



## **2021 CLM Construction Conference**

Sept 22<sup>nd</sup> – 24<sup>th</sup> 2021

San Diego, CA

### **Rocky Mountain Soils and Other CD Issues**

#### **I. Expanding and Contracting Soils & Steeply Dipping Bedrock**

##### **Overview:**

Expansive or “hot” soils are found in pockets across the Rocky Mountain region. Colorado has become infamous for its varying and extreme expansive soils conditions. Expansive soils are, in the simplest terms, those that expand or contract when exposed to moisture. From the early 1990’s to present, expansive soils have led to some of the most frequent and largest exposure construction defect and structural claims in the region, particularly in residential construction. Steeply dipping bedrock zones across the front range of the Rockies cause extraordinary challenges and can lead to significant differential movement in structures. Steeply dipping bedrock presents a unique geological hazard which essentially arises from uneven or sloping beds of expansive claystone bedrock. Construction and engineering techniques in the Rockies have evolved over time to minimize defects arising out of the region’s soil conditions, but not soon enough to prevent devastating financial losses to contractors and their insurers in the region.

##### **History of Rocky Mountain Construction Defect Claims Related to Soils**

The early expansive soils cases frequently focused on slab-on-grade construction in single family homes. Each case typically involved one home and one set of homeowners. Construction means and methods changed as geotechnical and structural engineers and builders alike endeavored to modify construction

techniques to minimize the onslaught of high exposure, soil-related defect claims. As builders moved from slab- on-grade to systems to structural wood floor systems and deeply peered foundation systems, the commonly alleged defects and damages also evolved. A new set of claims followed; namely those focused on mold and moisture. Some highly visible/prominent plaintiff 's defect firms endeavored to change their business model from pursuit of single-home cases to pursuit of class action litigation. Given the impact on recoverable attorney fees and outcomes, that model was somewhat short-lived. As the market for multi-family home construction grew, so did the frequency of litigation (involving soils and a host of other defect claims) across the Rocky Mountain region. While New Mexico experienced a relatively limited number of significant soil-related claims, the more populous regions of the Rockies emerged as construction defect litigation hot spots, particularly in multi-family settings. As legislative and insurance underwriting changes followed, procurement and cost of annual renewable insurance for residential construction professionals became even more challenging across the Rocky Mountain region.

As litigation spend and indemnity payouts escalated and affordable insurance choices became increasingly scarce, builders ceased or slowed multi-family construction starts. Apartment construction starts surged. Affordable, new "for sale" housing options virtually disappeared. Litigation continued throughout the statute of repose on multi-family communities across the region. At present, some opine that the litigation tide is turning back to single family home litigation and/or apartment conversion litigation.

Time will tell whether and how the population explosion and demand for affordable "for sale" properties will impact construction defect litigation in the region going forward.

## **II. Rocky Mountain Region – Special Considerations to for the Claims Professional, Coverage Counsel & Defense Counsel**

As claims and legislation evolve in response to the legal climate, so too does the insurance industry. To be successful, claims professionals must understand the soils-related claims, as well as the policy provisions and exclusions impacted by

those claims. Policy language such as ongoing/known loss provisions, earth movement exclusions and mold exclusions garner increasing attention in the region. Evaluating claims involving defects claimed to manifest and develop over time, treated as ongoing and progressive losses, present a complex host of issues for the claim's professional. Claims professionals evaluating conflicting policy provisions, other insurance clauses and progressive loss defects are faced with a myriad of coverage complexities. Retention of defense counsel knowledgeable about soils and construction issues, and sophisticated in successful risk transfer, has become critical to successful case outcomes.

### **Defense Counsel Considerations**

Given the importance of early case evaluation, and the knowledge that can be gained from meaningful site evaluation, it is important for defense counsel to identify skilled experts and to know the necessary fields of expertise needed for the case at the early stages. This is particularly true for multi-party litigation where structural and geotechnical expertise may be sought by four or five litigants in a single case. Defense attorneys with experience handling soils-related cases can quickly assist the claims professionals in early identification of the various trades, material providers and design professionals whose work, products, and services are likely to be most implicated - - even in the face of vague and wide-ranging allegations of defect. For those cases that can be resolved prior to trial or arbitration, settlement agreement terms are particularly critical when expansive soils are at play. Creative strategies can sometimes be utilized to minimize the likelihood of future litigation. By way of example, in some jurisdictions, parties to a settlement can negotiate the filing of a notice of settlement to be placed in the chain of title for a residence. With such notice in the chain of title, it is possible that claims that would otherwise be pursued by a downstream purchaser may be minimized.

The tripartite relationship between/among defense counsel, insured, and insurer, while beneficial on numerous fronts, can restrict the frank and open exchange in some situations. As a claim's professional, what facts and issues are you *not hearing about* from defense counsel that may be pertinent to your analysis of soils-related claims? Join us to find out.

### III. Current Trends in the Rocky Mountain Region

**Post Pandemic Population Explosion** - While construction continued in some jurisdictions as an “essential activity” throughout COVID-19 restrictions that devastated other industries, there is no question that the building and insurance industries will be detrimentally impacted by the Pandemic for years to come. Post pandemic, statistics demonstrate that populations are flooding from the big cities of the East and West coasts into Midwest and Western states. As a result, the demand for land in the Rocky Mountain region has continued to rise. As suitable building sites in popular areas such as Salt Lake City and Denver become scarce, builders may well be increasingly willing to take the risk of construction over expansive or undesirable soils. As populations explode, the demand for affordable housing follows. Several areas across the Rocky Mountains are experiencing unprecedented shortages of skilled labor. Escalating material prices - nationally and locally - are an added challenge. As a result of this perfect COVID-19 storm, “affordable housing” has become an oxymoron in many locations throughout the Rocky Mountains. As demand for labor and housing increases, quality of construction sometimes suffers at alarming rates. Increased litigation and the ensuing cycle of financial detriment to the insurance and construction industry is an unfortunate, but likely outcome.

The impact of the Pandemic on soil and other construction defect claims in the Rocky Mountain region will be discussed in an open forum, where panelists and attendees can share perspectives and experiences with the group.

#### **Trends in Insurance – Hot Topics for States with Hot Soils –**

Time permitting, the panel will also touch on cutting edge cases and pending legislation emerging in the first three quarters of 2021.