Best's Insurance Law Podcast

Navigating South Carolina Construction Defect Claims - Episode #208

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're pleased to have with us today, attorney, Thomas Pritchard, from qualified member law firm, Vernis & Bowling of Columbia, LLC.

Thomas is the managing attorney for the South Carolina office and is based in Charleston, South Carolina. The firm also has a Columbia, South Carolina office. Thomas provides legal services for the entire state. His practice areas include construction defects, automobile liability, professional liability, and product liability.

Thomas is well versed in all aspects of insurance defense and general civil litigation. His civil trial experience includes having tried more than 60 cases to verdict. He has also participated in more than 250 mediations.

Thomas is also a certified circuit court mediator by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification. Thomas was first certified in the year 2011. Thomas, we're very pleased to have you with us today.

Thomas Pritchard: Thank you so much for having me this morning.

John: Today's topic is the complexity of South Carolina construction defect claims. Thomas, for our first question, is there anything unique about South Carolina construction law?

Thomas: Absolutely, South Carolina construction law is, to me, fairly unique in that there seems to be a whole lot of creativity within the plaintiff's construction bar in creating cases where they might not otherwise be. Probably, one of the big issues there is in class action litigation.

South Carolina courts don't look hard into preventing plaintiff's counsel from bringing class litigation in these residential construction cases where you've got multiple single-family homes in a neighborhood developed by the same developer.

To me, that makes it a little unique in that the cases themselves don't lend themselves to being class cases. You have lots of houses with lots of different exterior cladding, lots of different issues, yet the courts are turning them into class action cases, nevertheless.

John: Thomas, what constitutes a construction defect?

Thomas: A construction defect is any deficiency within the construction of the home that leads to a failure of any component of the home's intended use. Primarily, for instance, if flashing is not properly installed, that creates an issue whereby water intrudes into the home.

Material decomposition occurs, things of that nature. It can be anything from lack of proper flashing, to lack of proper product selection, to lack of proper installation of any of the material component parts.

John: Thomas, what are some common building defects?

Thomas: We're seeing a lot of windows and doors especially. Always, always, always, we're going to see inadequate framing and flashing, particularly of rough openings associated with windows and doors. Improper installation of exterior cladding, more so in the areas of masonry and brick than in traditional wood siding or even Hardie siding.

Of course, the old synthetic stucco problems have run their course now. Even though synthetic stucco is still used, the application process is different now than it was before where we saw a lot of problems in the past.

John: Thomas, are there any current trends in construction claims?

Thomas: The trends are fairly consistent. Like I mentioned a few minutes ago, we certainly are seeing more window and door product claims than we were previously. That lends itself, too, to another issue that we see.

That is, a lot of the plaintiff's bar, particularly the folks that we see on a regular basis, have typically not been suing the manufacturers and suppliers directly. Especially if they've got a statute of repose concern or a statute of limitation concern, they let the sued primary defendant invite everybody else to the party.

Lately, we've been seeing more and more attempts for the plaintiff to bring direct claims against some of the subs and material suppliers. There is definitely what is largely the fallacious theory espoused by these plaintiffs that they are able to recognize a "bad call" and that if it is a bad call, then that's entitled to judicial redress. The courts have, as I said, almost uniformly rejected this notion, even assuming the call may arguably have been incorrect.

John: What types of construction claims are most common today?

Thomas: They run the gamut in South Carolina, from big commercial construction problems. We're still building a lot of big buildings in the coastal environment down here, so we see lots, lots, and lots of water intrusion issues, mold issues, those types of things.

Of course, we've got so many neighborhoods being developed, that we're dealing with a lot of neighborhood wide cases. To be candid with you, they're a little bit sometimes manufactured, if you will.

In other words, the plaintiff's bar will find one or two people within a neighborhood with a couple of problems, and recognizing that from an economies of scale issue, it's not profitable to them to bring these one or two residential construction defect cases in these big developer-built communities. They go out and try to gin up, if you will, more customers.

They go and invite other people, to let them come in and see what's going on with their houses. It just compounds itself. South Carolina, you had asked earlier, and I should have mentioned, South Carolina's statute of repose...of course, South Carolina used to have one of the longest statutes of repose in the country of 13 years.

They moved it down to eight years, but we still have an exception to the statute of repose, where a plaintiff is able to present and prove evidence of gross negligence. All you've got to do to allege gross negligence in South Carolina is to allege that there's a code violation because a code violation is per se evidence of gross negligence.

Now, it's still up to the jury to determine whether or not a plaintiff has proved gross negligence. Sometimes you get a case that's maybe 10 or 12 years down the road from when the certificate of occupancy was issued, and yet, you still find yourself having to defend that case, at least to a jury verdict, because of the statute of repose question.

If the jury determines the plaintiff has met its burden of proving gross negligence, then you go beyond just the jury verdict, because then the jury gets to determine damages. If they determined that gross negligence was not proved, then they can stop there and can't deliberate further on damages because the statute of repose has not been extended.

