

# Exploring the joys of defect litigation

Do you really want to know how bad litigation can be? Here's what to expect when their lawyer calls.

By Nancy Chillag

Years ago when a homeowner had a problem with a newly constructed or newly remodeled house, he simply called the contractor and the contractor came out and fixed the problem. Today, the art of pursuing a construction defect claim has risen to new heights.

## How Litigation Starts

After construction, the owner starts to notice "problems" such as warping hardwood floors, cracks in the stucco or sheetrock. They call the contractor who says, "The house is just settling, it will be fine," or "Stucco naturally cracks." And then they leave.

Dissatisfied, the owner hires another contractor to look at the situation. That contractor usually paints a worst case scenario, playing the "if this, then that" game, such as if the windows are defective, then the water will run into the walls, ruin your floors, cause dryrot and mold, and so on."

Now the owner is not sleeping at night, and is imagining the walls falling down on his kids, tidal waves coming through the windows, a swimming pool under his living room. Guess who his next call is to...that's right, a lawyer!

## Lawyers and Experts

Well, the lawyer is not going to take any chances. He/she hires experts in the field of construction (who no longer practice their trade, but only testify at trials). They investigate and prepare reports listing every little problem, usually numbered one through infinity. The report also contains a list of "unknown, but suspected defects" which will require destructive testing, such as opening walls, drilling holes, etc.

Needless to say, when the owner sees the reports he is furious that he paid any money to the contractor at all and is out for blood. And it is an established fact that you get blood out of a contractor by suing him.

## The Countersuits

Well, the contractor, furious himself that such a small problem has been turned into the equivalent of the Bill and Monica escapade, decides to share

the adventure with the engineer, architect, plumber and electrician by filing a countersuit. Each of those persons, feeling that they have absolutely no responsibility, countersues each of the other persons for indemnity. In addition, they sue their own sub-contractors and suppliers.

## The Insurance Companies

Now, to make matters even worse, each of the players named above files a claim with their insurance company. Each of those insurance companies hires a lawyer for their client. And each of those lawyers hires at least one, and sometimes five or more experts.

Now you have at least 20 contractors, 20 claims adjusters, 20 lawyers and 40 experts involved. The fun is just about to begin.

## The Discovery Phase

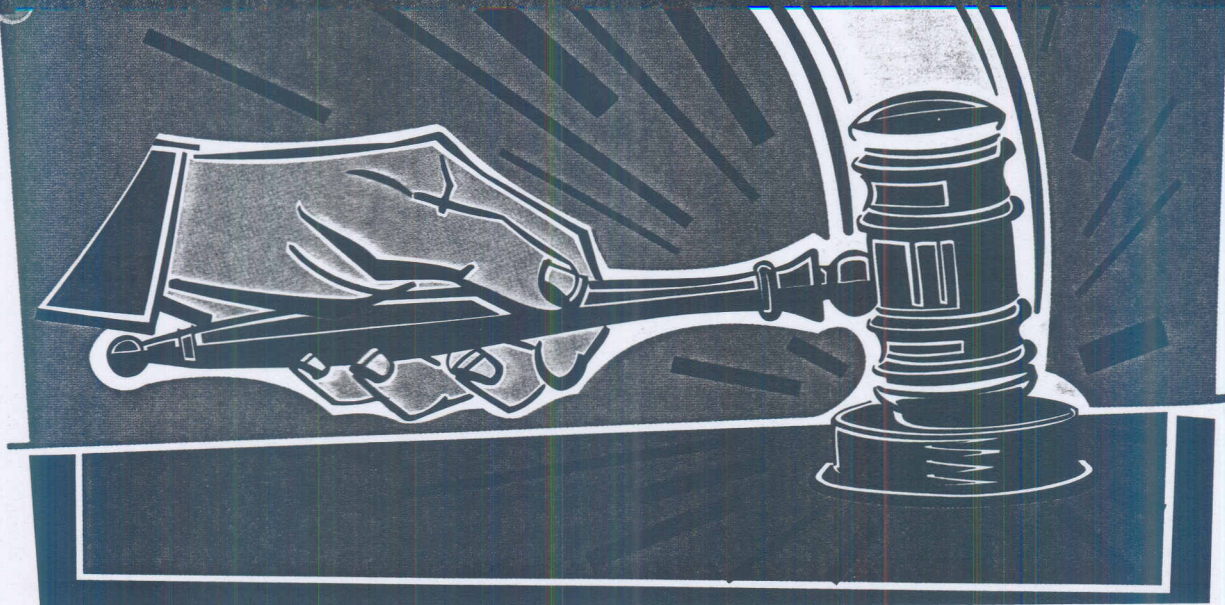
Discovery is the phase of the lawsuit where each party gets to find out what evidence the other party has so that they are better able to evaluate their chances of success (or failure) at trial and thus more likely to settle before trial.

