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The Usual Suspects: A Survey of The South's Trickiest Plaintiff's Attorneys

I. The Usual Suspects (But Not Every State Has Them)

Building trends, environmental and economic issues, and the temperament of the judiciary all impact whether a particular jurisdiction is apt to be a construction defects "judicial hellhole," or whether construction defects work simply will not flourish. As one attorney put it, construction defects in the South Carolina low country is a "cottage industry". Likewise, Florida, with its miles of coastline and housing bust is one of the well-known epicenters of construction defects litigation in the United States. Alternatively, large scale construction defects litigation is relatively unheard of in Georgia. However, in those states where construction defects litigation runs rampant, a handful of plaintiffs' attorneys have cornered the market. These attorneys appear time and again in such cases and their *modus operandi* often define the progression of certain claims. This means, if you are going to litigate in each of these states, you need to know the tricks used by the *Usual Suspects*.

a. South Carolina

South Carolina is a hotbed of construction defects litigation. Hundreds of millions of dollars have been spent in construction defects litigation in the state and less than a dozen plaintiffs' firms have cornered the market on prosecuting these cases. South Carolina enjoys a large expanse of coastline and experienced a massive coastal construction boom in the 1990s, fueled by easy access to developer money to purchase land at reasonable costs and an influx of retirees. After the economic downturn of the mid-to-late 2000s, prices plummeted, particularly on multi-family projects. South Carolina is traditionally a non-litigious state, and, at the time of the construction defects wave, there was significant unsettled law open for interpretation. Thus, a wave of construction defects litigation was launched and continues today.

Clever plaintiffs' attorneys in South Carolina have recently focused on eroding the tools used by the defense bar to mitigate damages. In so doing, these attorneys can increase their total recovery at trial and, by default, at mediation in anticipation of trial. While these tricks have produced mixed results, they are successful enough that even the threat of their use has impacted damages analyses.

The Attack on Apportionment

The "setoff" rule addresses sums received from settling parties. Defendants at trial are permitted to "set off" any amount for which they are found liable with the funds recovered by the plaintiff in settlement. The setoff is intended to prevent double recovery by the plaintiff. South Carolina

statutory law provides a "setoff from any settlement received from any potential tortfeasor prior to the verdict ***shall be*** applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C)." S.C. Code Ann. §15-38-15(E) (2012); *see, e.g.*, *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015) (discussing allocation of settlement proceeds between wrongful death and survival causes of action).

Plaintiffs' counsels have recently been seeking to preclude the receipt of a set-off by defendants through a variety of methods. First, plaintiffs have been arguing that the sums received in settlement are "confidential" and, thus, cannot be disclosed. There is no protection for the settlement documents sought in discovery under SC ADR Rule 8. Rule 8 of the SC ADR Rules provides that:

Communications *during a mediation settlement conference* shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications *having occurred in a mediation proceeding*…

Rule 8(a), SC ADR (emphasis added). It is well established that, "[w]hen the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004). Accordingly, while SC ADR Rule 8 specifically protects "written communications having occurred in a mediation," its language does not bestow confidentiality protections to documents prepared after a settlement has been reached and for the purpose of reducing a settlement or release to writing. The former documents are inherently prepared in connection with the litigation and its closing and are not prepared for the sole purpose of mediation. However, as noted above, the plaintiffs' bar recently has been claiming that confidentiality provisions within the settlement documents protect the amount of settlement received.

In order to judge how much a party might be entitled to as a setoff at trial, and to assess liability and settlement strategies, a defendant needs to know how much the plaintiff has received to date. However, by classifying the sums as "confidential" and refusing to provide them, plaintiffs shroud liability in mystery and drive up litigation costs by making a party fight for this information.

