

# Construction Defect Litigation: What You Can Do to Better Protect Yourself!

Kent Pagel, Pagel, Davis & Hill



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# Construction Defect Litigation: What You Can Do To Better Protect Yourself!

Kent Pagel, President, Pagel, Davis & Hill, P.C.

## Summary

- What is a construction defect (CD)?
- Construction defect vs. general liability
- Claims on the rise
- The heart of every lawsuit
- Types of construction defects
- A game plan for surviving litigation

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## What is a Construction Defect (“CD”)?

- Legal Definition: Failure of a building or **building component** to be erected in a workmanlike manner, **or** to perform as intended (by contractor or manufacturer), **or** as reasonably expected by buyer, and which causes damage.

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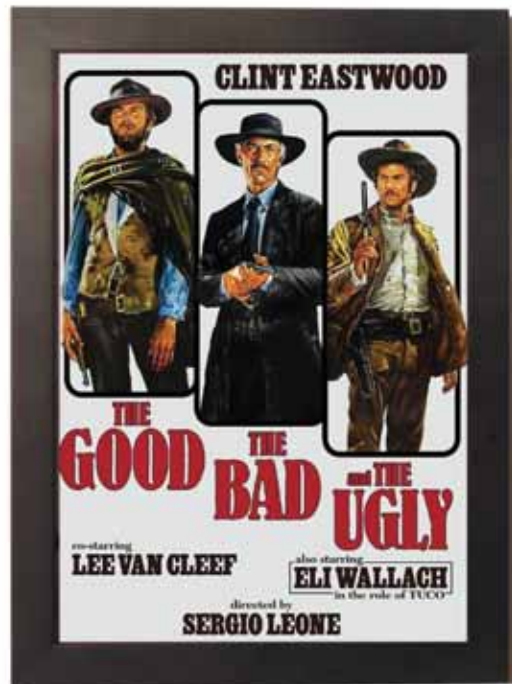
In Practice:



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In Reality:



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## How Are CD Claims Different From General Liability (“GL”) Claims?

**Traditional GL Claims – e.g., truss installation and truss fall-down accidents:**

- One or few plaintiffs
- Few defendants
- Known loss date
- Fewer classes of damages
- One insurance policy triggered
- 90% of claims reported in 4 years

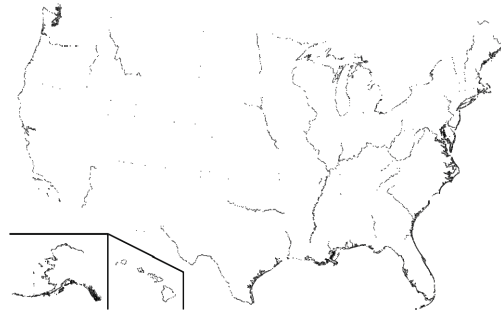
**CD Claims:**

- Often: multiple plaintiffs
- Always: multiple defendants
- Undetermined loss date
- Multiple classes of damages
- Multiple insurance policy periods potentially triggered
- 40% of claims reported in 4 years and 90% in 13 years

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## “If You Build, They Will Sue”

- Growth across the U.S. of specialty construction defect law firms
- “We’re not in Kansas anymore.” Don’t think just California
- Most costly form of litigation



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## CD Suits on the Rise!

- Recent AGC report:
  - 74% of construction firms can’t find qualified trade workers, including framers
  - 53% can’t find project supervisors, estimators and engineers



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## CD Suits on the Rise!

- As pace of construction picks up, combined with less experienced workers and fast turn times, CD claims will grow to higher levels



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## CD Suits on the Rise!

- Correlation between number of residential building permits and CD lawsuits filed within six years



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## At the Heart of Every Construction Defect Lawsuit:

- HOA/Homeowner/Property Owner v. Developer/Contractor
- Contractor v. Subcontractors/Suppliers
- Subcontractors v. Subcontractors and
- Developer/Contractor/Subcontractors/Suppliers v. Insurance Carriers

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## Four Types of Construction Defects:

- Design
  - Buildings and systems do not work as intended – e.g., under-designed floor loads
- Material deficiencies
  - e.g., off-grade lumber
- Construction deficiencies
  - Poor truss unloading, handling, storage, installation, bracing and inspection
- Operation and maintenance
  - e.g., student housing parties with dancing/jumping

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## The Old and the New

- Some things never change – water, water and more water
- New building materials and techniques can expose the construction supply chain to unintended consequences
- Example: Southern Pine Lumber



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## A Billion Here, A Billion There, Pretty Soon You're Talking Real Money!

