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[Legal Complexity of Construction Litigation - Episode #126](#)

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John Czuba: Welcome to *The Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Terry Lavy from the law firm of [Vernis & Bowling](#), with offices throughout Florida, Georgia, Alabama, North Carolina, South Carolina, and Mississippi.

Terry is a board certified specialist in construction law, and works in the Southwest and Central Florida office out of their Fort Myers location. Construction litigation and first party insurance matters are his primary areas of practice.

Terry has represented developers, general contractors, and subcontractors in construction defect disputes. Terry also assists insurance clients in pre suit investigations and defense of litigated matters.

Terry, we are very pleased to have you with us this morning.

Terry Lavy: Thanks, John. I'm glad to be here.

John: Today's discussion pertains to construction defect litigation. Terry, can you start out by telling us, what are some of your clients' concerns related to construction defect litigation?

Terry: What you find is that the contractors and the insurers are, first off, very concerned about trying to assess the claims right off the bat. Without exception, what I find is the contractors and the subs are usually stand up guys who really want to stand behind their work. That makes them great for clients and motivated to help with respect to the defense.

Both the insurers and the contractors are concerned about the major factors that they're going to see. How long is it going to take to litigate it? What are the expenses of the litigation? What you wind up with is a difficulty that the cases themselves tend to be very complex.

John: Terry, what is it that makes construction defect litigation so complex?

Terry: There are a bunch of things. Starting off with the very idea the number of parties that are there. If you take the typical condominium case, you can have well upwards of 10 defendants.

Any number of parties, including condominium boards, developers, architects, engineers, general contractors, and God knows how many relevant subcontractors, almost always including roofers, window installers, and that sort of thing.

We've had some major cases pending right now that have had upwards to 25 parties. Each of those have their own people, and it makes for a very long process.

Secondly, there tends to be an overlap in the work. Taking as a typical example, if you look at a window leak situation, you have numerous trades that actually their work meets at that location.

You can have issues with respect to the design of the window opening, the general contractor staging of the work, the framer, the concrete installer, the window installer, the window manufacturer, a water proofer, a painter, and sometimes, stucco people as well. In fact, that's pretty common.

We tend to see the entire range of that, and that overlap of work makes it very difficult when push comes to shove and each party is saying, "No, it's not my fault." You also wind up with, by the nature of the beast with that many parties involved in the typical case, you also wind up with a lot of pleadings.

You can see up to six or seven sometimes amendments to the complaint just to make sure the allegations are correct. Then you see counterclaims, cross claims, and third party claims that add into the mix.

Keeping track of the active and immediate pleadings really requires an attention to detail. You need to know that your attorney that's handling the matter is on the ball with that. One other thing that also comes up very often is indemnification issues. That's part of what you see in the pleas.

John: Terry, can you explain or elaborate what you mean by indemnification?

Terry: Sure. There are three types of indemnification issues that come up ordinarily. What you find is that the developer or the general contractor is trying to get a subcontractor to accept responsibility for their scope of the problem.

They tend to come into different parts, of course. The one is defending the claims, and the other is paying for it, so you have defense and indemnification. The three types of ways this is pled all have their own different issues.

The first is common law indemnification. That's usually where there's no formal contract. You see that a lot with smaller contractors, but it's limited. The responsible subcontractor should indemnify the general contractor, but only if the general contractor is not at fault at all. That's a really tough limitation to get around if you're representing the general contractor.

A second type that's a little bit easier to proceed with, and which we're seeing an uptake of, is contract indemnification. For that you're going back and taking a look at the formal contract between the parties.

Standard contracts are often used. The AIA form includes an indemnification provision that the Florida courts like a lot. Sometimes you run across homemade contracts that have indemnification provisions as well.

For those who want to check them because the Florida statutes are quite tight as far as what they will allow, and the Florida courts really don't like contracts that require you to be indemnified for your own negligence. That tends to be an issue that you see litigated a bit.