A second, powerful trick of the plaintiffs' bar involves allocating the proceeds from the pre-trial settlements to particular causes of action in the settlement documents. Then, plaintiff's counsel argues they are seeking verdict based on another cause of action at trial. This is not a new trick in South Carolina personal injury cases, but counsels are now successfully utilizing it in multimillion-dollar construction actions. In *Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), the plaintiff's counsel secured over $7 million in pre-settlement funds. At trial, the defendants argued they were entitled to a setoff of pre-trial settlement funds. *Id.* The plaintiff asserted that, prior to trial, it had reduced its demand to remove the amounts that, they argued, were attributable to the settling defendants responsible for other, distinct causes of action. *Id.* Thus, the plaintiff argued, and the Court agreed, allowing a setoff of the already reduced demand constitute a double setoff for the defendants. *Id.* at 442, 803 S.E.2d at 484. The problem with this type of argument is the amount of the reduction is often determined by the plaintiff's own expert and is likely to be a sum less than the amounts recovered in settlement. In fact, in the *Oaks* case, the difference in the plaintiff's voluntary reduction and the settlement funds was almost $3.5 million dollars; thus, as a result of this tricky maneuver, the defense lost out on a credit of almost $3.5 million.

Teseniar v. Prof'l Plastering & Stucco, Inc., 407 S.C. 83, 754 S.E.2d 267, 2014 S.C. App. LEXIS 3 (S.C. Ct. App. 2014), cert. denied, 2014 S.C. LEXIS 394 (S.C. Aug. 21, 2014), is yet another example of side-stepping the setoff rule by the plaintiff's counsel. In that case, counsel included the following language on their verdict form, "The plaintiffs have received a total of $8,025,000 in settlements in this matter from other parties. Therefore, any damages that you award plaintiffs would be *in addition to*

those damages already received." Verdict Form, *Teseniar*, No. 2008-CP-10-0049, 2011 WL 7394432 (S.C.Com.Pl. May 13, 2011) (emphasis added). Utilizing this language on the verdict form reclassified the amount of the settlement funds as part of the verdict, rather than as pre-trial settlement funds. The court permitted such language and, therefore, the defense lost out on a potential setoff of over $8 million.

II. Settlement Tactics

Unwritten Settlement Requirements

The South Carolina Construction Bar is fairly close knit. As noted above there are only a dozen or so heavy-hitter plaintiffs' attorneys and perhaps around 50 defense attorneys with practices centered on construction defects litigation. Attorneys are generally taken at their word and refusal to honor one's word would be career suicide. Thus, the field is ripe to encourage unwritten concessions as part of settlement. The most famous of such concessions involves requiring that an attorney eliminate his closing argument, as was the case in *E. Bridge Lofts Prop. Owners Ass'n v. Crum & Forster Specialty Ins. Co.*, No. 2:14-cv-2567-RMG, 2015 U.S. Dist. LEXIS 156947, at *6 (D.S.C. Nov. 2, 2015). Consequently, the jury only heard closing arguments from the plaintiff, the impact of which cannot be overstated, and when the jury convened for closing arguments, the defense table was empty. In the end, the jury returned a verdict for the plaintiff in the amount of $22 million in actual damages and $33 million in punitive damages. *E. Bridge Lofts Prop. Owners Ass'n*, at *7.

Another popular, albeit unwritten, settlement demand has been protecting or eliminating experts. The plaintiff's counsel demands that experts for the developer and/or general contractor who are particularly effective and impactful not be allowed to testify or demands that they not be hired by the remaining defendants as part of settlement. For small player defendants, a settlement with such a provision, when on the cusp of trial, can be ruinous. Similarly, plaintiffs have been demanding that settling parties cancel impending depositions prior to agreeing to settlement terms. Typically, there are a number of depositions scheduled shortly before trial. In a case about to be tried, the effect of canceling depositions can throw the pre-trial preparations of the remaining defendants into chaos, particularly if the judge is not willing to move the trial or insists that depositions be scheduled to occur during trial.

III. The Last Man Standing

Securing a trial date in South Carolina can be difficult, especially for multi-party construction defects cases slated to last more than two weeks. One recent trick of the Plaintiff's Bar is to request dates certain for trial at status conferences. Construction defects cases in South Carolina are eligible for trial within 180 days of the last party served; however, often the "last party" served is a third or fourth party defendant entering the action more than a year after the case has been filed and substantial discovery exchanged. At that time, the case may already have gone before the Court and be subject to multiple amended scheduling orders. In this scenario, so long as the trial date established in the order is not before the 180-day mark, a Court may not provide a "new party additional time to prepare for trial even though counsel for that party may only have just joined the suit.

