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Dealing with the “FLX”

The Practical Response to a Construction Defect Claim

By Wally McDonough and Karen Walsh



Construction defect claims chew up a lot of time, energy and money — from legal fees and discovery costs, to exposure analyses, expert efforts and consultants' time. Often, the energy is unfocused and each party in the group stakes out its own limited position and defenses, rather than focusing more globally on an appropriate repair scope and how to implement it.

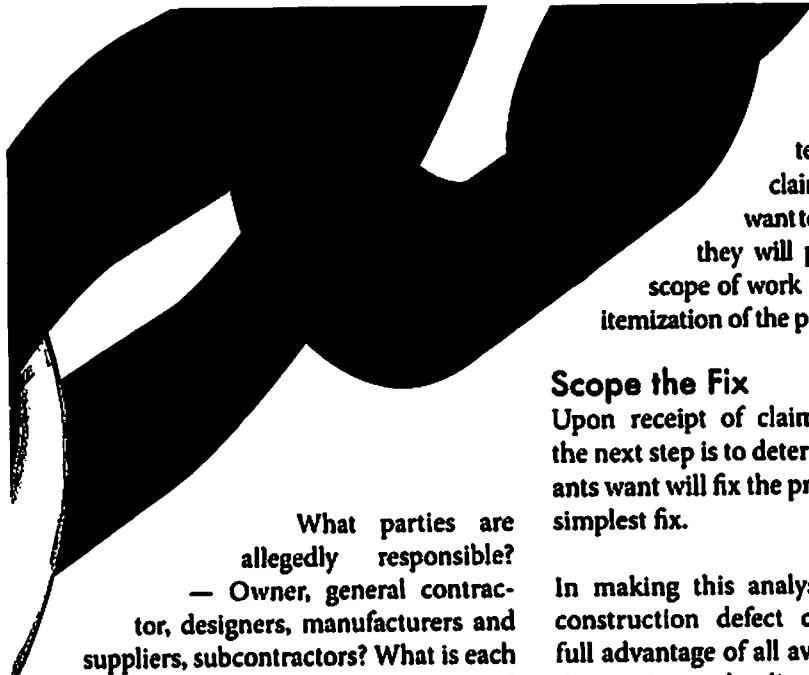
However, focusing early on development of a realistic repair scope for the alleged defects and realistic estimated cost for the “fix,” can lead to a quicker, more efficient resolution of the claim. If you can take a multi-million

dollar demand and, with application of some targeted analysis — shrink the cost of the fix to a several hundred thousand dollar issue — all parties will benefit and the probability of settlement will increase dramatically. Creating a roadmap for the fix will help all parties to limit the size of the dispute, keep transaction costs down and help to create momentum toward resolution, where one is possible, often avoiding litigation.

Assess the Scope

The first step is to assess the claim:

Who is asserting it? — Owner, developer, condominium association? Are their interests aligned?



This process can be dull and tedious, but if the claimants sincerely want to resolve the dispute, they will provide a proposed scope of work or, at minimum, an itemization of the problem areas.

Scope the Fix

Upon receipt of claimants' information, the next step is to determine if what claimants want will fix the problem and if it's the simplest fix.

In making this analysis, respondents to construction defect claims should take full advantage of all available resources. If the parties to the dispute are contractors/designers/manufacturers, then take advantage of their expertise in the industry to review the fix and provide an opinion on its likely effectiveness. For example, the claimants who want to stop leaks in a membrane roof may demand complete removal and replacement. The roofing contractor in the dispute may have an alternative that may be just as effective as the demanded fix and at a fraction of the cost. Experts can and should be involved, but the parties to the claim often have resources that cannot be ignored. Utilize whatever resources you have to make certain that the fix will work and that it's the most efficient fix available.

If claim respondents think the claimants' proposed repairs won't solve the problem, or are excessive solutions to the problem, the respondents need to present those opinions, with backup and with alternative solutions.

Estimate the Cost of Fix

Once the respondents have vetted the demanded scope of repair and determined which alternatives are effective, a good next step is to estimate the costs for the scope of repairs. Several sources can and should be considered:

Review the claimants' cost estimates for wage rates, material costs, general conditions, fee and determine (in)consistency with prevailing market conditions. If the claimants have asserted a damages claim and it's tied to the repair scope, then there

should be some estimate attached to that scope. If it's not part of the demand letter, request it so you can properly assess it.


Have each contractor/design respondent use their estimating resources to estimate the costs of each element of the repairs. Utilizing the contractor's resources can also potentially lead to creative solutions in settlement where a contractor respondent offers to perform its scope as an in-kind settlement or at a reduced price to limit its exposure. Again, the contractor/designer respondents in a claim can be valuable resources, don't waste them.

Bring in an independent cost estimator and commission a detailed takeoff estimate. These services are relatively cheap, and the expert testimony that comes from this analysis can and often does support a lower damages exposure and also will likely be necessary in the event the claims ever proceed through arbitration or trial.

What Are You Left With?

After the scope and cost reviews are done, the respondents, as a group, should be able to put forth a reasonable response to the claimants. The response should provide the scope, discuss whether and why a requested element from the claimants was not selected. From there, communicate that response, either through the decision-makers or engage a solid mediator to do so and keep the communication going. This is NOT the end of the road, but it can offer a really good start.

What Do You Have?

An early assessment of the scope of a construction defect claim is a major benefit to bring structure and some predictability to the claim. There is no guarantee this process will result in a settlement. However, undertaking the kind of analyses suggested here, at minimum, should provide a good platform to discuss how the "defects" are going to be fixed and what the likely range of costs for such will be. This may set the stage for productive discussions on settlement. 

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What parties are allegedly responsible?

— Owner, general contractor, designers, manufacturers and suppliers, subcontractors? What is each party's role? Are their interests aligned with your interests? If so, coordinating a response under a joint defense or similar agreement is often the best way to go.

What do the claimants want to fix the problem? — Removal/replacement, repair in place, extended warranty, cash, reimbursement for damages?

Some states' laws, such as the Florida condominium law (Fla. Statute 558), require plain statements of fact and summaries of the defects and requested fixes. If the claim is asserted in one of those states, the defendants need to take advantage of those laws, and demand clear statements of the defects and what is expected by way of repair/replacement.

In those states where the statutes don't require that type of specificity, the respondent should use its initial response to draw out the scope of the problem. Demand letters from defect claimants are long on rhetoric and photos of problems with a project, but often short on setting forth what the claimant considers the solution and why the recipients of the letter are specifically responsible to pay for it. As a party responding to a demand, it is vital that you learn as early as possible the scope of the problem. If the claimant simply provides a damages estimate with no backup, then as a respondent it's important to push early and often for detail and specifics of the claim and the specific remedies sought.