It creates an additional layer of uncertainty, particularly when carriers are trying to analyze the exposure. It's a hard exposure to analyze when you don't know for certain if you've got a valid statute of repose defense or not. You have to wait until jury determines that, in order to know whether or not you're looking at a verdict, an adverse verdict, I should say.

John: Thomas, I'm just going to go back to something you referenced a short time ago about what you're seeing in South Carolina, with I was referring to Plaintiff's counsel going through and trying to sign up neighborhoods, I may have misunderstood your question) going through, and I guess trying to get neighborhood homeowners to piggyback together.

We actually had a similar thing happen here. I live out in Pennsylvania, I have for 20 plus years, and the development I'm in, they tried to come through and claim it was hail damage to the rooftops.

There were at least a handful of homes that took advantage of that and kept that contractor in business for the better part of a year, a year and a half. Are you seeing it with rooftops in South Carolina, or are you seeing it with other areas as well, with those types of incidents?

Thomas: Oh gosh, it runs the gamut. For instance, one I was recently involved in, a big component of the early claim was that the site preparation was inadequate, such that it led to ponding in backyards after rain events and causing water to stay in the backyards, and in some instances get into the homes through door openings and things of that nature.

That can piggyback. Sometimes you might just have one or two houses in a neighborhood that have masonry siding and they have cracking and settling or whatever, and they get in there on that.

Once they get into the neighborhood and take a look at what's going on there, there's obviously not every house in the neighborhood has masonry. Some of them might be vinyl, some of them might be hardie, some of them might be brick, whatever the case may be.

When I say masonry, I'm using stone cladding there because, of course, masonry could mean brick too. To me, I separate masonry as a stone cladding from brick veneer as a stone is another cladding. They get in there and they start to investigate and they ask other people if they would be willing to let them investigate issues that their homes may be experiencing.

Pretty soon, it doesn't take long to find houses that maybe the end dams on the windows weren't properly done. Or the mulling of windows is not properly done, or the rough openings are not properly flashed, or the building wrap paper is cut.

One of my favorites, which I'll never quite understand as long as I live, is building wrap is reverse lapped such that the top layer of building wrap runs down behind the bottom layer of building wrap, which is completely counterintuitive to how water management systems are supposed to work.

They get in there and they find these defects, and then pretty soon it's a class action. All it takes is a few and they get a class going and then everybody is along for a long, long ride.

Of course, that lends itself to most of these national builders try to have arbitration provisions in hopes of forcing everything into arbitration so that they can spend less money and less time to get a case ready for trial.

Candidly, they'd rather be in arbitration because jurors are less sympathetic to the right side of the V, as I like to call it, than they are to the left side of the V because with the exception of the top 10 percent of the people in this country, most of the rest of us, our home is the largest single investment we'll ever have.

It's not necessarily a friendly place to find yourself in, on the right side of the V in a construction defect case in South Carolina, because jurors are typically unsympathetic. The big builders try to force arbitration now. That's still an unsettled area of the law in South Carolina.

South Carolina, like everybody else in the federal arbitration setting, which of course, these type of national home builder's cases always can be brought under the Federal Arbitration Act provisions because the delivery of the materials and everything else affects interstate commerce, so it triggers federal arbitration provisions, even though you're in state court.

Of course, our Supreme Court correctly says, "Hey, we got to follow Prima Paint," which is the National Supreme Court doctrine that requires our courts to look only at the arbitration provisions to determine whether or not they're oppressive.

They can't look at the whole contract and say it's unconscionable or unenforceable or oppressive or whatever. They have to look solely at the narrow arbitration provisions. There has been more than one instance where courts have determined that just looking at the arbitration provisions, they're unenforceable.

A recent case was a 2022 South Carolina Supreme Court case, *Damico vs. Lennar Carolinas*, and ironically, the Court of Appeals reversed the Circuit Court. Where the Circuit Court said, "No, the arbitration provisions are unenforceable."

Court of Appeals said, "You relied on stuff outside of the arbitration provisions." The Supreme Court reversed the Court of Appeals and said, "Even still, if you just look at the arbitration provisions, they're unenforceable because they're unconscionable."

Arbitration is still an area that there is a large battle going on. As a matter of fact, I'm involved in a case right now where a judge ordered arbitration about three weeks ago and then the other night sent us all an email and said he had considered one of the party's motions to reconsider and he was wrong.

He should not have compelled arbitration. I think even our judges struggle with it because we all struggle with it, what is arbitrable and what's not.

Of course, some of these folks don't assert their right to arbitration at the outset, and then later on down the road, they try to assert their right to arbitration, and the courts correctly typically say in those instances, "No, no, you waived it. You started to participate in the normal litigation process. You can't come back now and try to assert it."

John: Thomas, can you tell us about the economic loss rule and how that's impacting construction defect claims in South Carolina?

