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Law in Hand

PREPARING A CONSTRUCTION DEFECT CASE FOR TRIAL

Your construction defect claims have been investigated, destructively tested, analyzed, and quantified. During that process, experts in forensic architecture, structural engineering, plumbing, mold, soils, electrical, and perhaps other construction components have determined that dozens, perhaps scores, of other defects also exist at the development or in the homes. A cost estimator was retained, and has determined the cost to repair all of the defective conditions. The die is cast with the filing of a complaint - the association or homeowners are "plaintiff," and the developer, general contractor, and subcontractors are "defendants." Either the case settles now, or the parties have to begin to prepare for trial.

Mediations take place, where, armed with their notebooks full of construction documents and photos of defects and damage, plaintiff's attorneys proceed into battle. They attempt to persuade defendants, and especially their insurance adjusters, that the defects are valid, the damage is real, defendants are on the hook, and that settlement of these claims for a compromise amount will save the parties a lot of time and money. These mediations fail for any number of reasons. Perhaps plaintiff's idea of a "compromise" settlement figure was above the ceiling amount that the insurers had raised at that time; perhaps the defendants' attorneys felt that there was a legal defense to plaintiff's claims. Who knows? The reasons often only become evident after the case is resolved, and the plaintiff's and defendants' attorneys exchange war stories.

The earnest preparation for trial is like crossing an invisible line. The attorneys now know that their time has to be committed to getting the matter ready for trial. While mediation was the goal, the attorneys postponed the costly necessities inherent in trial preparation, to the extent feasible. Now, the wave of depositions begin. Bookcases are filled with the deposition transcripts of the experts, homeowners, developer and subcontractor principals. This is the time when the defendants' threatened legal motions challenging the plaintiffs case are brought, if at all. Although these motions rarely succeed, they can cause parts of the case to be carved out, devalued, or damaged.

Before each witness is deposed, the attorneys assemble the documents that the witness may have personal knowledge of, or may have signed. During the deposition, each document has to be methodically shown and discussed with the witness. This process, known as authentication, winnows out the documents that may be introduced at trial as exhibits. For homeowners, these documents include correspondence to the developer, photos they took, lists of construction issues they observed. For the developer and subcontractor principals, the contracts must be verified, along with change orders, field notes, letters to homeowners, letters to suppliers

and subcontractors. For experts, photos of conditions, field notes, matrices, reports of findings and recommendations all must be reviewed and understood. The depositions of all of the various witnesses can literally last for months.

Preparing for trial is similar to the process of pressing olives to get oil. A tremendous amount goes in, and the idea is to only get the highest quality out the other end. There is a lot of waste in the process, but ultimately, it is the only way to get a small amount of precious stuff, which is the distillation and the truth. If an awful lot of the waste is shown to the jury, they will fall asleep (figuratively and sometimes literally), and who can blame them? These trials, especially if they are not carefully prepared, can last well over a month.

Once depositions are concluded, the attorneys are mind-numbed, but the process must continue. Now, all of the documents, many of which were made exhibits to the depositions, must be re-evaluated. Only the best documents should be used at trial, and the attorney has to stand back and start to package the case as if he/she never worked on it. In other words, how could you talk about your case to a hapless bystander at a bar and keep their interest? Impossible, yes, but that's the goal.

The goriest photos, the most damning letters from the builder, the contract specifications, juxtaposed with the defense expert's field notes stating that some critical element is missing and noting damage. That's what the attorney begins assembling, and in some logical, meaningful manner, if possible. The witnesses supporting plaintiff's case must each be interviewed. Every apparent contradiction, foible, mistake, and pettiness must be reviewed, discussed, and rehearsed until these imperfections can easily be explained away. More importantly, for each witness, some message must be brought through to the jury: "This person is just like me and was victimized," "this expert is fair, reasonable, and seems impartial - the damages must be real," and the like.

As the trial date approaches, court-imposed deadlines for exchange of motions become the new reality. Trial briefs, responses and replies on legal issues; motions seeking to prevent introduction of evidence (also called motions in limine); exhibit lists, witness lists and a myriad of other tasks are due. The exhibit and jury consultants must be summoned to assist in creating oversize photos, boards, demonstrative exhibits, models, flow charts, and any other visual aid that might help in keeping the jury focused on the facts, and on "our" side of the case.

The pre-trial hearings take place before the judge, and the defendants do everything possible to dissect plaintiff's case. If they don't succeed in utterly preventing plaintiff's case from going before the jury, defendants at least seek to carve out parts of it on legal grounds. Plaintiff's attorneys must be prepared to rebut, refute, and offer evidence countering these challenges. Once the rulings have been issued, a crowd of people files in and jury selection begins (called "*voir dire*"), with challenge and excusal of potential jurors until the jury panel is selected.

Finally, plaintiff's opening remarks to the jury. To the attorney, the feeling is similar to standing on the high dive at the public pool. Once you leave the board, for better or for worse, it just happens. This is when all the preparation and work pay off - or not. Fortunately, in this area of law, at the end of trial and following closing remarks, there is frequently a resounding jury verdict for the plaintiff.