At least one jurisdiction in South Carolina has advised that they will not set a "trial not before" date more than 30 days after the date of mediation. This means that at mediation, the defense is under the gun to settle or to immediately begin trial preparations. Likewise, a clever plaintiff's counsel will request a status conference to set a mediation date with defense counsel, who is unaware that the

Court may insist on a trial date within 30 days of that date. Defense counsel is then stuck, having given permission to set the mediation date.

IV. Tanking Summary Judgment

Summary Judgment in South Carolina is notoriously difficult. The "mere scintilla" standard is incredibly difficult to overcome and, absent expert concessions that there is no damage attributable to a defendant's work, Summary Judgment is not likely to be granted. Yet, traditionally, if a party has been able to secure a settlement with the plaintiff that includes an issue release, the Court has generally allowed the party to be dismissed as to cross-claims without the permission of the general contractor/developer. Recently, one astute attorney for a national developer successfully argued that "reputational damages" are independent of the construction claims released by the plaintiff. Interestingly, the developer's attorney produced no evidence or testimony in support of reputational damages. Regardless, the mere argument had the unfortunate effect of keeping the defendants, who were otherwise wholly settled with the plaintiff, in litigation.

b. Florida

Florida's litigation trends mirror that of South Carolina. With a warm, humid climate, a history of major storms, and coastline filled with northern retirees, the building boom and subsequent bust hit parts of Florida harder than anywhere else in the country. Likewise, the trend of multi-family litigation has now turned more towards single family residence litigation and, as a result, the Plaintiff's Bar has been doing well.

V. Tricks of the Trade from the Plaintiff's Bar

Two recent rulings out of Florida demonstrate a few of the tricks used by the Plaintiff's Bar against which savvy defense lawyers need to protect. The first is *Altman*, in which a high-rise residential condominium served the project's general contractor with several Chapter 558 notices of claim, alleging over 800 construction defects. *Altman Contrs., Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273, 275 (2017). Florida's Chapter 558 is a statutory process for the resolution of construction defect claims, which requires the provision of notice and an opportunity to respond prior to the initiation of litigation. *Id*. at 274. Following the receipt of such notices of claim, the general contractor notified its insurer and demanded a defense and indemnification. *Id*. at 275. However, the insurer refused to act, claiming that its duty to defend had not been triggered as the state's Chapter 558 notices of claim did not constitute a "suit" under the operative language of the general contractor's insurance policy. *Id*. On appeal, the Florida Supreme Court held that the state's Chapter 558 process is an alternative dispute resolution proceeding and should be treated as a suit under the claimant's commercial general liability insurance policy. *Id*. at 274. As a result of this decision, all carriers now assign counsel for 558 notices of claim where they had not previously done so. Moreover, general contractors are now tendering 558 notices received to their subcontractors and demanding a defense. In this way, the plaintiff's bar is triggering the duty to defend earlier in the process.

The second decision of note was issued earlier this year, *Mid-Continent Casualty Company v. Adams Homes of Northwest Florida Inc.*, No. 17-12660, 2018 WL 834896, at *3 (11th Cir. 2018). There, homeowners sued the successor in interest to the original developer alleging negligence in failing to ensure that adequate drainage was installed in a residential development. *Id*. at *1. More specifically, the homeowners claimed that, due to such insufficient drainage, their homes, streets, and common

areas were now prone to flooding such that the "ordinary use or occupation of their property" was "disturbed" and "physically uncomfortable." *Id*. At the time of the alleged negligent acts, the successor in interest was insured by policies that provided the "right and duty to defend the insured against any 'suit' seeking 'damages because of "bodily injury" or "property damages," with "property damages" defined as "physical injury to tangible property…*or*, [l]oss of use of tangible property that is not physically injured." *Id*. at *2 (emphasis added). The successor in interest demanded a defense under these policies; however, the insurer denied coverage. *Id*. On appeal, the Eleventh Circuit Court of Appeals held that, where a policy's terms so provide, carriers must cover loss of use damages even if there is no accompanying damage to tangible property. *Id*. at *3. Given the recent date of this decision, many arguments based on this holding have yet to be made; however, plaintiffs are likely to use this holding to recover lost rents absent physical damage to the related structure.