But discovery is not as simple as it sounds. There are "Interrogatories," which are a series of questions about your business, the project, your history, your education and the like. Each lawyer will send approximately 50 such questions to each other party to the lawsuit equating to approximately 950 questions for each party to answer. So, just when are you supposed to run your construction company?

Then there are the "Document Requests." These are a little simpler..."Provide your entire file on the project." Well, it's easy if you have one file for the project. Most contractors, however, have billing files, job files, employee files (timeslips), subcontractor files.

Guess what...you need to go through all those files and pull all the documents that pertain to the project. You weren't really planning to do anything over the weekend (or several weekends) were you?

Then there are "Site Inspection" and "Destructive Testing" where the experts poke around in an attempt to determine why the problems exist. If there was nothing wrong with the house prior to



this time, there certainly is after. The house looks like a big puzzle with pieces missing. A cutout here, a hole there.

And don't forget "Depositions" where a party, an expert or a witness answers questions in person. The challenge is finding a conference room large enough to hold all the lawyers who show up to ask questions. A deposition can last for days, sometimes weeks, because each lawyer, in turn, gets to ask questions, and after you go through all the lawyers once, each lawyer gets another turn to ask "follow-up" questions. You look at your watch day after day, wondering if your crew is out there creating another construction defect because you are not supervising. Oh well, you'll deal with that lawsuit in due time.

### **Settlement Negotiations**

Once all the evidence is gathered, each side analyzes the case to determine the extent of the defects and the cost to repair. Astonishingly, even with all the same information, the owner still contends that the defects require the house to be torn down and rebuilt and the contractors contend that a little putty and paint will solve the entire problem. So one must ask, what was the point of all the discovery?

Eventually everyone gets together to try to hash out a settlement. The process is a lot like playing poker. You try to figure out the other side's bottom line and try to get as close to it as possible. In addition, you factor in the cost of proceeding to trial with the case.

Once an agreement is reached on how much the owner will take to settle the case, the battle begins

between the various contractors as to which one is going to pay how much of the total. The reality is that the ultimate allocation of the payment usually has nothing to do with the potential liability of a particular party.

The party with the most money, or the most insurance funds, usually pays the highest percentage. Sometimes the players with the most liability pay virtually nothing because they have no insurance. Most of the time, however, these contractors are no longer in business because all their money has gone to their attorney and experts.

### **The Trial**

God forbid that the case not settle! The owner usually opts for a jury trial. Not only does the jury need to determine whether there is anything wrong with the house, but also what is wrong, the cost to repair and who is responsible. *Whew, what a job!*

During the trial, the owner is portrayed as an unsuspecting consumer. And usually the contractors are so busy pointing fingers at each other that the jury figures that there must be something wrong with the house or else the contractors wouldn't be suing each other. And with 20 lawyers involved, the trial can last for months! And in case you didn't know, yes you need to attend the trial.

### **The Moral of the Story**

When a customer finds a defect with your construction, fully investigate it and fix it. **QR**

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