

## Construction Defects: Things to Remember to Make Sure You Can Get the Problem Fixed

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### CONSTRUCTION DEFECTS: THINGS TO REMEMBER TO MAKE SURE YOU CAN GET THE PROBLEM FIXED

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Construction projects take a lot of time, cost a lot of money, and often result in more than a few headaches along the way. When the project closes out, most people are relieved. The business finally gets to use the new facility and enjoy the benefit of all of that time, money and headache. Then it happens. The business starts to notice problems. Good contractors typically address the smaller problems with slight inconvenience to the owner. But more significant problems resulting from construction or design defects must be managed correctly to ensure that the problems get fixed by the contractor or the owner receives compensation. Here are some things to remember when you discover a potential problem.

**1. Don't destroy anything relevant.** Notify any parties who may be responsible for the problem and allow them the opportunity to inspect before you change the conditions as a part of an investigation or repair. Failure to do so could result in a court entering a spoliation instruction. Spoliation is the destruction or failure to preserve evidence in your possession when a party knew or should have known that a claim would be filed and that evidence would be material. A spoliation instruction is a statement from the judge to the jury that it may presume the destroyed evidence would have been unfavorable to the party who destroyed it. Even in the rare instances when you need to immediately repair the problem to avoid a shut down or further damage, a simple email notifying the other parties can help avoid a spoliation instruction.

Retaining experts early will also ensure that they have the opportunity to observe the conditions as they exist at the time the problem is uncovered. Savvy experts will also provide invaluable guidance in the investigation and preservation of evidence. It may make sense to have legal counsel retain a consulting expert with responsibility to coordinate the work of other experts who are likely to testify. Communications between the legal team and a consulting expert may remain protected, unlike communications with those experts who are designated later as testifying experts.

Of course, you also need to notify employees to preserve anything related to that project. Remember to include IT folks to stop any automatic deletion programs until after emails are preserved.

**2. Document the problem and send appropriate notices.** Take photos and videos immediately to preserve a visual record of the condition. With assistance of counsel to ensure privilege, prepare a written description of the problem and interview key people to capture information about when the problem arose and the impact. Review the contract and provide notice to the construction and design professionals. Most contracts, including industry forms such as the AIA general conditions, include contractual notice provisions. Failure to provide the notice may waive your right to require correction or to make a claim for breach. Prompt notice also positions you best to get the problem fixed quickly. Consider whether notice should be sent to manufacturers or suppliers under warranty provisions. Evaluate whether any carriers should be put on notice of a potential claims, including under any policies that many cover business interruption.

**3. Time is of the essence.** In addition to contractual deadlines for warranty repair claims (often one year), you need to watch the statute of limitations for asserting claims. Construction defects typically give rise to claims for breach of contract, breach of express warranty, breach of an implied warranty, or professional liability. The limitations period and when the claim accrues differ based on the claim and also by jurisdiction. In Texas, for breach of contract or breach of express warranty, a four year statute of limitations applies. For breach of an implied warranty, limitations may run in either two or four years depending on whether it is predominately an issue of tort or contract. When exactly the timeline begins to run will also depend on the type of claim and type of injury. Generally, limitations for contract claims starts at the time a breach occurs. In other words, you could have less than four years from when you discover the problem to pursue a claim if the discovery rule does not apply. The discovery rule applies when an injury is inherently undiscoverable and objectively verifiable and sets a different start date for limitations running—when you did or should have discovered the problem. Determining exactly when limitations started and whether the discovery rule applies can be tricky. If the claim arises many years after substantial completion, pay attention to the statute of repose. In Texas, for example, you must bring claims within ten years of substantial completion of a construction project regardless of whether the discovery rule applies, although that timeline can be extended by sending a notice within the ten years. Although public owners are exempt from certain statutory limitations periods, the statute of repose does apply to both public and private owners. If you think you have a claim, acting fast and reaching out to a lawyer, if necessary, may be the best thing you do to make sure you preserve your claims stemming from a construction defect.

Preserving evidence, properly documenting the problem, providing appropriate notices, and being conscious of timing considerations will go a long way in helping to preserve your rights and ensure you get the problem fixed or get compensated. While this overview provides an outline of steps and considerations, the devil is in the details. Engaging an attorney and consulting experts early will help you to navigate these details. Attention to detail when you run into a construction or design defect very well may be the difference between getting your problem fixed by the contractor or design professional instead of having to dig into your own pocket to fix it.