Finally, on July 1st, a change in Florida law will take effect that will extend the statute of limitations to file a cross-claim, counterclaim or third-party suit. FLA. STAT. § 95.11 (effective July 1, 2018). By such an extension, guileful owners will be precluded from filing their complaints on the eve of the limitations period's expiration, so to inhibit the ability of the general contractors to investigate and bring their own actions against responsible subcontractors. This additional time is a positive development – we all know what it's like to be the last party joined and to be barred from any filings.

VI. Addressing Additional Insured Challenges

Additional insured claims pursued by developer/general contractor parties are the new norm in Florida. The scope of additional insured coverage is key to determining when a duty to defend has been triggered under a policy, established through phrases such as "arising out of" or "caused in whole or in part." On the one hand, the breadth of the former likely means almost any connection will fall within the scope of the coverage. On the other hand, the narrower language of "caused in whole or in part" requires a pleading of vicarious liability. *King Cole Condominium Ass'n, Inc. v. Mid-Continent Casualty Co.*, 21 F. Supp. 3d 1296, 1299 (S.D. Fla. 2014); *North Point Insurance Co. v. KB Home Jacksonville, LLC*, 2017 WL 3669490, at *4 (M.D. Fla. 2017) (explaining that a "[c]laim brought under the inherently dangerous doctrine is tantamount to a claim for vicarious liability.") Defense attorneys and their carriers should be on the lookout for those claims and work towards resolving such claims quickly, before damages for attorney's fees are incurred.

VII. Hurricanes and the Rise of Single-Family Home Litigation

Currently trending is single-family home litigation, which is not dissimilar to South Carolina trends. Condo litigation prevalent for the last decade or two is now giving way to single-family home cases, usually arising in mega- or mixed-use housing developments. The single-family home litigation in Florida has become so popular that attorneys who formerly specialized in sinkhole litigation are now proceeding from development to development in an attempt to sign homeowners on to join in these suits, which commonly relate to stucco issues and certainly include all subs. On that note, stucco litigation is a driving force in Florida. In a class all by itself, stucco litigation seems to be the darling of the Plaintiff's construction bar in Florida.

c. North Carolina

VIII. Mixed Used Developments and White Shoe Players

The latest trend in North Carolina is construction defect cases arising in mixed-use developments, those that are part residential and part commercial, in large urban areas where the

owner/developer is well-financed. In such cases, white-shoe firms are typically handling owner-side representation. These suits tend to include all contractors and designers as defendants and are very expensive, indicating that owners are willing to foot huge bills to prosecute claims.

Why the Uptick in Additional Insured Claims?

For a long time, insurance coverage law that was relatively favorable for insurers has made construction defect lawsuits prohibitive from a cost standpoint. While North Carolina law is generous to the insured regarding the defense duty, it is stingy as to actual damages covered. North Carolina courts have recognized that "the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986); *North Carolina Farm Bureau Mutual Insurance Co., Inc. v. Phillips*, 805 S.E.2d 362, 365 (Ct. App. 2017). "An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial." *Waste Management of Carolinas*, 315 N.C. at 691, 340 S.E.2d at 377. Due to the ostensible lack of coverage for any award, plaintiffs have been wary about spending too much to litigate these cases. We have seen owners try to mitigate this risk by requiring performance bonds on private projects with more frequency. It is not clear whether this trend is due to lender requirements, or whether owners are simply becoming savvier.

