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## When Construction Defects Appear, Don't Choose Between Rebuilding and Building Your Case

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When construction defects occur during construction, they intensify pressure from a schedule that may already be tight. Defects must be analyzed, confirmed, removed, and replaced and this can be time consuming. Or course, a construction schedule rarely anticipates defects, demolition, and rework and the owner will still expect the project to be completed on time; however, pressing forward with immediate remediation may have unintended consequences.

Before starting demolition, consider the evidentiary doctrine of spoliation. Spoliation occurs when a party destroys or unreasonably deprives another party of evidence and courts have imposed sanctions on a party that deprives an opponent of evidence. The doctrine has historically concerned documents, but its application has extended to electronic data, and courts

also apply it to building conditions in construction defects cases. So, before tearing out or fixing defective work, consider the need to allow the opposing party to inspect, test and document it.

Imagine this scenario. The concrete in a slab placed by your subcontractor shows low compressive strength results in the 28-day cylinder tests. Tearing out the slab and replacing it will put you at least a month behind schedule and you don't want to waste any time before removing and replacing it. Nevertheless, while you're rebuilding the defective slab, be mindful that you are also building a case. If you plan to recover the costs you incur because of the defective concrete from the responsible parties, you should allow the subcontractor (and possibly the concrete supplier and other implicated parties) to examine, preserve, and/or test the work in question. Failure to do so may subject you to spoliation sanctions and jeopardize your right to recover damages.

Fast forward to the litigation over the defect. The concrete subcontractor may make a case that the concrete wasn't defective at all. Its expert may argue that cylinder tests aren't always accurate, and that some may not represent the actual strength of the concrete – for example, some concrete cylinders may break early due to anomalous concentration of aggregate in the cylinder. The expert may argue that if given the opportunity to review later tests, or conduct alternate testing of the slab's compressive strength, it might be shown that the cylinder test results do not represent the actual concrete strength – that the slab was strong enough, met specifications and should not have been replaced.

Courts may be sympathetic to a party claiming spoliation. You should expect that a trial judge's analysis of a spoliation claim will begin from the presumption that the parties have a duty to preserve evidence. At least one court said that "the burden of prejudicial effects" falls upon the spoliating party.

If spoliation is proven, courts in most jurisdictions allow a variety of sanctions against the spoliator. The harshest sanction for spoliation is fatal: the dismissal of a defect claim or the rejection of a defense because courts may treat the alteration or destruction of evidence as a form of admission by conduct. Other sanctions can be less harsh but still damaging – for example, a judge may presume or instruct a jury to presume that missing evidence would have been detrimental to the party that altered or destroyed it.

Does the spoliation doctrine mean that you must halt construction or repairs that could damage or destroy defective work? Unless there is an emergency or unsafe condition, the answer is usually yes; a pause should be made to put the parties responsible for the defective work on notice and provide an opportunity for them to inspect and evaluate it. The goal then becomes to limit the length of the pause, so that repairs can get underway as quickly as possible. With proper planning and swift communication and action, the pause may not unduly delay remediation. And that pause will pay dividends in building your case and avoiding claims of spoliation.

Every construction defect case is unique, but a few practical steps may guide you through the tension between preserving evidence and moving forward with repairs.

1. Thoroughly document the defect.
2. Give all potentially responsible parties written notice of the problem and an opportunity to inspect the site and document their findings if this can be done safely.
3. Notify the affected parties in writing of what steps will be taken to remediate the problem and when this will be done. Solicit and consider any suggestions from affected parties about preserving evidence or allowing testing.
4. Consider whether an expert should be retained to assess, document, and report on the problem. If testing is done, invite other parties to observe the testing and/or preserve other sections of the work to allow other parties to conduct their own testing.
5. Preserve all documents showing the original condition, corrections made, and all costs associated with remediation. When possible, preserve samples of defective work for later inspection and/or testing.

Owners, General Contractors, and subcontractors, when faced with defective construction, should work to preserve evidence that may be critical in a later legal battle. If they approach the problem prudently, they may be able to build their case while they rebuild the defective work.