**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 12: Defective Construction**

Liability for defective construction involves many of the same legal theories and principles that Lesson 11 covers concerning defective design, materials, and equipment. In *Construction Defect Claims Against Design Professionals and Contractors,* 23 Constr. Law. 9 (Spring 2003), by John W. Hays, read from the heading “Claims Against the Contractor and Installer/Subcontractor” to the end of the article. While a construction defect case commonly asserts a simple breach of contract or breach of warranty, as Hays explains, depending on the circumstances, plaintiffs may also base defective construction claims on other legal theories, including negligence, negligent misrepresentation, and violation of consumer protection laws.

Next, read *Liability for Construction Defects That Result from Multiple Causes*, 9 Am. Coll. Constr. Laws. J. 2 (January 2015), by James S. Schenck, IV and Kelli E. Goss. As this article explains, assessing liability becomes more complex when multiple participants and multiple causes may have contributed to the alleged defect. First, the fact finder must sort through the evidence, which may be technically challenging, to determine which participant or participants caused the alleged defect. Then, if two or more participants share that responsibility, the legal system must address whether or how to apportion damages between or among those participants. Apportionment principles vary not only from one jurisdiction to another but also based on whether contract law or tort law provides the basis or bases of liability. While Schenck and Goss only discusses defect cases, similar problems of causation and apportionment of liability can arise whenever construction litigation involves multiple project participants (as is often the case with disputes over delays or cost overruns).

Schenck and Goss also delve into several other issues that construction defect cases often present. For current purposes, two of these deserve further attention. First, the article’s extended discussion of the economic loss rule of tort law reprises an important topic noted in Lesson 11 (defective design, materials, and equipment). Second, the article explains how indemnification principles may reallocate liability between two or more parties. Just as with the causation and apportionment discussions, you should take special note of these topics because they often present difficult issues, not only in construction defect cases but in connection with many other construction industry disputes.

The economic loss rule may apply whenever a claimant seeks to recover damages in tort for purely economic loss, such as when an alleged construction defect causes no bodily harm and no property damage (other than, perhaps, to the construction work itself). As Lesson 11 noted, and as Schenck and Goss explain in much greater detail, the economic loss rule has generated inconsistent judicial results, and it remains the subject of much debate among legal scholars and commentators. Whether a party raises the economic loss rule in response to a defect claim or in any other circumstance, the ultimate policy question is whether the court should impose on the defendant a tort duty of care to avoid causing economic harm to the claimant or should only protect purely economic interests to the extent, if any, that a contractual relationship between the parties creates a relevant obligation. See Jeffrey L. Goodman & Courtnery E.C. Ringhofer, *Economic Loss Doctrine: An Analysis of the Rule’s Applicability to Design Professionals*, 70 Drake L Rev. 297 (2022); Carl J. Circo, *Placing the Commercial and Economic Loss Problem in the Construction Industry Context*, 41 J. Marshall L. Rev. 39 (2007).

Indemnification, the other topic of especially broad interest that Schenck and Goss cover in detail, provides a potential reimbursement right. In effect, a party held liable for damages may seek indemnity from another person or entity who ought to bear the loss. In the construction context, damages may be awarded against one project participant even though one or more other participants may also be legally responsible for those damages. The underlying claim may be for defective construction, delays, personal injury, property damage or some other loss involving two or more potentially liable parties. Indemnity may be based on equitable principles that determine which of the parties is more responsible for the damages or on express or implied terms of a contract. Because construction contracts often include express indemnification provisions to shift risk from one participant to another, contractual indemnity claims are particularly important in the industry. Contractual indemnity provisions frequently lead to intense negotiations between the contracting parties. Moreover, the interpretation and enforceability of these provisions are often subject to judicially imposed policy limits and to statutory restrictions. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 3 *Bruner & O’Connor on Construction Law*, §§ 10:1-10:30 (Westlaw Aug. 2023).

Beyond the specific matters the two assigned articles cover, construction defect cases present good opportunities to explore these additional issues:

