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Qualifying Language in Repair Litigation

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Speaker Bios

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Nicholas C. Snow, Esq.

Nick has been in and around the construction industry in some form for more than 20 years with experience in grading and drainage, framing, waterproofing and roofing. He prides himself in resolving complex disputes in a timely manner and regularly helps his clients navigate bid disputes, breach of contracts, delay claims, termination, differing site conditions, mechanic's lien foreclosure, and trust fund violations. His experience includes handling large loss first-party property coverage disputes, bad faith litigation, subrogation, contract negotiation, government contracts, and employment issues. Aside from earning his Juris Doctorate, Nick also earned his construction management certificate from Columbia University.

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Ryan Phillips, PE, MSCE

Ryan has testified approximately 70 times, providing expert witness opinions relating to quantum/damages, cost estimating, scheduling, allocation, building codes and standard of care. Ryan earned his Bachelor of Science in Engineering with a Mechanical Specialty from the Colorado School of Mines and his Master of Science in Civil Engineering and Engineering Mechanics from Columbia University. Ryan routinely advises developers, contractors, engineers, architects and attorneys regarding best practices and risk management pertaining to the built environment.

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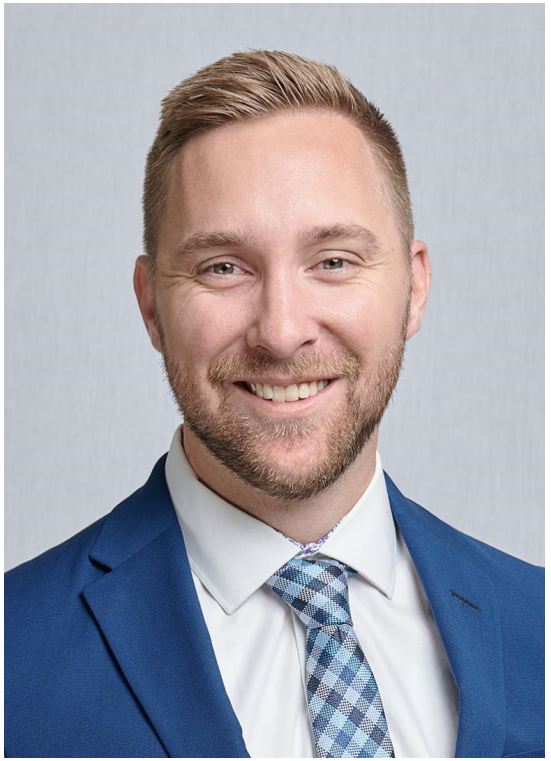
Matthew W. Blubaugh, Esq.

A Colorado native, Matt's background in architectural engineering and construction management gives him an insider's perspective when counseling clients. He represents construction and design professionals, and his background enables him to better understand technical project documents and have detailed conversations about the design and construction process with clients. His experience includes counseling contractors, engineers, architects, and other professionals on issues including defective construction, payment and contract disputes, and contract negotiations.



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Outline

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Presentation Outline

- Examples of qualifying language and its impacts from a liability and costing standpoint
- Approaches from experts to address issues with qualifying language
- Approaches from attorneys to address issues with qualifying language

Premise

Increasingly, liability experts have begun using qualifying language within their reports such as recommending repairs “where defects exist.” While this is a potentially acceptable repair recommendation, oftentimes drawings or other means of clarifying where these defects should be assumed to exist are not provided, leaving the responsive experts with an information void and unclear direction on approaches to address these issues. Furthermore, the qualifying language acts as a means of extrapolating proposed repairs.

Examples

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Examples of Concise Language

- ***Remove all*** metal wall caps at the Project (44 locations)
- ***Remove*** ceilings of second-floor units ***where insulation was noted to be missing during intrusive testing.***
- These repairs should be performed ***at all steel awning connections to exterior walls.***
- ***At all*** garage gable trusses, install 2x4 diagonal brace with stiffener at mid length of gable truss wall as specified on Detail LB of structural plans.

Examples of Qualifying Language

- "Where necessary…"
- "As required…"
- "Where defects exist…"
- "Regrade as necessary…"
- "Where proven to exist…"
- "Where damage exists…"
- "Where observed…"
- "May require…"

Report Excerpt of Qualifying Language

"…non-compliant installation of trim and siding at horizontal flashing was noted ***throughout the Project*** and repairs are required."

