SOME REMINDERS ABOUT CONSTRUCTION DEFECT LITIGATION IN CALIFORNIA, AND MAYBE ELSEWHERE TOO

Construction defect litigation is an odd creature. It began in Southern California in the 1980s and now extends throughout the United States, but its roots remain entrenched in the California building industry and the California judicial system. Other jurisdictions have created their own statutory and case law systems to address construction defect litigation close to home. Their judges and legal commentators may not admit it readily, but many of them still look to California to help define the standards of this litigation as it continues to spread despite repeated predictions of its early demise.

A good primer of some basics about construction defect litigation is found in a 2007 California appellate decision that is still good law today: *El Escorial Owners' Association v. DLC Plastering, Inc.*[1] The case involved a 261-unit condominium complex where litigation began when the owners' association gave notice under California's Right-to-Repair ("*Calderon*") statute: California Civil Code § 1375. The builder filed a third-party lawsuit against various subcontractors, and some of them settled before trial for a collective payment of $10.6 million. The builder assigned its rights against the non-settling subcontractors to the plaintiff owners' association, and won another $7 million at trial. This article discusses what that verdict entailed.

The first issue is whether an owners' association can sue for nuisance in a construction defect action. The Court dismissed that cause of action because it was pled as a variation of a negligence claim. California law requires that a nuisance claim typically requests an injunction and not monetary damages. In this case, the owners' association alleged the nuisance was due to a lack of care from negligence and defective workmanship. The Court decided that was not sufficient to meet the pleading standard for a nuisance claim. Thus, it is important to read complaints carefully and not assume that claimants may recover on a particular legal theory unless they have complied with the pleading requirements of that jurisdiction.

The next issue was whether a subcontractor which won a defense verdict at trial could recover contractual prevailing party attorney fees even though the subcontractor was a suspended corporation. Its insurer did not intervene as the real party-in-interest but chose to defend the insured as if it were not suspended. The Court agreed that the insurer should have intervened, since California law precludes a suspended corporation from prosecuting or defending any claim so long as it is suspended. Insurers should evaluate whether their jurisdiction allows them to defend a suspended corporate insured. In this case, the attorney fee award was disallowed.

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[1] See *El Escorial Owners' Association v. DLC Plastering, Inc.*, 154 Cal.App.4th 1337, 65 Cal.Rptr.3d 524 (2007).

Another issue was how to allocate the settling subcontractors' contributions as off-sets to the plaintiff's recovery against the non-settling subcontractors. In a complex multi-party construction defect lawsuit, a trial court may use rough calculations to determine initial settlement allocations for various categories of construction defects. Flexibility is necessary, and mathematical precision is sometimes impossible to achieve, because allocations may involve some degree of overlap between two or more subcontractors' scopes of work. Thus, the Court had broad discretion to approve pre-trial settlements as a way of encouraging informal resolutions.

One subcontractor then complained that the plaintiff's statute of limitations should not have been tolled during the *Calderon* period, since the *Calderon* notice here did not explicitly name any subcontractors. The Court disagreed, saying that *Calderon* notices apply to any party that may be responsible for causing the alleged damage (which can include subcontractors even if they are not named in the notice), and that *Calderon* notices should be encouraged because they are designed to promote early settlements.

The subcontractors who lost at trial also argued that the Plaintiff won a double recovery because they received insurance proceeds from the settling subcontractors plus indemnity monies from the non-settling subcontractors. The implication is that the settling subcontractors' payments were a collateral source of payment. The Court disagreed; the collateral source rule did not apply to the plaintiff's assigned indemnity claim against the non-settling subcontractors. This was a creative argument but it ultimately failed because it was not practical.

Finally, there was the reoccurring issue of whether a plaintiff may recover as a component of damages the expert fees it incurs in investigating a claim. The subcontractors argued that the plaintiff's claimed investigative fees were really disguised litigation fees and therefore not really *Stearman* expenses (which may be recoverable in California in order to make the claimant whole). The Court allowed the fees, implying that expert fees may be recoverable for more than strictly investigative purposes.

In sum, the *El Escorial* opinion is special – although a few years old now – because very few construction defect cases are tried in California. This is mostly due to the time and expense involved in complex, multi-party litigation. Thus, this opinion is important because it reflects something that does not happen often: an actual trial of a construction defect lawsuit in California.

The opinion also contains a warning for the wary. Because trial courts have broad discretion in trying these cases, they might not have particular biases or predilections toward or against any party, but there are risks in trying what may appear to be the strongest case on paper. Some cases deserve to be tried. Other cases need to be tried. But the decision to try a case should be evaluated as objectively as possible, based on a careful consideration of all the potential benefits and potential downsides for doing so. The trial court's broad discretion will not necessarily be overturned on appeal.