* Notice and cure rights - As conditions precedent to pursuing certain remedies, construction contracts often require the claimant to give the party allegedly in default a formal notice specifying the nature of the default and an opportunity to rectify the problem. Judicial attitudes toward these contractual notice and cure requirements range from relatively relaxed to strict. The litigated cases often present difficult issues of waiver or estoppel against the party insisting on contractual notice and cure rights. In addition to contractual conditions precedent, many jurisdictions impose statutory notice and cure procedures before a party may commence litigation over an alleged breach of a construction contract, especially where a residential owner seeks damages for construction defects. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 5 *Bruner & O’Connor on Construction Law*, § 18:15 (Westlaw Aug. 2023); Steven B. Lesser & Ryan F. Carpenter, *My Favorite Mistakes: An Owner’s Guide to Avoiding Disaster on Construction Projects*, 37 Constr. Law. 6, at 10-11 (Spring 2017).
* Statutes of limitations - Different statutes of limitation apply to different construction industry claims (negligence, professional malpractice, breach of contract, breach of warranty, misrepresentation, etc.), and the statutes vary from one jurisdiction to another. Discovery rules, which also vary among jurisdictions, can delay commencement of the limitations period until the plaintiff knows or should be able to discover the existence of the claim. Courts often must decide whether or how to apply a discovery rule when many months or years pass before damage or injury from the defect manifests. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 2A *Bruner & O’Connor on Construction Law*, § 7:30 (Westlaw Aug. 2023).
* Statutes of repose - These statutes, which most state legislatures have enacted, take a different approach to avoiding stale construction claims. They impose a deadline measured from a specified triggering event, typically the date when construction was completed or substantially completed or upon completion of the relevant contractual duties. Once the cutoff date has passed, with only limited exceptions, no claim or cause of action relating to matters within the scope of the statute can arise or accrue. With respect to defects in design, materials, equipment, or construction, the statutory bar generally precludes recovery even if the prospective plaintiff has not yet suffered any injury or damage and has no reason to know of a potential problem. In theory a statute of repose sets an objectively determinable deadline, but circumstances sometimes create doubt about the precise date that commences the period of repose. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 2A *Bruner & O’Connor on Construction Law*, § 7:29 (Westlaw Aug. 2023).
* Insurance coverage issues - Construction defect claims often present complex insurance coverage questions, especially under commercial general liability (CGL) policies. One of the most frequently litigated questions is whether a CGL policy affords coverage when a construction defect affects the construction project itself without causing bodily injury or property damage to other property. For example, is the construction defect itself “property damage,” and is defective construction an accidental “occurrence” as the policy uses those terms? Conflicting judicial and legislative approaches, along with evolving insurance policy language, have generated a string of controversies over these, and similar coverage questions relating to construction defects See Phillip L. Bruner & Patrick J. O’Connor, Jr., 4Pt1 *Bruner & O’Connor on Construction Law*, §§ 11:200-11:263 (Westlaw Aug. 2023).
* Warranty issues - Because construction activities involve multiple participants, defect claims sometimes present issues concerning the rights and obligations of different participants based on the existence or absence of warranty obligations, express or implied. Disputes over contractor warranties, express or implied, often involve questions about the scope of the warranty or how to interpret the precise warranty language. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 3 *Bruner & O’Connor on Construction Law*, §§ 9:61–9:71, 9:76–9:87 (Westlaw Aug. 2023). The Spearin Doctrine’s implied warranty also sometimes gives rise to disputes. Recall that under the Spearin Doctrine, an owner that provides defective design specifications may be liable to the contractor for breach of an implied warranty that the design is sufficient for its intended purposes. Most courts, however, decline to imply a corresponding warranty from the design professional to the owner. As a result, an owner may be liable to a contractor for design defects but may be unable to recover from the design professional for those design defects unless the owner can prove breach of the professional standard of care. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 3 *Bruner & O’Connor on Construction Law*, § 9:98 (Westlaw Aug. 2023). Another situation sometimes arises when an implied warranty conflicts with an express warranty. In *Rhone Poulenc Rorer Pharms. Inc. v. Newman Glass Works*, 112 F.3d 695 (3d Cir. 1997), the plaintiff contractor specified the glass the defendant subcontractor was to supply and install. Under the subcontract, the defendant warranted its work to be free of defects. Applying Pennsylvania law, the court held the subcontractor liable for defects in the glass under the express warranty notwithstanding the contractor’s implied warranty under the Spearin Doctrine.

For Review and Discussion

1. According to Schenck and Goss, what distinguishes the remedies of contribution and indemnity in multiple-party defect cases?
2. What are the most important policy considerations that should determine whether the economic loss rule should bar recovery for damages attributable to construction defects?
3. Read the majority and dissenting opinions in *Rhone Poulenc Rorer Pharms. Inc. v. Newman Glass Works*. In your view, which opinion provides the stronger arguments?
4. Would the result in *Rhone Poulenc Rorer Pharms. Inc. v. Newman Glass Works* have been in the subcontractor’s favor if the subcontractor’s warranty read as follows (based on the warranty language of Section 3.12 of ConsensusDocs 755, *Standard Master Subcontract Agreement between Constructor and Subcontractor* (2019))?

Subcontractor warrants that all materials and equipment shall be new unless other specified, of good quality, in conformance with the Subcontract Documents, and free from defective workmanship and materials. Upon request by Constructor, Subcontractor shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. Subcontractor further warrants that the Subcontract Work shall be free from material defects not intrinsic in the design or materials required in the Subcontract Documents.