Bad faith claims are not assignable in North Carolina. *Horton v. New South Ins. Co.*, 468 S.E.2d 856, 858 (Ct. App. 1996); *Johnson v. Carolina Casualty Ins. Co.*, No. 98-101-GMS, 1999 WL 33220032, at n. 1 (D. Del. 1999). Consequently, setting up a bad faith case for a contractor against its insurer provides no benefit to a plaintiff. Even if an assignment is valid and not prohibited by a policy's terms, suit is limited to breach of contract claims. Perhaps due to this dynamic, plaintiffs have not been seen rushing to file declaratory judgment actions. However, we have seen a significant uptick in declaratory judgment actions in the context of additional insured claims brought by general contractors and their insurers against the insurers of subcontractors. Broadly interpreting the policy language of "arising out of," North Carolina courts have held that additional insured coverage will be triggered if a causal nexus exists between the work of the named insured and the liability claimed against the purported additional insured. *Pulte Home Corp. v. American Southern Ins. Co.*, 185 N.C. App. 162, 647 S.E.2d 614 (2007). A sufficient "nexus" exists where liability is "a natural and reasonable incident or consequence of those operations." *Id.* Thus, no act or omission by the insured is required to trigger coverage, only a relationship to the operations of the named insured. Debroah J. Bowers, *Risk Transfer – Additional Insured, Insured Contract, Etc*., NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS, p. 5 (June 18, 2016), http://www.ncada.org/resources/CLE/AM16/Materials/VIII.a.GL%20Risk%20Transfer%20Bowers.pdf. Given this broad construction, additional insured provisions have evolved to place limitations on the scope of additional insured coverage. *Id.* at p. 4. Such limitations are achieved by incorporating the terms of named insured-additional insured agreements by reference into the additional insured endorsement of the policy. *Id.* Conversely, the phrase, "caused, in whole or in part by," has been interpreted more narrowly, necessitating some act of omission on the part of the primary policyholder to trigger additional insured coverage. *Westfield Ins. Co. v. Nautilus Ins. Co.*, 154 F.Supp.3d 259, 267 (M.D.N.C. 2016).

IX. Statute of Repose Exceptions

Another strategy of clever plaintiffs' attorneys in North Carolina is to bring negligence claims directly against the subcontractors themselves, as opposed to waiting for general contractors to bring subcontractors as third parties. This move is made for both coverage and liability reasons due to the nuances of North Carolina's economic loss rule. Although traditionally proof of privity has not been

required to invoke the economic loss rule, North Carolina courts periodically refuse to apply the rule where no contract between the plaintiff and subcontractor existed. Louis A. Bledsoe, III, *The Economic Loss Rule*, Superior Court Judges Conference, p. 5-6 (Oct. 2016) https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/The%20Economic%20Loss%20Rule%20%20LBledsoe.PDF; *Buffa v. Cygnature Constr. & Dev., Inc.*, No. COA16-237, 2016 N.C. App. LEXIS 1334, at *13 (N.C. Ct. App. Dec. 30, 2016) (citing *Lord v. Customized Consulting Speciality, Inc.*, 183 N.C.App. 635, 643, 643 S.E.2d 28, 33 (Ct. App. 2007)).

In recent cases, there are two issues primarily raised under North Carolina's statute of repose: one dealing with claims against developers, where the first-time possession or control exception has been applied; and, the other involving claims against general contractors. The general contractor exception will likely prove more significant as the state's Court of Appeals appears to have created an equitable estoppel exception to the statute of repose bar for general contractors. In the two cases in which this exception has been applied, the court found there to be an issue of fact, thus precluding summary judgment, as to whether a general contractor should be equitably estopped from relying on the statute of limitations/statute of repose where:

1. Evidence tended to show that the general contractor placed other building materials over subsurface construction defects before these defects could be observed and the general contractor learned of various defects in the construction without passing information on to the HOA or ensuring that the defects were fixed. *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 497, 764 S.E.2d 203, 217 (Ct. App. 2014).

2. Evidence tended to show that the general contractor supervised the installation of windows, the window installation had significant deficiencies, and the general contractor concealed the defective work by placing other building materials over subsurface construction before those defects could be observed. *Buffa v. Cygnature Constr. & Dev., Inc.*, No. COA16-237, 2016 N.C. App. LEXIS 1334, at *30 (N.C. Ct. App. Dec. 30, 2016).

These decisions are significant because, for the last 30 years or so, the statute of repose in North Carolina has been virtually exception-proof. While the statute provides an exception for "willful/wanton conduct," no Court of Appeals or Supreme Court decision has ever utilized this exception to reverse summary judgment for a contractor, despite egregious facts. Yet today, the Court of Appeals recognizes an exception that is arguably breached by ordinary negligence, which may lead to an increase in the filing of construction defect suits, as well as a wave of significant changes in the availability of the statute of repose as a defense. While this has yet to fully play out, aggressive plaintiff's attorneys will inevitably "crack the nut."

Key construction defect defenses in North Carolina include:

1. N.C. GEN. STAT. § 1-52 (2017).
   North Carolina's most prevalent statute of limitations section, which includes a discovery provision for the "claimant's property."

