SEPTEMBER 2012

BLWM Newsletter, September 2012

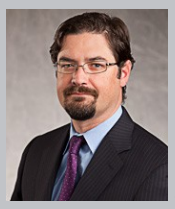
Graeme A. Reid

Welcome to BLWM's Second Newsletter

Welcome to the second BLWM construction defect newsletter. We hope you find it beneficial. In this edition we discuss Arizona's Purchaser Dwelling Act, pre-litigation tactics for Subcontractors in Nevada and the "Empty Chair Defense" in Arizona.

Please feel free to join our discussions on our website regarding these and other developments of interest. Do not hesitate to contact me or any of the authors directly if you have any questions or would like to discuss it further. We look forward to hearing from you.

THE "EMPTY CHAIR" DEFENSE IN ARIZONA



Paul T. Landis

The "empty-chair defense" is a trial tactic in multiparty cases, whereby one defendant attempts to put all or some of the fault on a defendant who settled before trial or who was not named as a party. In construction defect cases in Arizona, this trial tactic can help a subcontractor move the responsibility for construction defects to other subcontractors whose work may be implicated, thereby reducing their potential liability at trial.

This concept is set forth in Arizona Rules of Civil Procedure 26(b)(5) which states that within 150 days after filing their Answer, a party is required to disclose any person or entity, not a party to the action, who may be wholly or partially at fault in causing the plaintiffs' losses. These parties are known as "non-parties at fault." A defendant who identifies a non-party at fault must also set forth the facts supporting the claimed liability of any such non-party.

In addition, ARCP 26(b)(5) works in conjunction with Arizona's contribution statute which provides that the jury is allowed to consider the fault of all persons who contributed to the plaintiffs' losses regardless of whether the person was, or could have been, named a party to the suit or has settled. The jury can assign percentages of fault to these non-parties, but only for purposes of determining the fault of the named parties, that is, such an allocation of fault by the jury, does not subject any non-party to actual liability. *See, Arizona Revised Statute 12-2506(B).*

In construction defect cases in Arizona, subcontractors can benefit greatly from this statutory scheme as the various trades often perform work that overlaps or affects the work of other subcontractors. For example, a drywall subcontractor's work may have been damaged by poor framing, but what happens if the framer was never brought into the action or had settled? Under Arizona law, the drywall subcontractor may name the framer as a non-party at fault, and, once the proper disclosures are made under ARCP 26(b)(5), then the jury will be allowed to allocate a percentage of fault against the framer for the plaintiffs' drywall defects. In this manner, the drywall subcontractor can potentially reduce its overall liability at trial.

This scenario may play out for any number of interrelated trades such as where foundation and concrete subcontractors' work has been damaged by the work of soils subcontractors or engineers or where the framing has been impacted by poor foundation work. In the end, it will be important for any given subcontractor to assess the plaintiffs' specific claims and to hire an expert who may be able to identify whether work performed by other subcontractors may have caused damage or contributed to the damage alleged by the plaintiffs.

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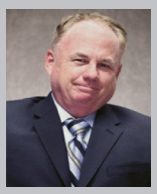
PRE-LITIGATION TACTICS FOR SUB-CONTRACTORS IN NEVADA



Whitney C. Wilcher

Chapter 40 of the Nevada Revised Statutes (*NRS 40.600, et seq.)* includes a pre-litigation process whereby claimants and contractors are encouraged to resolve their dispute without the necessity of formal litigation. While the primary alternative process is the "right to repair," a close reading of Chapter 40 reveals three important provisions which can be used to help resolve such claims prior to litigation.

Few subcontractors elect the right to repair option. The primary reason for this is that homeowners are not required to give repairing subcontractors a release from liability, which, therefore, does not preclude the possibility of litigation against the subcontractor. However, Chapter 40 provides that homeowners who reject a reasonable offer of repair run the risk that they may not be awarded their attorney's fees and costs by the Court and that the subcontractor may receive an award of their attorney's fees and costs. *NRS 40.650*

Often, the non-participation of a subcontractor's insurance carrier or carriers at the pre-litigation phase of a construction defect claim can drive the case into litigation without a meaningful attempt at resolution. This lack of carrier participation can be because of the lack of a lawsuit, however, Chapter 40 states that if the subcontractor presents a pre-litigation construction defect claim to its insurance carrier, the claim must be treated as if a lawsuit has been filed. *NRS 40.649*

