



## Winning the liability game

*When dealing with liability claims, the best defense is a good offense; thorough documentation is tough to beat*

*By Dan Berman and Stacey Blank*

Many states such as California, Nevada, Arizona, Hawaii, Washington, Georgia, Texas, Colorado and Florida have adopted laws outlining procedures for handling construction defect claims prior to filing a lawsuit. These laws sometimes are referred to as “right to repair” statutes. Their stated purpose is to afford builders and contractors the right to repair construction defects before a lawsuit is filed.

Unfortunately, these laws do not outline or guarantee a builder the ability to recover the monies spent on these repairs from insurance and/or the trades whose work is implicated. Despite this shortcoming, there are many ways builders can protect themselves both before and after a claim is made.

For starters, outlining subcontractor obligations for repairs in

subcontracts is a good idea. The subcontracts delineate the construction work the subcontractors are expected to perform. The contracts also can delineate the obligations the subcontractors have to repair faulty work and/or to reimburse the builder for making repairs to the faulty work. Subcontractors should not be required only to repair the faulty work itself, but also should be required to repair any damage caused by the faulty work.

For example, if a plumbing fitting leaks and damages the wall of the kitchen, the plumber should be required to fix the fitting which leaked as well as repair any damage caused by the leak. Simply stating in a contract the subcontractor must repair any faulty work may not be enough. The subcontract should make it clear the subcontractor is responsible for fixing the faulty work and any damages it caused.

Another good practice is to keep updated records regarding subcontractor/supplier contact information. For every home or building constructed, a master list should be kept of all subcontractors who performed work on the project and all companies that supplied materials. This list should include: name of the company/contractor; contractor’s license number; address and



telephone number of the main office; name, address and telephone number (both cell and office) of the jobsite superintendent; and the name of the person with whom the contract was negotiated. After work has been completed, the contact information should be updated yearly. This will ensure that if you need to contact the subcontractor/supplier, the contact information is current.

Keep a record of manufacturers' warranties to help homeowners if needed. Oftentimes claims arise because of a product failure — a window doesn't lock, a thermostat isn't working or a faucet is leaking. Many times homeowners are not educated about making claims directly to a manufacturer. By keeping records of the warranties offered by manufacturers, a builder can help the homeowner make a claim directly with the manufacturer. If it is a product failure that falls within the warranty, the manufacturer often will repair or replace the item at its own cost.

It's also important to develop a procedure for reporting problems. The agreement with clients to build or purchase a home typically outlines a builder's obligations to that client, including any obligation the builder may have to repair damages. These agreements also can outline the client's obligations to the builder. The agreement should clearly set forth the procedures a client should use to notify the builder of a problem. By developing a procedure before work is completed, confusion and risk of a claim can be minimized.

For example, if a builder requires that all claims for faulty work be submitted in writing, provide a form to the client that identifies the information the builder needs to make repairs such as: a description of the problem; location of the problem; when the client first noticed the problem; and any damage caused by the problem. The more clearly a builder sets forth the procedures the client should use, the more likely the builder will be able to

identify the most efficient way to respond to the problem before the builder arrives at the home to make the repair.

## Repairs and claims

Making repairs correctly is important, but so is documenting the repairs, damages and expenses. Photographs should be taken when the claim is first reported. Documenting the damage is key when builders submit a claim to their insurance company. By establishing there was damage before any repairs were made, builders can short-circuit a claim that the repairs builders made were voluntary or unnecessary and therefore not covered by their insurance policy.

The preresearch photographs should be taken not only of the specific item of damages, but also of the general conditions. Oftentimes if there is no point of reference photographed, the damages can appear to be more significant than they truly are. If the damage appears on a wall, take a picture of the entire wall not just the damaged portion. A written description of the photographs should be prepared as the photographs are taken and written on the back.

As soon as the claim is received, notify any subcontractor whose work is suspected to be the cause of the damage. This notification should be made in writing. Ideally, the subcontractor will respond and make the repairs. Sometimes, however, the subcontractor may not respond and will not undertake the repairs. Ultimately, repairs should be made whether or not the subcontractor responds to the notification.

Regardless of who makes the repairs, obtain a signed authorization from the client to do the work, before they are made. This document should outline where the work is going to be performed, a general description of the work and the time frame within which the work will be performed. This authorization also should list any additional compensation such as a daily expense allowance or relocation expenses. Finally, in conjunction with the work authorization, once the work is completed the client should acknowledge the work was satisfactory and all other compensation agreed to was received. Keep the work authorization with the records regarding the repairs.

While the repairs are underway, whether by a builder or a subcontractor, photographs should be taken to document the step-by-step process of revealing the cause of the damage and the repairs to same. A written log should be kept as the photographs are being taken. After the photographs are developed, the date and description of what the photographs depict should be written on the back of each photo. Documenting the repairs with photographs is a simple way of keeping a clear record of work performed.

Once the repairs are completed, create a file that contains: the notification received from the client; all photographs taken; written logs created when photographs were taken; signed authorization and acknowledgement received from clients; the written notification to the subcontractors; copies of all invoices and contracts signed to have the repairs performed; and copies of all checks to pay for the repairs and any additional compensation to the client. By keeping a complete file regarding the repair, most if not all the documents builders will need to recover costs associated with the repairs will be located in one place.

Organization and good record keeping is the key to managing client claims. By maintaining these records, builders are not only documenting that they addressed the damages and claim made, they are arming themselves with the documents necessary to control and potentially recover costs associated with the repairs. ▀

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