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Why Every Insurance Carrier Should Insist That The California Construction Form Interrogatories Be Used

By Katherine Gallo

John Podesta, an insurance coverage attorney at Wilson, Elser, Moskowitz, Edelman & Dicker in San Francisco, brings us his perspective on why the California Judicial Council Form Interrogatories–Construction Litigation which can be found at should be used. John has handled hundreds of coverage cases involving Construction litigation and other complex matters for over twenty years. He is a nationally known speaker on Insurance Coverage issues in Construction and has written several articles on the subject. He is also the author of the Interrogatory 304.1 regarding insurance of Construction Litigation Form Interrogatories. Form Interrogatories—Construction Litigation can be found at www.courts.ca.gov/documents/disc005.pdf.

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It is generally recognized that construction defect cases are some of the most expensive, and complicated, cases being litigated in California. I have personally been involved in cases with more than 75 payers contributing to a settlement, including contractors, insurers, and sureties. I have witnessed them from the beginning of the modern Special Master programs in the 1980's through the single assignment Special Masters (both mediator and case management/discovery referee) and the dual reference (where the case manager/discovery referee and the mediator are separated) and cases with no outside supervision and the case is handled per the CCP. In all these cases, the carriers ask the same question: "*How can we get these cases evaluated and resolved quicker and less expensively?*" And the related question: "*If this is a case that needs to be tried how can we get to that decision point as soon as possible?*"

There have been many creative approaches to Alternative Dispute Resolution ("ADR") of Construction Defect, or "CD" cases over the years, but the shortcoming seems to always be that to avoid the large anticipated legal expense, the defense carriers must agree to defend and pay investigation costs, and commit early to a settlement construct before a full investigation into the actual damages. And, it follows logically, that where some of the defense clients are willing to take that chance, it creates opportunities for less willing players to refuse and reap a short-term windfall; in the long term, the lack of fairness dooms the process.

Construction defect cases settle when the claims, damages and insurance picture are known to all the participants, at a time when the anticipated cost of not settling is greater than the present settlement demand. Or, as a mediator once said: "*Every settlement occurs at the intersection of fear and greed*." Proper information supporting a large damage award increases the fear; proper information concerning recoverability by plaintiff reduces the greed. Thus, there are two components to every settlement. The first is difficult to manufacture in an ADR setting: create an

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exigency that supports an early settlement, when there may not even be a trial date set or in the near future. As to the second, adequate information, the Judicial Counsel has presented parties with a golden opportunity to bridge the information gap: Construction Form Interrogatories. While still somewhat new, and just entering the Lexicon, use and enforcement of this simple tool will document objectively verifiable claims to support settlement decisions, and information on the other payers that are relevant to your allocation decision (other insurance, other subcontractors, etc.).

The first level of information needed is the basic description of the defect and damage claims. Every decision maker, including general counsel, claim manager or insurance coverage counsel, wants the following information before authorizing (or recommending) a specific settlement amount:

(1) What did your insured/client do at the project in terms of trade and scope of work?

(2) What is a description of the owners' (or general contractor's) claims that involve your client or insured?

(3) What is the frequency that the defect or workmanship error occurs throughout the subject project?

(4) What is a reasonable range of the cost to repair the defects and damages and other recoverable costs (if there is an indemnity agreement or amounts recoverable in addition to the cost of repair).

At the same time, the sophisticated client wants to know whether their client/insured is involved in defect issues that involve multiple trades that could create joint and several liabilities.

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The second level of information is allocation: if the client/insured has liability in a given dollar range to justify a settlement, how is that settlement range to be allocated between all of the following players:

(1) Each of the sequential insurers for that insured/client if the loss is a continuous injury type;

(2) Other insurers that cover the client/insured as an additional insured;

(3) Do any of the direct insurers or additional insurers have coverage defenses that increase your specific responsibility; and

(4) What is the insurance or solvency picture for any issue that your client/insured is jointly and several for? If an insurer that a decision maker believes should be participating has a solid coverage defense it should be factored in immediately.

The general counsel or claim manager needs to accurately estimate a range that will be on his or her check, before he goes to his superiors for settlement authority. The need for early information illustrates why the new Construction Form Interrogatories should make a significant difference. Used properly, and assuming the courts will enforce them; they attack both the defective conditions and objective value of the claim as well as the allocation aspects of the claim.

The Construction Form Interrogatories should be used and insisted upon by insurers and clients for several reasons. First, they are Judicial Counsel approved, which means that objections as to the form of the question will be overruled, making it more likely to obtain answers without motions to compel. As the report to the Judicial Counsel from the Civil and Small Claims Advisory Committee

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reported, the interrogatories were developed by a group of plaintiff and defense lawyers and that the group "***reached consensus on almost all of the content of the proposed form with the committee making final decisions on a few minor points that remained in dispute***." The committee recommendation continues that even where the Case Management Order overseen by a mediator is present, "a set of form interrogatories will already be in existence for the Judicial Officer to approve or select from." See www.courts.ca.gov/documents/jc-20121026-itemA10.pdf

Use of the Construction Form Interrogatories concurrent with the mediation process will allow for earlier resolution, because of the requirement for verified answers which addresses the inherent skepticism of decision makers being asked to pay significant sums based on unverified lawyers' claims that in some circumstances seem to have questionable support. The questions are targeted to the actual information that clients and insurers need to evaluate the claims because they are specific to construction and construction defect litigation. For example, note the following interrogatory to the plaintiff:

> **305.1** Do you [homeowner or project owner] attribute any loss of damage to subject property to the facts on which the construction claim or the construction defect claim is based? If so, for each subject property,
>
> (a) Identify the subject property;
> (b) Describe the nature and location of the loss or damage to the subject property;
> (c) State when you became aware of the loss or damage;
> (d) State the amount of damage you are claiming for each piece of subject property and how the amount was calculated.