Report Excerpt of Qualifying Language

"Siding and trim veneer materials are quired to be installed in accordance with manufacturer requirements and the building code in order to perform as intended. The lack of clearance to hard surfaces for siding and trim ***was observed throughout the Project***, which has caused damage and requires repairs. It is our opinion that ***in areas where the siding/trim and adjacent hard surfaces do not have the minimum clearance as required*** by the manufacturer's installation guidelines, ***repairs are required***."

Appendix C – Observations and Intrusive Testing Summaries

- C1: Table 1: Summary of Building Envelope Defects per Intrusive Testing Location

Appendix C1, Table 1 - Summary of Building Envelope Defects per Intrusive Testing Location

				A. Building Veneers and Joint Construction							
				A1a	A1b	A2a	A2b	A3a	A3b	A3c	A3d
Building No.	I.T. Location No.	Facade Direction	I.T. Location Description / Material(s) Tested	Non-Compliant Siding and Trim Clearance to Hard Surfaces	Non-Compliant Siding and Trim Separation from Flashing	Non-Compliant Stucco Clearance to Hard Surfaces	Non-Compliant Stucco Weep Mechanism	Non-Compliant Weather-Resistive Barrier Installation	Non-Compliant Isolation Joints Between Dissimilar Materials	Non-Compliant Isolation Joints at Penetrations in Building Veneers	Non-Compliant Awning Attachment and Flashing
Bldg. 1	1-1	west	Deck Gutter: stucco				x	x			
	1-2	west	Window: siding/trim		x			x	X		
	1-3	west	Window: stucco								
	1-4	south	Window: siding/trim		x			x			
	1-5	south	Deck Edge: stucco						x		
	1-6	north	Veneer Transition: stucco/trim				x	x			
	1-7	north	Window: trim/siding/stucco		x						
	1-8	east	Sliding Glass Door Head: stucco/trim/soffit		x		x	x			
	1-9	east	Garage Door Head/Jamb: siding/trim		x			x			
	1-10	west	Window: stucco								
	1-11	north	Deck Door Threshold: stucco/siding/trim	x							
	1-12	west	Roof Interface: stucco/metal parapet cap					x			
	1-13	west	Roof Interface: siding/ metal parapet cap					x			
	1-14	west	Awning Attachment: stucco								

What do you do?

- Are you to assume these conditions exist everywhere?
- Are you to assume this condition only exists at locations where intrusive testing was performed?
- Does “damage” mean any photo, or a specific photo in the report, appendix to the report, job file, or some other document?
- If wholesale repairs are based on limited observations or testing is this extrapolation?

Approaches from Expert Standpoint

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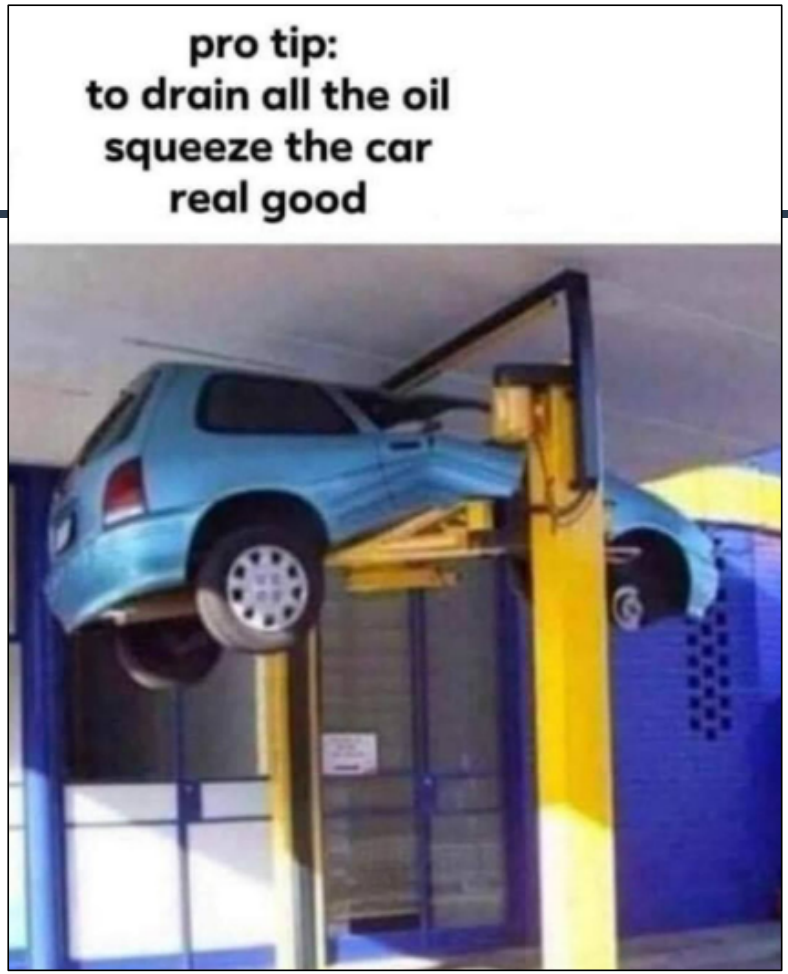
Pro Tip

