



# Strategies for Challenging Extrapolation Evidence

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*By Valerie Garcia and Chloe Mickel*

Plaintiffs bear the burden of proving the existence of construction defects and the amount of claimed damages. In cases involving large residential communities and multiunit commercial buildings, it is becoming common for plaintiffs to attempt to prove the existence of defects through extrapolation evidence. Rather than limiting damages to the actual locations and conditions where defects are observed, extrapolation assumes that conditions in a limited sample exist throughout the project. This effectively shifts the burden of proof to defendants to refute inflated damages figures. Defendants should urge courts to prohibit the introduction of extrapolation evidence by challenging the methodology and foundation of plaintiffs experts.

The Oxford online dictionary defines “extrapolate” as “extend[ing] the application



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of [a ... conclusion...] to an unknown situation by assuming that existing trends will continue or similar methods will be applicable.” Construction defect litigation is often driven by a battle of the experts. For expert testimony to be admissible, the party offering the testimony must show that the method employed by the expert is scientifically sound and the expert opinions are based on facts that sufficiently satisfy Rule 702’s reliability requirements. Admissible expert testimony must be grounded in scientific methods and procedures rather than subjective belief or unsupported speculation. It is universally accepted in the medical community that extrapolation might lead to invalid and unreliable results. So why are courts welcoming extrapolation evidence in construction defect litigation? Rule 702 mandates that the same reliability standards be applied to expert witness testimony in all contexts.

Extrapolating from a limited sample to an entire construction project has some obvious benefits for plaintiffs. Expert fees are reduced. So are disruptions associated with intrusive testing. Damages figures are usually on the high side.

## Wi-Fi Certified Homes Hit Market

Lennar is the first homebuilder to market houses with home automation and voice control built into the walls and certified by the Wi-Fi Alliance, a nonprofit dedicated to the interoperability, adoption and evolution of Wi-Fi. The Wi-Fi Certified Home Design program attests to a builder’s compliance with Wi-Fi Alliance deployment guidelines, which include optimal placement of wireless access points, professional design and installation to maximize signal strength and quality, and interoperability. The Lennar homes feature Ruckus access points, ICX switch-

ing, Samsung SmartThings connected-home hubs, and Amazon Echo voice control to operate systems. Honeywell thermostats, Ring video doorbells, Kwikset and Baldwin smart locks, Lutron lighting, and Sonos wireless speakers are also part of the Lennar layout. All homes are iOS and Android compatible. The companies haven’t said what cyber-security protocols the homes will follow or who will bear liability if the systems are hacked and damage results. The Wi-Fi Alliance website says its certifications indicate awardees meet industry-agreed standards for security. ■

However, extrapolation evidence is often unreliable. It is speculative and easily tainted by improper statistical sampling methods. Defendants challenging data and expert opinions based on extrapolation are forced into the highly prejudicial position of having to prove the nonexistence of damages in locations that have not been inspected. The burden of proof and costs associated with conducting more reliable, independent testing and inspection are impermissibly shifted to the defense.

Challenging the methodology employed by plaintiffs experts is critical to defeating extrapolated evidence. Defense attorneys should keep the following issues in mind:

- Extrapolated evidence must be based on a sample of units or project conditions that are randomly selected. If the sample is cherry-picked by plaintiffs experts, the number of defects in the project will be overrepresented, and this will lead to inaccurate damages figures.
- The sample size must be large enough relative to the size of the project. This also increases the accuracy and avoids selection bias by experts.
- Pay attention to experts' confidence or claimed "degree of certainty" with respect to accuracy levels of their conclusions. All too often, plaintiffs experts abandon principles of scientifically based selection and methodology to produce results their clients desire.

In support of their experts, plaintiffs will argue that it is reasonable to assume that the means and methods of construction work will generally be consistent on a day-to-day basis. Accordingly, it is safe to assume that the workmanship and quality will be consistent from location to location. Plaintiffs will argue that, under the circumstances, it is expensive and unnecessary to inspect each and every balcony or gable to prove defective installation.

Extrapolation may be appropriate in some cases. However, the risks associated

#### Rulemakers

### DOL Pulls Employee Classification Rules

The U.S. Department of Labor has rescinded Administrator's Interpretations No. 2016-1 and No. 2015-1. The 2016 guidance opened the door to potential liability for contractors for bad employment practices of subcontractor, vendor and temporary staffing firms. The 2015 guidance expanded the definition of "employee" to include an assessment as to whether an individual was economically dependent on the employer, in which case the individual would not be classified as an independent contractor. That interpretation exposed many construction firms, which hire seasonal or single-project workers, to penalties for misclassification of workers. The rescission of the administrator's interpretations may bring some reprieve to contractors in their liability for workers compensation obligations, wage and hour disputes, health insurance mandates, and employment practices. But the DOL warns that the removal of the guidance "does not change the legal responsibilities of employers under the [FLSA and MSPA] as reflected in this department's long-standing regulations and case law."

with this approach necessitate a challenge in all instances. Take, for example, a case where a community association for a large condominium complex alleges that windows were installed improperly, leading to water intrusion and mold in residents' homes. Typically, this type of project will be built in phases over several years. It is not uncommon to have different subcontractors install windows for different phases of the project. Perhaps the plans and specifications changed for different phases of the project or a different superintendent was involved in overseeing construction over the years. Even if the same subcontractor was used throughout the project, the crew working for the subcontractor may have varied from building to building. These project conditions lead to inconsistencies in workmanship.

To support its construction defect claims, the association hires an expert who uses an extrapolation approach. He chooses to do intrusive testing on windows installed in units on the perimeter of the complex out of convenience and in an effort to include units that have obvious window problems. Although there are 200 windows on the project, he tests only 15. It turns out that the complex was built starting with units closest to the community pool, which is in the center of the property. Therefore, all of the units

tested were built in the final phase of the project by one subcontractor crew.

These facts present defense counsel with several opportunities to challenge the expert's methodology as being unreliable under Rule 702. There are obvious problems with sample size, overrepresentation and speculation. Defense counsel should focus on the following issues during depositions and motions in limine to expose the pitfalls of extrapolated evidence:

- Determine how many construction crews worked on the project and their scope of work.
- Consider the impact of plans and specifications that were changed throughout the project.
- Study the expert's pattern of test locations to ensure randomness and avoid inaccuracies caused by cherry-picking or convenience.
- Closely review the expert's findings, keeping in mind that unchallenged extrapolation claims can lead to enormous damages figures after they are multiplied exponentially. ■

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