhood Outreach / Meetings / Opposition*
1.25 Physical Conditions*	3.22 Conditional Use Permit*
1.28 Competitions	3.25 Traffic Studies*
1.30 Due Diligence	3.28 Shade & Shadow Studies*
1.31 Existing Leases	3.31 Conditions of Approval / MM / MMP*
1.32 Easements / Agreements	3.32 Geotechnical*
1.33 Land Approval*	3.33 Land Use Plan*
1.34 Land Purchasing Agreement	3.34 Acoustic Report*
ACCOUNTING	3.35 Archaeology*
2.01 Preliminary Lien Release	3.36 Affordable Housing*
2.04 Invoice	3.37 Legal – Entitlement*
2.07 Conditional Lien Release	3.38 Covenants / City Required*
2.04 Unconditional Lien Release	
2.05 Purchase Orders	SALES / WARRANTY
2.06 Work Orders	8.01 Transaction Documents
2.07 Material Receipts	8.04 Lender
2.08 Work Tickets	8.07 Escrow
2.09 Checks	8.10 Title
	8.13 Owner's Manual
	8.16 Warranty Documents
	8.19 Lease-Up Reports
	8.25 Licenses
	8.28 Operating Staff
	8.31 Building Turn

- Standardize the set up list of documents, origination, flow and archiving of your project documents.
- Each file should be accounted for during the entire home building process.
- Documents should be audited for originality, final copy, execution, recordation, stamped by local authority..etc.
- Organize files and store in safe place for the 10 year period.

MASTER ARCHIVES

The Process

- **INVENTORY and SCAN**
- **QUALITY ASSURANCE:**
- **AUDIT**
- **GAP REPORT**
- **FILL DOCUMENT GAPS**
- **CLIENT REVIEW**
- **ACTIVATE WEB ARCHIVE**
- **ONGOING DOCUMENT UPDATES**

MASTER ARCHIVES

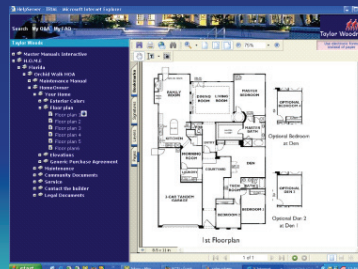
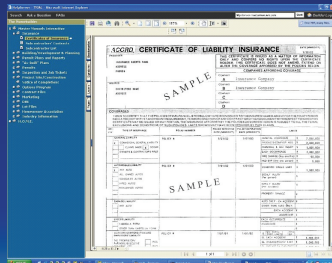
Value

- Having all documents retrievable in minutes via the Web
- Complete retention of all the right documents
- Secure storage of document
- Library of information for all departments to utilize
- Improve your document flow by reducing redundancy and duplication
- Strengthen risk management
 - common area turnover.
 - easements have been recorded.
- Third party model
- Cost Savings

Publish Documents on your Website

Password-protected access
Daily Backups
Managed Security Services:

Managed Firewall Services
Managed VPN Services
(encrypted)
Network Security
Physical Security



Damages

- A plaintiff can recover under strict liability when a defect in one component part of a house causes injury to other component parts of a house
 - When a defective foundation results in cracked walls, ceilings and countertops through the home, recovery of strict liability damages is not barred by the economic loss rule. *Stearman v. Centex*
 - A component part may or may not be part of the whole; it is a question of fact.
- Plaintiff is entitled to investigative costs if successful in claims. *Stearman v. Centex*
 - Not attorney fees, unless there is a contractual right to fees

Right to Repair

- Cal Civ Code sections 895-897, 910-938
 - Notice
 - Successful Party

NV – Basis for Liability

- *NO Strict Liability*
 - *Calloway v. City of Reno*, (2000)-Cannot sue for strict liability in construction defect action.
- *Chapter 40* codifies and allows construction defect claims based in tort.
 - Negligence, not Strict Liability

NV - Joint and Several Liability

- **Joint Liability**
 - Responsible to plaintiff for the entire loss regardless of percentage of fault
 - Can seek reimbursement from other at fault parties
- **Several Liability**
 - Responsible to plaintiff for the percentage of damage you cause, not others

NV - Joint and Several Liability

- If a Defendant can assert the plaintiff was comparatively negligent, there is **only several liability** among the defendants.
 - *Buck v. Greyhound Lines*. There must be a legitimate claim of comparative negligence
 - children passengers in vehicle involved in accident cannot have a valid claim of comparative negligence against them.
 - Thus, the liability of the defendants as to the children was joint and several.

