Construction Defects & Insurance Recovery

How to Identify whether Damage Stems from a Construction Defect vs. a Covered Peril

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Why Do You Care?
Hold people accountable:
- Construction promises
- Insurance company promises

Your duties
Construction Defect?  Covered Peril?
What is a Construction Defect?

A deficiency in performing or furnishing:

- Design / Planning
- Supervision
- Inspection
- Construction, or
- Observation of construction

to any new building, where there is a failure to construct the building in a good and workmanlike manner, to industry standards, manufacturer’s recommendations, plans, or applicable building codes.
MARKET DEFECT RATES

RETAIL
1 in 20

CONSTRUCTION
1 in 4

SEMICONDUCTOR
1 in 10,000

AUTOMOTIVE
1 in 100
Who’s Responsible?

Developer, General Contractor/Builder
Typically, the developer, general contractor or builder is responsible for their own acts as well certain acts of their subcontractors.

Subcontractors
Subcontractors are responsible for their own work product

Architect/Engineers
Responsible for design defects

Vendors
Responsible for product defects, such as roof products, siding, water heaters, light fixtures...
Common Construction Defects

Issues with:

- Heating, Ventilation and Air Condition (HVAC)
- Roof Integrity and Leaks
- Window Compromise
- Grading/Landscaping/Drainage Issues
- Building Envelope
- Plumbing
- Flashing
- Foundation
- Electrical
- Flooring
- Turf/Tracks & Stadiums
Construction Defects Result In:

- Poor Energy Efficiency
- Higher Energy Costs
- Frequent Maintenance Issues
- Poor Air Quality
- Possible Microbial Growth
- Difficulty Maintaining Comfort Levels
- Shortened Usable Life of the Individual Systems and the Entire Building
- Higher Maintenance Costs
HVAC Units Not Level and Curbs Improperly Installed.
Portions of the supply air duct system were not properly insulated (internally or externally - as represented in the photographs above) or sealed properly allowing condensation on uninsulated supply air ductwork. Stained ceiling tiles in thirty-five (35) locations revealed condensation from ductwork.
Ceiling tiles showing signs of condensation dripping off the HVAC ductwork.

Water leakage down HVAC return air duct.
The design of the condensate drain pans in the air handling units allowed *standing water* in the air stream as presented at right. It has long been known by the industry that standing water provides an environment that promotes *microbial growth*. 
Fiberglass insulation in the air stream provided an extended surface area and an ideal trap for dirt and debris which was impossible to keep clean. The combination of dirt and moisture from the saturated air stream created conditions favorable to allow microbial growth as represented in photographs below. Extensive mold growth sites were confirmed on fiberglass insulation in the air handling units’ cold deck section.
ROOF

Water Ponding

Interior Roof Leaks
Incomplete *Air Barrier* at roof to wall intersection
Efficiency

Missing thermal blocks, insulation improperly installed and seams not sealed.

Resulting in roof not in code compliance, higher energy bills and less wind uplift resistance.
Building Envelope - Walls

Insulation board on exterior walls installed with gaps

Result: higher energy bills
Moisture from construction activity and breaches in the envelope was stored in the exterior wall system. Relative moisture measurements indicating excessive moisture in building materials around windows. Moisture had migrated to the vinyl wall covering on the cool surface side of the exterior wall which provided ideal conditions for mold growth.
Envelope/Windows

Windows and wall intersections lack properly backer rod and sealant

Result: leaks
Case Study: Building Envelope
This code requires a **12” drop** in the ground surface in the first 10 feet, sloping away from the building. Purpose is to remove surface water away from the building almost immediately. Failure to provide this can lead to numerous problems related to excess moisture.
Grading & Drainage Problems

Soils report:

- 10% slope away from **building 12” in 10’**
- Downspouts discharge beyond backfill zone
- Foundation drain with proper slope and discharge
- No irrigation within 5 feet of foundation
- Properly installed foundation voids
Best Practices

- Thoroughly commission building upon move-in.
- Thoroughly review building for one year warranty repairs.
- Evaluate building systems annually.
- Administrators should consult with maintenance staff on a regular basis.
- Maintain thorough maintenance logs.
Contractual Limitations

- May limit your rights to recover.

- May require binding arbitration, which prevents rights to jury trial/appeals.
Insurance and Liability Issues

- Be wary.
- May be coverage issues.
- Insurance proceeds may be limited.
Strategies for Dealing with
General contractors, subcontractors, and design professionals
WHEN ENOUGH IS ENOUGH

- When one year warranty expires.
- When contractor refuses to return or complete repairs.
- When contractor comes back but keeps patching and covering up defects with temporary repairs.
- When building systems continue to fail.
- When construction issues interfere with daily business operations.
<table>
<thead>
<tr>
<th>Scenario 1</th>
<th>Scenario 2</th>
<th>Scenario 3</th>
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<tbody>
<tr>
<td>New building &lt;1yr</td>
<td>&gt;1yr (not over 2 years)</td>
<td>2 – 5 yr</td>
</tr>
<tr>
<td>Warranty Period</td>
<td>Possible Warranty</td>
<td>Consider hiring own experts</td>
</tr>
<tr>
<td>Letter to General Contractor</td>
<td>Letter to General Contractor</td>
<td>If go beyond 3 years, could limit your recovery</td>
</tr>
</tbody>
</table>
The Point of *No Return*: Statute of Repose

5 YEARS
General Contractors DO NOT Want You to know
1 Year Warranty? Not exactly…

Push you past 1 year

Ask **YOU** what is wrong

True repairs too expensive

Wear you down

They know you do not like conflict!
Insurance Recovery
Covered Peril

Definition: Damage to your building caused by a type of loss covered by your policy.

- Fire Damage
- Water Damage
- Wind Damage
- Hail Damage
Know Your Policy

- Specific Peril v. All Risk
- Claims-Made v. Occurrence-Based
- RCV v. ACV
- Business Interruption coverage
- Deductibles
When You Have a Claim

- Document your damage
- Collect your documents
- Speak with one voice
- Watch out for vendors
Policyholder Duties

- Provide notice of loss to carrier or agent
- Take steps to protect property from further loss
- Cooperate with insurance company
- Submit to examination under oath if requested
- Meet all conditions precedent (ex: proof of loss)
Assistance For The Policyholder

- Contractors
- Public adjusters
- Attorneys
Practical Tips

- Document your loss
- Document your communications
- Respond to insurance company requests
- Be proactive
Potential Causes of Action

- Breach of Contract

- 12% penalty plus attorney’s fees prompt payment violation within the time specified in the policy after demand is made

- 20% of the amount demanded
Insurance Companies DO NOT Want You to know
1. They have deadlines
2. You don’t need to hire experts
3. There is no such thing as a supplemental claim
4. 12%
5. They only write what they want to see
6. Proof of Loss
Be SMART About it
How to Pick a Winning Team to Maximize Recovery

① Construction Experience
② Actual Trial Experience
③ Actual Appellate Victories
④ Insurance Experience