An essential tenet of Chapter 40 is that of the pre-litigation mediation at which, it is intended that, the parties will engage in settlement discussions. However, these mediations are quite often an exercise in futility due to the fact that the subcontractor can lack the claim documentation needed to enable it to fully evaluate liability. However, Chapter 40 provides a pre-litigation discovery tool which provides that not later than 15 days before the pre-litigation mediation the subcontractor can request "all relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders for repair, videotapes, technical reports, soil and other engineering reports and other documents and materials relating to the claim…" *NRS 40.681*

In cases where counsel is retained at or near the beginning of the pre-litigation phase, the diligent defense lawyer can take advantage of the above provisions of Chapter 40 to assist a subcontractor client in evaluating whether to make an offer of repair, to encourage full participation of all of a subcontractor's insurance carriers and to obtain discovery necessary for a meaningful mediation, all thereby increasing the chance of negotiating a favorable settlement and avoiding the necessity and expense of formal litigation.

Bauman Loewe Witt & Maxwell sponsored a team in the Microsoft Licensing charity golf tournament benefitting the Boys and Girls Club of Truckee Meadows.

From left: Craig Smith (BLWM), Deborah Irish (Desert Research Institute), Graeme Reid (BLWM) and Hank Bryant (Frontier Adjusters)

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ARIZONA'S PURCHASER DWELLING ACT

Paul T. Landis

Pre-litigation Requirements Before Suit

In Arizona, before a homeowner can file a lawsuit for residential construction defects, they must comply with the terms of the Purchaser Dwelling Act which is found in the Arizona Revised Statutes at §12-1361, *et seq*. Like Nevada's Chapter 40 statute, Arizona's Purchaser Dwelling Act is a pre-litigation statute which is designed to avoid litigation by requiring homeowners and builders to make attempts at a negotiated settlement prior to a lawsuit being filed.

The statute requires the homeowner to give the seller (usually the builder) written notice of the alleged defects and an opportunity to inspect and repair before they can file suit. *See McMurray v. Dream Catcher USA, Inc.* 220 Ariz. 71, 76, 202 P.3d 536, 541 (App. 2009); ARS §12-1363(A). Such notice tolls the applicable statute of limitations for ninety days. *ARS §12-1363(G).*

Unlike Nevada, the rights to pre-litigation inspections and repairs generally only apply to the builder and do not apply to subcontractors; indeed subcontractors in Arizona are typically not involved in the pre-litigation process at all.

After receipt of a notice of alleged defects issued under the Purchaser Dwelling Act, the builder may inspect the home and may make an offer of repair. The response to the notice must be made with sixty days. The builder may include in its response an offer:

(1) to repair or replace any alleged defects,
(2) to have the alleged defects repaired or replaced at the builder's expense, or,
(3) to provide monetary compensation to the purchaser." *ARS §12-1363(C*).

It is only after this process has run its course, and come to an unsatisfactory conclusion, that the homeowner is statutorily permitted to commence a lawsuit for alleged defects to their home.

Once a lawsuit is filed, the Purchaser Dwelling Act does not change the normal course of litigation, nor does it change the common law rights and obligations of the parties to such a lawsuit. The Purchaser Dwelling Act does not permit homeowners to sue third-party subcontractors directly because they are usually not in privity of contract. Negligence claims against the builder are barred by the economic loss doctrine, which requires homeowners in Arizona to bring claims based on contract theories of liability.

UPCOMING EVENTS

MC Consultants, Inc. is holding a Construction Defect and Insurance Coverage Seminar at the Hilton Bayfront in San Diego, California on September 20th and September 21st. The conference is a CLE approved educational conference for members of the construction industry, attorneys, financial institutions and insurance professionals. Topics include discussions of construction defects, risk management, coverage issues, litigation management, and insurance issues arising out of construction related claims. Graeme Reid and Kirk Walker from BLWM will be in attendance and, if you are attending, we hope to see you there. Click here for more information regarding the seminar.

This newsletter is edited by Graeme Reid who is a partner based in the firm's Reno office. Paul Landis is an Associate in the firm's Scottsdale office. Whitney Wilcher is an Associate in the firm's Las Vegas office.

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