Thomas: Sure. South Carolina used to recognize that you couldn't recover in tort for purely economic loss.

Going all the way back in 1989, our Supreme Court ruled in *Kennedy vs. Columbia Lumber* that the economic loss rule does not prevent the imposition of tort liability upon a residential home builder when the builder violates a legal duty and that the violation of a building code or failure to undertake construction commensurate with industry standards is a violation of a builder's legal duty.

They said if they violate the legal duty code, we go back to the code again, I mentioned that before on the statute of repose, determination of violation of a legal duty allows a homeowner or a claimant to recover in tort for purely economic loss.

It's still something that our judges, our lawyers, our courts all struggle with. What is an economic loss that is a recoverable loss in tort liability? Our Court of Appeals just recently addressed that again in a not a construction defect case per se, but it had components of residential home damage.

It was *James E. Carroll vs. Isle of Palms Pest Control, et al*. It was August of this year, August 2023, Court of Appeals case. They went back into another analysis of what is a recoverable tort liability loss under the Economic Loss Rule.

It's something that everybody needs to understand better because it is a dangerous component of damages in construction defect cases where a plaintiff suffers purely economic loss, i.e., diminution in value, loss of use of their home, that kind of a loss that you still have to address as a component of your construction defect cases.

I can guarantee you, I have, in 31 years of practicing law, never once experienced a construction defect case where there wasn't some allegation of violation of code, because that, in and of itself, creates another avenue of damages for the plaintiff. It also creates, as we addressed earlier, a path around a statute of repose issue if they've got to otherwise have a statute of repose issue.

It further creates a path to the potential for special damages, i.e., punitive damages, violation of code. It's an area that everybody needs to be familiar with in analyzing the exposure that exists in these cases.

John: Thomas, what should claims managers be aware of in construction claims?

Thomas: It is vital in construction claims that claims managers be on the same page early on with their counsel, in getting experts involved, in trying to analyze the potential exposure to their individual insured. Frankly, 95 percent of these cases are cases that need resolution because they are dangerous in South Carolina to the defense side of the case.

If there are opportunities to resolve early, they should be looking for those opportunities, because typically, the earlier you can resolve your exposure once you've got a handle on what the exposure is, and whether or not there's true exposure the less costly it's going to be.

Frankly, the significant plaintiffs' bar, the folks we see regularly in South Carolina, are very good at what they do, and they know how to work these cases up. They're not afraid to spend the money to work them up, so the other side needs to not be afraid to spend the money to defend them.

The other side needs to understand that these folks are very good at crafting resolutions with individual parties on the defense side in such a way that it, if anything, broadens the exposure to the remaining defendants because, of course, we've got joint and several liability, and they craft frequently releases with individual entities that are issue related releases.

They might take an issue off the table without taking the whole rest of the case off the table. Then it becomes also a question of set off and what you're entitled to in terms of what they've recovered if you get an adverse verdict, what you're entitled to set off as a result of the verdict.

Again, there's another case that folks should familiarize themselves with where they went through this again recently, and that is the case of *Palmetto Pointe at Peas Island vs. Island Pointe LLC, et al.*

That was where a defendant, a roofing company, was left in the case after a number of parties settled out, and they were arguing what set off they should be entitled to. The Circuit Court didn't grant them the set off they felt they were entitled to, so they appealed to the Court of Appeals.

Again, this is a fairly brand new case, I said. Let me look to see when it was decided by our court. June 28th of 2023, it was decided by the Court of Appeals, where they go into another analysis of set off.

It's something that I frankly think that even we as lawyers sometimes struggle to articulate, both to our carrier clients as well as to the court, on why we should be entitled to the set off we should be entitled to.

That's an area that these claims managers really need to understand, because there's always danger in being the last person standing, always danger.

Again, let's go back to a case that I was involved in that just went to jury verdict about two or three weeks ago, and one masonry sub was left in the case. That masonry sub got an adverse verdict for $4 million. That $4 million, frankly, was probably more than the total masonry component exposure in the case was worth.

They stuck around, everybody settled around them. Everybody got what they needed out of it. The plaintiffs counsel crafted really good issue releases and party releases and did what he needed to do such that they're now looking at this $4 million verdict and trying to either get the court to undo it with post-trial motions, or they may end up heading up with the Appellate Court.

That, to me, is a real underappreciated area of South Carolina construction defect law, is understanding the dangers of hanging around until the end of the case, right before it's ready to go to trial. Then you end up either in trial, and it costs you more money to settle, or you get a verdict that's probably more than the exposure that you really were going to have if everybody was there.

John: Al, thanks very much for joining us today.

Thomas: Gentlemen, thank you all. I know I talk too much, but that's the nature of a lawyer.

John: You've just listened to Thomas Pritchard, Managing Attorney for the law firm Vernis & Bowling of Columbia, LLC and their South Carolina operations. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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