- Expert – Call your client to discuss.
- Attorney – Call your expert to discuss.



Discuss with Counsel

- Can save time and money…
- Can the lack of clarity be resolved outside of expert reports?
  - Best Case: Clarification leads to repair scope being reduced from the outset.
  - Worst Case: You have a clearer understanding of the expert's approach to the defects.

Defense Liability Expert Approaches

- Need to determine:
  - Should observations/measurements be taken across the entire site/project or just at observed locations?
  - Should intrusive testing be performed?
  - Should performance testing be done?
  - Are the claims of commonality of construction reasonable in any manner?

Defense Liability Expert Approaches

- Dispute the presence of these issues on site:

"At a majority of locations, ***a gap of multiple inches*** was provided between the hard surfaces and trim/siding. However, ***at isolated locations***, the clearance was less than what is noted by the manufacturer and code requirements."

Defense Liability Expert Approaches

- Is this merely a technical violation and is there actual damage?

"It is our opinion that a ***1-inch clearance to hard surfaces is reasonable*** and sufficient to perform over time without a negative effect on the cladding material. Consequently, we believe that where a 1-inch or greater clearance is provided, no repairs are necessary as there would be no perceived benefit and an economical waste."

Defense Liability Expert Approaches

- If the repairs are alleged to be throughout the project, meaning everywhere there might be siding at entry porches, is this extrapolation?
- Should a statistical expert be engaged to dispute this?
  - How much intrusive testing was done to determine “damage” exists?
- Does the entity (general contractor, subcontractor, developer) you are representing have helpful information that can assist you – ask to speak with them.

Defense Cost Expert Approaches

- Evaluate Plaintiff Cost Expert's Job file
  - Do they have superior information?
  - Is their correspondence between experts clarifying the scope?
  - Are they pricing wholesale repairs or repairs simply at tested locations?

Defense Cost Expert Approaches

- Provide alternate estimates based on different assumptions
  - Assume conditions exist throughout the site
  - Assume conditions only exist at locations where testing was done
  - Use photographic documentation to serve as the basis for locations
  - Compare observation logs/matrices to repair recommendations…this is especially helpful when the repair states corrective work is necessary "where observed."
- Take a strict stance to only price issues where it's specifically alleged based on Plaintiff's reported criteria.

Defense Cost Expert Approaches

- Assist with document review to determine what contractors did what work and on which buildings.
  - This can assist with disproving any “commonality” arguments.
- If a statistical expert is to be used, the cost expert can provide quantities of the various components of a project to allow for the statistician to perform calculations as it relates to sample size and probability.
- Evaluate if poorly conceived repair programs overlap with other proposed repairs.