- Pooling settlement funds is the driver of all CD claims



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## Tiered States

- First tier states:
  - California, Nevada, Florida
- Second tier:
  - Washington, Oregon, Colorado, Arizona, Texas, Louisiana, South Carolina, North Carolina and New York
- All the rest

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## The Anatomy of a CD Claim

- Call or notice letter
- Inside my scope of work or not
- What does my contract say?
- Indemnity and Additional Insured Endorsements
- Insurance carrier notification
  - Flows downstream

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## The Anatomy of a CD Claim

- Inspections and experts
- Litigation and arbitration – is there any difference?
- Joint and several liability
- Why do we have to settle?

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## A Game Plan For Surviving CD Litigation – The Right Stuff!

- It all starts with good, experienced counsel
- Insurance defense vs. “we understand construction AND truss manufacturing!”
- There is a right way, a wrong way, and the U.S. Army way



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## A Game Plan for Surviving CD Litigation - The Right Stuff Part Deux!

- Having the right experts is critical



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## A Game Plan for Surviving CD Litigation - The Right Stuff, Part Drei!

- Who is your insurance broker and insurance carrier?
- Is there an “occurrence?”
- A closer look at exclusions
- Reservation of rights letters



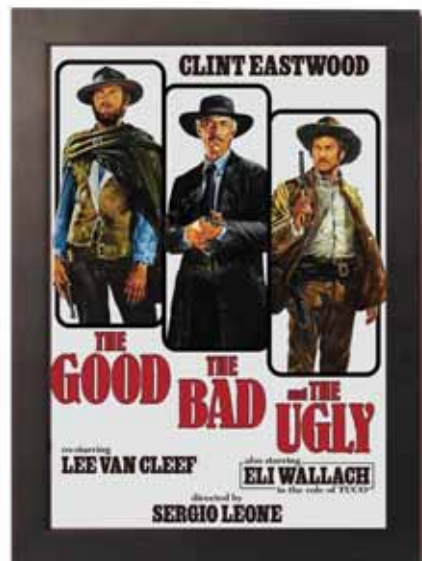
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## Every CD Litigation Game Plan Should Include:

- Organization on the part of defense counsel is crucial
- Evaluation of anti-indemnity statutes
- It all starts with the customer contract!
- Contractual warranty recommendations and the Economic Loss Rule
- Building codes and building departments
- Spoliation and betterment defenses

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## Final Thoughts



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## Questions?

- Kent Pagel
  - Email: [kjp@pdhlaw.com](mailto:kjp@pdhlaw.com)

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## SBCA Resources

- For more resources on this topic, visit [www.sbcindustry.com](http://www.sbcindustry.com) and search for the below titles:
  - [Online Risk and Liability Management \(ORISK\)](#)
  - [Webinar: Common Misconceptions About Component Manufacturer Warranties](#)
  - [Webinar: Monitoring Project Specifications & Plan Notes](#)
  - [Risk Assessment of the CM Turnkey Sales Model](#)
  - [Workshop: Customer Contract Ouch Points](#)
  - [Workshop: Best Practices for Customer Contracts](#)
  - [How Lumber Impacts Risks and Liabilities of CMs](#)

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## Learning Labs

### Wednesday

- 1 pm – Partnering with a National Builder
- 2:30 pm – Best Practices for Developing a Local Workforce
- 4:00 pm – Designing for the Code

### Thursday

- 12 pm – Knowing Your People to Keep Your People
- 1:30 pm – Safety
- 3 pm – Cybersecurity

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Please Fill Out Your Session Evaluation

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# How **BCMC** Contributes to Your Business Success



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