

# CONSTRUCTION DEFECTS



Robert Wilkinson

By Robert Wilkinson

*“There is nothing more important than a good, safe, secure home.”*

— Rosalynn Carter

For most of us, the home is our refuge and our springboard. It is a place of memories, family and inspiration. It is often the single biggest investment any of us will make in our lives. How devastating, then, when one discovers their home was not built right: windows leaking during a rainstorm, putting out buckets to catch the drips from the roof, or stepping out onto the deck, afraid it will collapse. All too often, this is the reality many homeowners live with.

I started working in the field of construction defects almost 20 years ago. Since then, I have represented public agencies, retail and industrial owners,

hotel and apartment owners, condominium and townhome associations, and a great many single-family homeowners. Each case is unique, but my homeowner clients have all shared the same anxiety, the same deep-rooted disappointment their home is not what it should be and not what they paid for. My job for these clients starts with reassuring them there is a process and a legal path to follow. It may not be easy, and it is not quick, but most of the time there is some compensation at the end of the road.

For an attorney, construction defect work is complex and challenging. It starts with a basic understanding of construction. I am always thankful I spent a lot of time in my college years working for a small contractor. I learned the basics of framing and siding, and spent many hot Chicago afternoons with a nail gun in hand. That construction work has helped me understand the basic concepts behind most construction issues I see. Also, it has helped me understand that construction, as they say, is more art than science, and mistakes can and do happen. Today, because the defects I deal with vary widely and involve the application of various materials, I rely on my experts (and the internet) to educate me. Window installation, for example, may differ depending on the type of window, and the materials used to flash and incorporate the window. Over time, the methods have changed. I rely on my experts to keep me up-to-date on the latest industry

standards.

The homeowner clients typically do not have that same construction knowledge. They have been teachers, government workers, doctors, tech workers, happily retired, you name it. All they usually know about construction is their windows are leaking when it rains, and they are having to put towels at the base of the windows to try and catch the water coming in. They wonder about the damage they cannot see, and what that water could be doing inside the walls. Many have real concerns about mold and the harm it can cause to their health and the health of their children. Most owners have real financial uncertainty about how they are going to fix their homes. There is a lot of anxiety and a lot of sleepless nights for clients in these situations. It is important for the attorney to recognize the anxiety and worry, and help the clients through it. I will not forget the client I had recently who was taking hard-earned money early from her retirement account due to construction defect issues. Other clients have closed up portions of their homes and moved children to new rooms, to avoid the danger of mold in the walls.

Luckily, homeowners in Oregon are blessed with a pretty good legal framework for the recovery of money for construction defects. It is not a quick process, though. For most homeowners, the process begins with a notice of defect.

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The notice of defect process at ORS 701.560 *et. seq.* requires a homeowner provide a “notice of defect” to a contractor before filing suit. The statute is very precise about what a notice of defect must include. If a plaintiff does not follow the statute, the complaint can be dismissed. The process has a number of steps, but a contractor is required to respond within 90 days with an offer to repair asserted defects, pay some amount of money or deny responsibility for the defects. After that, a homeowner can file a lawsuit or an arbitration claim.

As great as that sounds, I can count on one hand the times a client and contractor were able to come to agreement as to repairs. Often, the contractor will not even respond to a notice of defect. One downside of the statute is it does not really punish contractors for ignoring the process. Sometimes, the contractor

is out of business and there is no one to write back. Copying insurance carriers on the notice of defect is therefore an important part of the process. Some carriers will appoint defense counsel based on the notice of defect alone, while others will wait until a lawsuit is filed.

Breach of contract and, sometimes, breach of the implied warranty of fitness for purpose and habitability are claims available to an “original” owner. Even if an owner is not the original purchaser of a home, that owner can bring a claim for negligent construction, regardless of privity. *Abraham v. T. Henry Constr., Inc.*, 350 Or 29 (2011); *Harris v. Suniga*, 344 Or 301 (2008). In other words, a second or third homeowner can bring a negligence claim against a general contractor and subcontractors for home defects, even if the homeowner is a total stranger to the contractors. Many other states are not so generous, and require privity between the plaintiff and the defendant. Other claims

might be available to the homeowner, depending on the facts of the case.

Every construction defect case requires an expert and, sometimes, more than one. Construction defects can take many forms, and you will need an expert versed in the particular set of problems. The expert must be able to help prosecute the case, of course. But the expert should also be able to explain defects to the client. Just as important, the expert must be able to educate me about the defects. I need to understand the defects in my cases, because I have to take depositions of contractors and others — depositions that really focus in on what happened during construction and why the defects are there. You can’t do that unless you understand the building science behind the defects.