Legal Approaches

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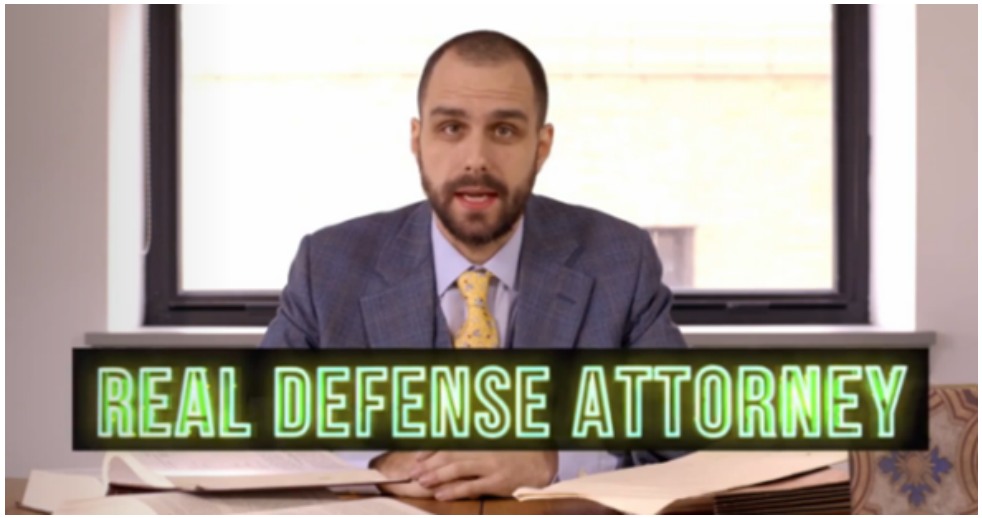
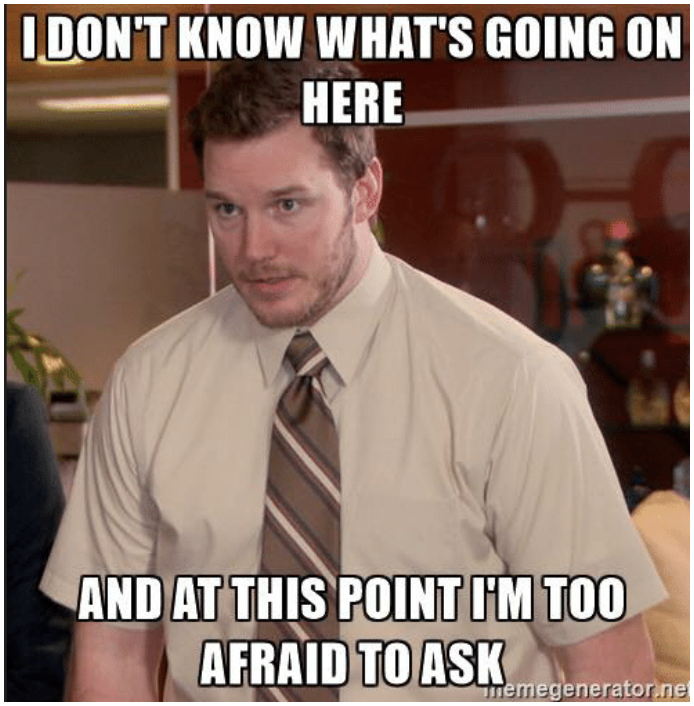
Approaches from the legal standpoint

- Why extrapolate/use limited testing?
- Burden of Proof.
- CDARA.
- Reliability.
- Common Sense.
- Use your experts.



Approaches from the legal standpoint

- Why would Plaintiff use extrapolation and/or limited testing to determine damages?
  - Cost
  - Time
  - Feasibility
  - Ulterior motives?



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Approaches from the legal standpoint

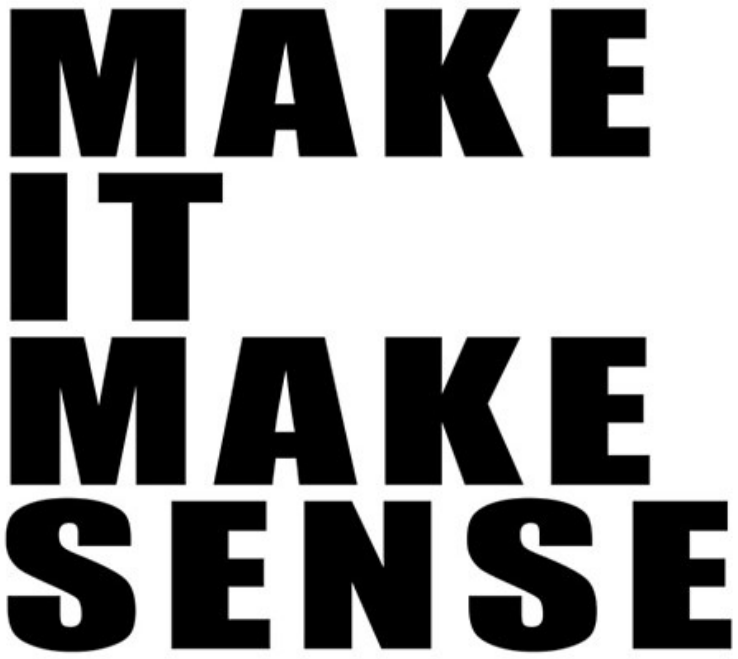
- Burden of Proof
  - Remains with the Plaintiff
  - Requires Expert Testimony from:
    - Liability and Statistical Experts.