The third way that it comes up in terms of an indemnification issue is whether or not the general contractor is an additional insured under the subcontractor's policy. Again, this is usually a requirement of the standardized contracts. The AIA certainly includes it.

What you want to do if you're representing early on is find out what's actually in the policy that the general contractor is an additional insured on. Sometimes that language doesn't include very basic things like completed operations coverage.

If that coverage isn't there, then the additional insured language in the context of a litigated case really doesn't do the general contractor a heck of a lot of good. In any indemnification claim, the proof tends to be a problem because where you have so many parties whose work meets at a particular location, trying to single out one from the next is a challenge.

There, you're looking at the quality of the experts. There's a lot of complexity to indemnification issues, and it's really core to this type of litigation.

John: Terry, what strategies do you recommend to address the client's concerns about time and cost?

Terry: The Florida legislature has helped us out a bit with respect to that. They passed a statute, which is referred to as 558. What that requires is that the owner provide a notice and opportunity to cure for any contractor before he can bring suit.

This is interesting because it gives the contractor at least the opportunity to get in and find out what's wrong -- or what's alleged to be wrong, I should say -- very early on and maybe get a little bit of control of the process.

The statute provides you with access to the property, destructive testing if needed, design plans and specifications, photos, videos, expert reports. Anything that you could really want and that you will eventually get in discovery, you can theoretically obtain through the 558 process if you're aggressive in pursuing it.

That's not always done, but if you take advantage of that opportunity, it costs more upfront, of course, but in the long run, it will give you a better handle on your case sooner rather than later.

John: Terry, what are some of the key cases now involving insurance carriers?

Terry: There's an interesting one actually going up before the Florida Supreme Court right now called *Altman Contractors v. Crum & Forster*. That one actually deals with the 558 notice. The question there becomes whether or not the filing or receipt of a 558 notice actually requires the insurer to defend.

At the lower courts, the trial court said that it did not because a 558 notice is not a lawsuit, essentially. At the appellate level in the 11th Circuit, the court wasn't quite so sure. The Supreme Court is now considering that. I would expect a decision on that maybe sometime in the fall if the Supreme Court is quick.

It does make for a very interesting issue. It has a lot of permutations with respect to insurance companies and how they deal with construction defects claims from the get go. Depending upon who your contractor is and their involvement in the claim, I think it's probably a good idea to be aggressive and get that information anyway.

Of course, cost is a concern. If you have something of a minor player, a poor water-proofer or something, for example, maybe you're not necessarily going to spend the time and the expense of going through that process.

If you have a general contractor, or a stucco person, or a window installer who is typically a primary target, or a roofer for that matter -- even if *Altman* goes as it should -- the carrier may want to consider taking a more aggressive approach to investigation at that stage anyway.



John: Terry, the Florida bar certified specialists in construction law, is this unique to Florida, or do other states supply this type of information as well?

Terry: I did some checking on this, to start with, to see about locations where Vernis & Bowling practices. We are all over the southeast as you mentioned. As it happens, none of the other states that we practice in provide for a bar certification in construction law.

Most states do provide some form of board certification. Typically, it tends to be in litigation, civil trial, criminal trial, what have you. As far as board certification in construction law, the only other state that I immediately found that does that is Texas.

It's really not that common a thing in Florida. What we find in Southwest Florida, for example is in these counties, there are approximately 11 board certified construction law attorneys. Of those, some of them are plaintiffs oriented. Some of them represent condominiums. Some of them just do transactional work.

If you're looking for somebody that is a specialist in that area for the defense of the matters, your options maybe somewhat more limited. Of course, choosing a defense attorney wisely is a first step in investigating your claim and getting it resolved at a reasonable resolution.

John: Terry, thank you so much for joining us today.

Terry: My pleasure. Thank you, John.

John: That was attorney Terry Lavy from the law firm of [Vernis & Bowling](#), with offices throughout Florida, Georgia, Alabama, North Carolina, South Carolina, and Mississippi. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now, this message.

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