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DID THE RECESSION IMPACT DESIGN DEFECT CLAIMS?

For several years now since the beginning of the Great Recession, lawyers specializing in construction defect litigation for developers, designers and contractors have predicted a dramatic slowdown in claim frequency. The thinking goes, since there are less projects being built, there should be less claims on the back end, right? In our experience, there is not a true cause and effect relationship between broader market conditions and eventual claim activity. In fact, in down markets, trial lawyers are usually busier.

While it is true that our law firm has been hired to defend a few less lawsuits against design professionals since 2009, the cases we have handled have generally been more complicated, and therefore more expensive to defend and settle. Why?

FIRST

There are many factors at work here. First, the boom in design and construction defect litigation over the last 15 years in Colorado has trickled down to impact practice standards. Probably because of hyper-vigilant expert witnesses supporting homeowner claims with new theories on the standard of care, all design professionals who have ever lived through a claim now have a tendency to "design scared," which can result in more robust plan details, notes and disclaimers. This has made both the designs and the resulting claims for "bad design" more complicated to prosecute and defend. This has also made developers and contractors resistant to spend more money on fees for efforts like construction administration services.

SECOND

The statute of limitations for design and construction defects does not begin to run on latent defects that are difficult to discover. Thus, we see endless debates over whether an owner "knew or should have known" of a hidden design defect years before a suit is brought. Since Colorado's statute of repose can be extended up to eight years, this long tail period means that we are still getting claims from projects that were first designed and built back in 2005 or 2006, well before the recession hit.

THIRD

For more recent projects, economic pressures on all parties have given rise to an unreasonable "perfection standard" applied to architects and engineers. Budgets are tighter and do not include money for contingencies. Many times, we have seen a dynamic develop where an owner and its contracting team engage in extensive value engineering, with little or no input from the design team. Perhaps the market to sell the property has gone south, resulting in a fear of lost

profits. When things inevitably go wrong – with defects appearing or profits disappearing – owners and contractors are motivated to blame others, and this blame is often cast towards the architects and engineers whose plans contain "some errors," no matter how trivial.

FOURTH

Economic pressure causes architects and engineers to agree to unfavorable written contract terms to get work. When future claims arise, bad contract provisions undercut the designer's defense leverage, making a quick resolution of the case more difficult. Some of these bad provisions impose a heightened standard of care, which will then be used in lieu of standard jury instructions on what is "reasonable care."

FIFTH

For myriad reasons related to budget, value engineering and competence, contractors often fail to follow plans and specifications, especially where the design is complex. They don't ask for clarifications, especially when the architect is not performing construction phase services. While this makes it attractive for the design professional to argue lack of causation as a defense to a claim, these issues trigger very difficult debates about the "constructability" of the plans and pit the design and contracting teams against each other in litigation. This unfortunate dynamic plays right into the hands of the plaintiff's attorney.

SIXTH

In a tough lawsuit headed for trial, it is very difficult to convince a jury made up of people with little design or construction experience that "some errors" in instruments of service are to be expected, and that plans containing errors can still satisfy the standard of care. This can also be a tough sell to even experienced mediators overseeing the settlement process.

SEVENTH

Finally, economic slowdowns in the private sector have not impacted public projects, such as highway and infrastructure development. We have noticed an increased willingness over the last decade for government officials to assert claims, where in the past issues might have been more easily resolved "among friends." These projects always present very one-sided bidding, contract and disclaimer documents that protect the public entity to the detriment of design professionals. Public officials are also subject to their own money pressures, sometimes motivated to preserve funds by denying change orders, or to recoup "taxpayer dollars" by seeking damages from defect claims.

CONCLUSION

Generally, our design and construction defect lawyers have remained busy through the economic downturn. Because of the factors outlined above and broader litigation trends, we did not see a big drop-off in claim activity over the past five years. Generally, our clients' biggest challenge is overcoming the "heightened" standard of care as the sophistication of Plaintiffs' attorneys and experts has evolved.

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