Approaches from the legal standpoint

- How does CDARA help?
  - No later than 75 days before the lawsuit is filed (or 90 days in a commercial case), a claimant must deliver to the construction professional a written notice that describes the alleged defect "in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect." C.R.S. 13-20-802.5(5); see also C.R.S. § 13-20-803.5(1). The claimant is then obligated to provide the construction professional with access to the allegedly defective construction within 30 days of service of the notice of claim so that the construction professional may make an inspection.

Approaches from the legal standpoint

- Reliability
  - Representativeness
  - Sampling methodology
  - Sample size
  - Selection of sample
  - Sample analysis
  - Margin of error
  - Mathematical modeling

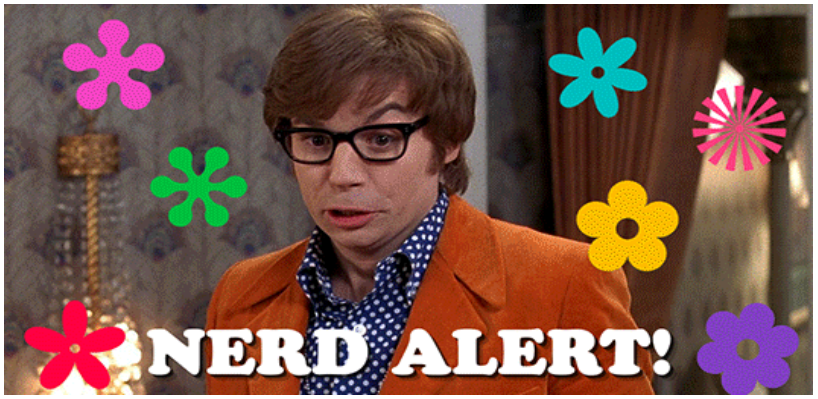


Approaches from the legal standpoint

- Common Sense Approaches
  - Don’t forget, you’re trying this to a jury.
  - Sample size relative to size of project
  - Number of contractors/trades on project implicated by claim.
  - Where its PROVEN to exist.
  - Poke holes.

Approaches from the legal standpoint

- USE YOUR EXPERTS.
  - Involved early and often.
  - Determine who you need to prove/disprove each issue.
  - Meet with them before inspections and depositions.
  - Have them speak to your client.
  - Use them to determine what information you need.



Legal Standards

- C.R.C.P. 26(a)(2)(B)(I)
  - Expert reports shall include:
    - "(a) a complete statement of all opinions to be expressed and the basis and reasons therefore;"
    - "(b) a list of the data or other information considered by the witness in forming the opinions."
- CRE 702
  - *People v. Shreck*, 22 P.3d 68 (Colo. 2001)
    - Court must make determination on "(1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury."

Approaches from a legal standpoint

Your Experts' Reports:

- Liability
  - Challenge qualifying language
  - Clear scope of repair recommendations
  - Either include quantities or direct cost expert to evaluate

- Cost
  - Address Plaintiff's quantities and basis/lack thereof
  - Provide basis for quantities

Extrapolation

- Methodology
  - Random selection, sample size, margin of error
  - ASTM Standards
    - ASTM E122, E141, E178, E2128
  - Consider retaining you own expert
- Assumptions
  - The project and the players
  - Discrepancies in existence of defects

Approaches from a legal standpoint

Plaintiff's Liability Expert

- Deposition
  - Scope of observations?
  - Documentation of quantity?
  - Conversations with cost of repair expert?

- Motions Practice
  - Rule 26: failure to disclose basis of opinions
  - Rule 702: reliability, not helpful to the jury

Approaches from a legal standpoint

Plaintiff's Cost Expert

- Deposition
  - Interpretation of qualifying language in repair recommendation?
  - Basis for quantities (observations, conversations, etc.)?

- Motions Practice
  - Rule 26: failure to disclose basis of opinions
  - Rule 702: reliability – improper assumptions, lack of basis, etc.