2. N.C. GEN. STAT. § 1-15 (2017).
   North Carolina's statute of limitations provision relating to professional malpractice claims. Battles frequently arise over the way in which this statute interacts with other time limitations statutes.

3. N.C. GEN. STAT. § 1-50 (2017).
   North Carolina's statutes of repose for both improvements to real property and product liability. The distinction in materials covered by the provision hinges on whether the provider was merely selling the materials on the open market, or whether the products were intended to be delivered to the project in dispute. It should be noted that hidden within this repose statute is a provision that creates a discovery rule for use within N.C.GEN.STAT 1-52, North Carolina's three-year statute of limitations. This discovery rule applies to any claimant, not only the property owner. While federal courts have acknowledged this provision, state courts do not appear to have yet addressed the subject.

4. Contributory Negligence
   A common law defense.

5. Indemnity
   A common law defense. North Carolina does not recognize equitable indemnity. Indemnity must be based on either: (1) negligence; or, (2) an express, not implied, contract.

6. N.C. GEN. STAT. § 22B-1 (2017).
   North Carolina's anti-indemnification statute, which is applicable to indemnity claims based on negligence. This provision provides that an indemnity clause will not be enforced where it ostensibly seeks to require the indemnitor to indemnify the indemnitee, or its agents or other subcontractors, against their own negligence.

X. The Not So Usual Suspects

d. Georgia

In contrast with South Carolina and Florida, Georgia is not characterized by a large volume of construction defects litigation. Historically, Georgia construction defects litigation has centered on delay claims. Moreover, Georgia's coast is limited to approximately 110 miles of continental land and four developed barrier islands, islands which did not experience much multi-family development during the building boom. As such, Georgia lacks two key factors that have served as drivers of the litigation trains in South Carolina and Florida. Likewise, case law has created a unique setting for construction defects litigation in Georgia. In *Stamschror v. Allstate Ins. Co.*, the Georgia Court of Appeals reiterated that a cause of action for negligent construction accrues upon "substantial completion of the project, not upon discovery of the negligence." 267 Ga. App. 692, 693, 600 S.E.2d 751, 753 (Ct. App. 2004) (citing *Mitchell v. Contractors Specialty Supply*, 247 Ga. App. 628, 629, 544 S.E.2d 533, 534 (Ct. App. 2001) ("[T]his rule applies notwithstanding the fact that the [plaintiffs] may have had no knowledge of any alleged defects until after the substantial completion of the [project]."). Consequently, the statute of limitations may expire even before damages have been sustained. As such a holding relates to the statute of repose, Georgia courts have explained that, even where no discovery rule applies to the statute of limitation, the statute of limitation may coexist with the statute of repose. *Mitchell*, 247 Ga. App. at 630, 544 S.E.2d at 535 (citing *Howard v. McFarland*, 237 Ga. App. 483, 486-87, 515 S.E.2d 629, 632-33 (1999)). Thus, the statute of repose cannot be used by plaintiffs to extend the statute of limitations.

Everything Is Twice As Hard

The downside of Georgia's lack of construction defects litigation is that, when litigating a claim, one is *not* dealing with the "Usual Suspects." There is no established plaintiff's construction defects bar and each case can be a first-time experience for plaintiff's counsel. Such a lack of experience can be challenging for all involved. Seasoned construction defects litigators in neighboring states understand the pace of the case, the claims typically made, including those claims that are likely to fail, as well as the identity and expected testimony of the standard experts. However, this is not the case in Georgia. There, there are no go-to experts and, therefore, less experience-based information upon which to draw. Likewise, finding your own responsive expert is challenging as the pool is smaller and those that are viable candidates likely lack the substantial deposition and trial experience of experts in other states with higher volumes of construction defects cases.

Yet another issue arising in Georgia relates to negotiation tactics and settlement strategies. In states with active construction defects practices, defense counsel can draw upon prior experiences with plaintiff's counsel to determine settlement value and create a negotiation strategy early on. Likewise, experienced plaintiff's counsel knows what they can, and what they cannot, recover in a suit due to their prior dealings with defense counsel and carriers, as well as the scope of damages. However, none of this is applicable in Georgia. Moreover, because each case is so unique in Georgia, it is twice as difficult to resolve.