NV - Joint and Several Liability Comparative Negligence

- The plaintiff may not recover if his comparative negligence is greater than the negligence of the defendant or the combined negligence of multiple defendants. NRS 41-141

NV - Joint and Several Liability

- Exceptions where there is always joint and several liability:
 - Strict liability;
 - An intentional tort;
 - The emission, disposal or spillage of a toxic or hazardous substance;
 - The concerted acts of the defendants;
- *GES v. Corbitt*. Just having a relationship between defendants is not a concerted act
 - Building a project is not a concerted act

NV – Indemnity No Types

- Nevada trial court judges (specifically Hon. Nancy Saitta) have ruled to enforce contractual indemnity provisions as written
- **Anderson v. Plaster**
 - Tried in front of the Hon. Nancy Saitta
- Plaintiff sought \$5 Million for a block wall
- Developer argued for less than \$200,000
- Verdict under \$500,000
- Indemnity provision enforced to pass **100% of loss to subcontractor**

NV – Indemnity GFSM

- GFSM
 - I paid money to claimant and I want out
- NRS 17.245 bars both contribution and equitable indemnity claims if a good faith settlement is reached
- **express** indemnity claims are not barred by a good faith settlement

NV – Damages

- Chapter 40 Governs
 - The reasonable cost of any repairs already made
 - The reduction in market value
- Can get cost of repair, and
 - The loss of the use of all or any part of the residence;
 - The reasonable value of any other property damaged

NV – Damages

- Any additional costs reasonably incurred by the claimant, including, any costs and fees incurred for the retention of experts to:
 - Ascertain the nature and extent of the constructional defects;
 - Evaluate appropriate corrective measures to estimate the value of loss of use; and
- the cost of temporary housing and
- Any interest provided by statute. NRS 40.655
- Attorney Fees and Costs can be awarded to the prevailing party.
- No punitive damages
- Mechanisms to allow defendants to become prevailing parties

NV – Right to Repair

- Right to Repair (NRS sections 40.640-675)
 - Successful Party
 - Notice

AZ -Strict Liability Not by claimant against Builder

- **CARSTENS v. CITY OF PHOENIX**
(2004) 206 Ariz. 123, 75 P.3d 1081
 - The economic loss rule bars a party from recovering economic damages in tort unless accompanied by physical harm, either in the form of personal injury or secondary property damage
- No Negligence; no Strict Liability
- Only contract claims against Builder

AZ - Joint & Several Liability

- ARS 12-2506. Abolishes joint and several liability unless:
 - Both the party and the other person were acting in concert.
 - The other person was acting as an agent or servant of the party.
 - The party's liability for the fault of another person arises out of a duty created by the federal employers' liability act.

AZ – General Indemnity but read it

- When language in an indemnity agreement does not specifically discuss what effect the indemnitee's negligence has upon the obligation to indemnify, the agreement generally is considered a **general indemnity** agreement.
 - Under such an agreement, the general rule is that an **indemnitee is entitled to indemnification** for a loss that results in part from an **indemnitee's passive negligence**, but not for a loss that results from an indemnitee's active negligence.
- However, while the rule should generally be followed, a **mechanical application of the rule should not be followed** because it may prevent an indemnity agreement from being enforced as intended.

AZ – Specific Indemnity

- Court held the following indemnity language was sufficient to hold the indemnitor liable for all of the indemnitee's passive and active negligence:
 - indemnify and hold Lessor harmless ... against any and all claims ... [and] expenses (including attorneys' fees) ... arising [from] ... any accident or other occurrence in or about Premises, when such injury ... shall be caused in part or in whole by ... the act, neglect, fault of or omission of any duty ... or negligence of Lessee...."

AZ – Damages

- Damages for defects in dwelling unit (Cost of Repair) can be recovered in Contract action, NOT in Negligence based action.
- Court shall award the successful party
 - (1) reasonable attorney fees,
 - (2) reasonable expert witness fees and
 - (3) taxable costs

AZ – Right to Repair

- Right to Repair (ARS sections 12.1361-1366)
 - Successful Party
 - Notice

Lessons Learned

- Customer Service
- Documentation
 - 10 years +
 - Contracts, insurance policies
 - Photographs, videos
- Warranty Coverage
 - Owner Purchased
 - Seller Provided

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.