### The building envelope

Most of my cases involve the “building envelope” — that is the siding, windows, doors, roof and decks. For this, you must have an expert witness capable and experienced enough to conduct an investigation, compile a report and then testify as needed. The initial investigation of a home usually involves the expert conducting “destructive” or “invasive” testing. This requires removing trim, siding, or other materials to see if there are underlying defects and property damage. The expert will take photos and, more and more, videos of the defects. Sometimes the expert will conduct water testing and video record the result that shows the path the water takes through the building.

Clients are often dismayed when they see the layers of their home peeled back and the damage water can do to wood over time. I have had experts who reach out and with a bare hand, and take out handfuls of decayed and rotted sheathing, and framing from a home. Sometimes, the damage is so bad the expert will have to recommend temporary repairs for safety. Decks that are deteriorated often will need shoring up to make

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them safe. Sometimes, decks cannot be made safe and must be closed off entirely.

Some cases involve specialty experts. I have had cases where the geotechnical issues are important. I have litigated cases based on houses built on steep hillsides that are moving, and houses suffering from extensive shifting and moving, causing cracks, and windows and doors that stick. Geotechnical experts will often want to do their specific testing, including borings into foundations or hillsides, or the installation of gauges that measure slope movement. Some cases have required structural engineers who can testify as to framing issues or decks that are not built to code. I have had cases where there is significant mold growth, and you will need a mold expert to assess that problems and diagnose remediation. In sum, an attorney in this area has to evaluate the needs of each case, and bring the right expert to bear on the specific defects.

### Inspecting responsibilities

The experts in a construction defect case must be able to assess the building condition and demonstrate why something is defective. They may rely on industry standards, manufacturer instructions or the building code to do this. Also, the experts often have to speak to the efforts the homeowner has made to maintain the home. This is because a common defense tactic in these cases is to blame the homeowner for a lack of maintenance. In almost every homeowner deposition I defend, the defense attorneys grill the homeowner on maintenance. They want to know how often the homeowner has cleaned the roof and gutters, has the home been painted? Does the homeowner check the caulk joints around the windows and doors every year? Does the homeowner's sprinklers get water on the home in the summer? The experts must not only speak to the cause of the defects, they must also be able to diagnose the repair of the defects.



For example, if the windows are installed wrong and leaking, will the expert recommend that all the windows be removed, and then reinstalled properly, or is there some other fix that is not so expensive or intrusive? Once the expert can recommend how the home should be repaired, there needs to be an estimate or a bid in order to establish what it will cost to do the repairs. In Oregon, with our “trial by ambush” rules on expert discovery, much of the information from the various experts would normally be a mystery to the other parties in a case. But, through mediation, the common practice is to share expert opinions, reports, photos and bids.

Construction defect cases can be a challenge with the sheer number of parties involved. It would not be unusual to have a relatively straightforward, single-family home case with five to 10 defendants. The general contractor will typically file a third-party case against many of the subcontractors involved in defects,

from the siding subcontractor, to the roofer, to the gutter installer. The homeowner can allege direct negligence claims against these same parties. Working with this many attorneys and parties involves a great deal of coordination. Depositions, for example, can take days and even weeks. It is part of my job to corral all the attorneys and keep the momentum of the case moving forward.

Some construction defect cases involve motion practice. Most motion practice is focused on contractual defenses, or the statutes of limitations or repose. In Oregon, the statute of repose is 10 years. The statutes of limitations for the most common claims of negligence and breach of contract are two and six years, respectively. Opposing motions, based on the passage of time, typically involve client declarations, and marshaling evidence and argument.

Most of the time, the money to resolve these cases is insurance money. So, a basic understanding of insurance coverage is essential to prosecuting these cases. When contractors are no longer in business, but the insurance carrier is providing a defense, it becomes even more important to know the arguments that will convince insurance adjusters to settle.

### Managing mediation

A good mediator is key to resolving construction defect cases. We are lucky in Oregon to have a number of excellent

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mediators, well versed in the complexities of construction defect work. Often the mediator has to wade into the insurance issues, particularly if the actual defendant is out of business or absent. The mediator also has to manage the competing interests of multiple defendants, all pointing fingers at each other.

Trials in construction defect cases are fairly rare. With the experts involved, trials are expensive. When you add in multiple parties at the trial and the need for lengthy trial settings, it gets even more expensive. The risks of trial for all parties also weigh in favor of a mediated settlement. For the contractors and their insurance carriers, there is always the chance the plaintiff will win and will recover the prayer. Sometimes, there is a prevailing party attorney fee provision that would allow the homeowner to also seek attorneys' fees if victorious. For homeowners, trial is always a gamble, coupled with the added worry of appeals and of being paid from a judgment if the insurance is a problem.

#### Helping the clients

After this many years in the construction defect field, I am happy to say I am still challenged. I learn from every single case. I am often surprised at what we find in the construction, and spend the time to try and understand it. It has been one long educational process. And in the end, it is about the clients, and being able to provide them with answers, hopefully money, and a path through the challenges to a repaired home.

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