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And, for the contractors, the Scope of Work interrogatory answers the first question that will be asked by any claim manager or client – What did our party do?

> **321.2** Describe the scope of work that you [contractor] performed and any materials that you supplied at the subject property.
>
> **321.3** Describe all locations on the subject property where you performed work or services (by phase number, unit number, building number or address, or common area description).
>
> **321.4** State all dates, including first and last, that you:
>
> (a) Performed work or supervision for or at the subject property; or
> (b) Supplied materials for the subject property.

The Construction Form Interrogatories also address the unique insurance issues present in contractors' coverage and was specifically designed to get all the relevant insurance information from the developer/general contractor as well as the subcontractors and design professionals.

304.1 requests the following for **EACH POLICY** in effect from the date of construction forward:

> (a) the policy number or other unique number used by the issuer to identify the insurance policy, and the effective dates of coverage;
> (b) the kind of insurance or coverage (including without limitation commercial general liability, professional liability, directors and officers, homeowners, property, course of construction, builder's risk, automobile, or public entity liability protection);

(c) the policy level and description of any underlying insurance or self insurance that must be exhausted prior to its application (for example, for umbrella or excess insurance, please state the amount of underlying insurance or self-insurance that must be exceeded before the policy applies);
(d) the name of any person who is or may become a party to this action who may qualify as an insured, an additional insured, or a protected or covered person;
(e) whether the insurance policy contains a blanket additional insured provision or other provision whereby the person insured (or person protected by the insurance policy) includes any person or entity for whom one Insured or protected person is obligated to provide additional insured coverage in some kind of contract or agreement;
(f) the aggregate and per-occurrence or per-claim limit of liability for each potentially applicable coverage contained in the insurance policy, including the limit the insurer claims is potentially applicable (if less than the limit stated in the policy declarations);
(g) the limit of any retained amount payable by any insured relative to a claim otherwise covered by the policy, whether by means of a deductible, self-insured retention, deductible indemnity agreement, or retrospective premium provision, and whether the payment of loss and adjustment or defense expense reduces such retention obligation;
(h) whether the insurance policy contains an exclusion barring coverage for damage known to any insured prior to the policy period or barring coverage for damage that first occurred prior to the coverage period.
(i) whether the indemnity limit of the insurance policy is diminished by the cost of defense;
(j) whether any controversy or coverage dispute exists between you and the insurer;
(k) whether the insurer issuing the insurance policy has issued a written reservation of rights; and

(l) the name, address, and telephone number of the custodian of the policy.

In lieu of responding to items (a)-(i), Interrogatory 304.1 also gives you the ability to attach a complete and accurate copy of each insurance policy instead as the policy itself is discoverable. *Irvington-Moore v. Superior Court* (1993) 14 Cal App 4th 733, 737.

While each insurer has their own proprietary reasons to resist, the case will not settle without reasonable disclosure of the above insurance information.

Once the insurance picture is known the parties can resolve the allocation between the contractors and their insurers. Once the developer or general contractor, who remains vicariously liable to the plaintiff for damages caused by all of the subcontractors, understands the insurance picture of all the contractors, and once the plaintiff understands the insurance picture and recoverability potential, expectations are adjusted appropriately. The same goes for each subcontractor; if a claims manager thinks that his "time on the risk" is minimal, but all the other insurers have valid defenses, it will affect his evaluation. This kind of information is often obtained informally and at the last minute…right before the case settles!

Finally, how does a client or an insurer take steps to get the information in their file? For clients and insurers one way would be consistent litigation guidelines, combined with the "power of the purse". In California, mediation is a voluntary process. A client cannot be compelled to mediate. There should be minimal impact on the case as a whole, if the client or insurer is clear that the Construction Form Interrogatory information must be obtained before mediation. If an insurer has several contractors in the lawsuit, a typical scenario, it can exert more influence over the process that can only help the insured in the long run. If a majority of the contractors and insurers insist upon the information, it will start

being obtained as a matter of course. Obviously, to avoid unnecessary expense and disruption to an ongoing case, the insurer/client's insistence on the use of form interrogatories and/or their equivalent should be voiced early and clearly.

Of course, the court or the discovery referee must grant approval to the use of Construction Form Interrogatories if the lawsuit involves more than six single-family homes. While court approval, or discovery referee approval is needed, I submit that in any construction defect claims, an analysis and disclosure of the actual claims and insurance information is not only advisable, it is critical to resolution of any medium to large case.

Nothing in the Construction Form Interrogatories prevents "peripheral parties" from settling. While some mediators and referees are better at separating the main players from the "peripheral" ones, attempts to remove the smaller players oftentimes devolve into information gaps. The proper use of form interrogatories, even in these circumstances, will likely push the parties towards settlement sooner, which means a reduction in legal expense.

You may find this blog and additional blogs on California Discovery by Katherine Gallo at www.resolvingdiscoverydisputes.com

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