

Tough Days for Stucco-Clad McMansions

BY DANIEL J. RUCKET

Special to the Legal, PLW

During the housing boom in the late 1990s and early this century, there was a proliferation of new construction of large, luxury stucco homes, often called “McMansions.” We are now seeing a rash of water infiltration claims and lawsuits across the country, including Southeastern Pennsylvania, against developers, builders and subcontractors arising from alleged problems with the “building envelope” of these homes.

Extensive water infiltration around and through the exterior of these homes can cause major rotting and damage to the plywood or oriented strand board (OSB) sheathing and framing, often resulting in the formation of mold. Repair costs can easily reach six figures per home. Litigation of water infiltration claims can be difficult and costly to defend, often involving numerous parties, documentation and expert witnesses.

This article will address basic difficulties and issues encountered by contractors in determining the source and cause of the water infiltration, as well as assessing responsibility for it, and an important current insurance coverage issue regarding these claims.

Contractors, from the builder to the stucco installer, window installer, framer, roofer and often the window manufacturer, initially are faced with determining if, how



DANIEL J. RUCKET

is a partner at Rawle & Henderson in Philadelphia, defending builders and subcontractors in a variety of construction defect cases, including both property and bodily injury claims. He may be contacted at 215-575-4217 or drucket@rawle.com.

and why water is infiltrating the exterior cladding or windows of the home. This is not as easy as it may seem. Stucco is cementitious, meaning that water naturally will migrate through it, if it is not finished with an acrylic or elastomeric finish, to the underlayment, which traditionally was composed of 15-lb. asphalt-impregnated felt over plywood sheathing.

In addition, water can infiltrate around and under the stucco from various other areas, including unsealed joints and junctures, roof to wall intersections, and through the windows themselves. Traditionally, when using 15-lb. felt, water going through and around the stucco would either drain down and out of the exterior of the home or dry up before infiltrating through the felt to the sheathing. With modern construction, this draining and drying is no longer occurring the same way, which is an entire other subject not addressed here. Plaintiffs experts in these cases now typically focus on the source of the water infiltration with recommendations on how to

prevent the water from getting around and through the stucco.

The first problem for plaintiffs and defendants is to determine whether there is water infiltration causing damage to the underlayment. Some areas of water leaks are evident by visual inspection. Staining of stucco under the corners of windows, for example, is very visible and often indicates a problem around that area of the window.

Finding water infiltration in other areas, including the stucco field areas away from through wall penetrations or roof/wall intersections, is more difficult. Regardless of the area, testers commonly find water infiltration by moisture testing, where holes are drilled through the cladding and probes of a moisture reader are inserted to gauge moisture levels.

An elevated moisture reading, however, is not necessarily indicative of damaged sheathing or even a major source of water infiltration. Where severely elevated readings are found, more destructive testing may be necessary, which can entail cutting out a large area of the cladding to observe conditions under it. While repairing and patching areas with elevated moisture readings or damage is a common remedy, most plaintiffs experts recommend completely decladding the entire home upon finding only a few elevated moisture readings.

The next problem is determining the source of the water. This varies from spot to spot on the house. Most often, water infiltration is seen below windows. This

water may be coming from a problem with the window itself, such as a separated miter joint, improperly beveled windowsill, lack of caulking around the window frame, or improperly installed windows or stucco, among other things. Water underneath roof/wall intersections may be indicative of water failing to kick out from the wall due to lack of diverter flashings, improperly installed roofing or stucco, or lack of caulking at the top edge of the stucco. Damage seen in the stucco field may be due to, among other things, excessive cracking of stucco, lack of caulking or water pooling along band joists from infiltration at nearby windows. These lists are not exhaustive. Specific areas of damaged sheathing may be due to a combination of multiple different sources, involving more than one trade.

Plaintiffs often repair their homes before all contractors and subcontractors have an opportunity to inspect them, making spoliation an issue. Photographs do not show whether OSB is soft — an indication of extensive damage. Felt residue seen on photographs can easily be confused with damaged sheathing. Inspections of homes are crucial to evaluating the source and extent of the damage.

The next problem is determining responsibility for the water infiltration. Plaintiffs typically blame the builder, which in turn blames the multiple trades for the problems. Most of these homes have extensive fields of stucco, many windows, decorative

McMansion continues on **CL10**

Complex Litigation

ADR

Risk Management

Forms & Contracts

Client Development

Westlaw® Construction Law Practitioner.
Save time. Save work. Find more. Every step of the way.
 From a single screen, enjoy ready access to tools that save you time and work, every step of the way.

- Leading practice guides – including *Bruner & O'Connor on Construction Law!*
- Construction law forms, with the ability to search by title or subtopic across Westlaw
- Litigation materials specific to construction law
- The ability to learn quickly how courts have interpreted AIA documents

View a **FREE** online demonstration.

For a free, no-obligation demonstration, visit www.WestlawPractitioner.com or call 1-800-762-5272.

McMansion

continued from CL7

window heads and multiple roof sections. Damage may be more severe on different elevations of the home based on the design and location of the home. Each area with elevated moisture readings or damaged sheathing must be carefully reviewed to determine which of several trades may be responsible. Window testing also may be necessary if obvious defects in the windows are not evident from visual inspection.

If defending against allegations of negligent construction is not enough, contractors in Pennsylvania currently are faced with a major insurance coverage problem. Almost all contractors obtain Commercial General Liability (CGL) insurance to protect them from risks of loss due to injuries and damage to persons and property as a result of their work. On Oct. 25, 2006, the Pennsylvania Supreme Court decided *Kvaerner Metals Division of Kvaerner of United States Inc. v. Commercial Union Insurance Co., et. al.*, holding that a coke battery builder was not entitled to coverage under its CGL policy for damage to the coke battery as the damage due to water infiltration was not an "occurrence" under the policy.

Kvaerner, however, lacked sufficient clarity when evaluating coverage for water infiltration on stucco clad homes, particularly damage to the sheathing caused by

water infiltration. After *Kvaerner*, many insurance companies have denied coverage for these claims, while others continue to defend and pay them.

On Dec. 28, 2007, the Pennsylvania Superior Court decided *Millers Capital Insurance Company v. Gambone Brothers Development Co., Inc., et. al.*, reargument denied Jan. 11, which involved five stucco homes in Chester and Montgomery counties. The *Millers Capital* court, relying on *Kvaerner*, held that the water infiltration was not an "occurrence" and therefore there was no coverage under the standard CGL policy issued to the defendant builder.

Many builders and subcontractors do not have an extensive amount of available funds to pay for these water infiltration claims. Under the *Millers Capital* decision, without insurance to cover these claims, many builders and subcontractors face potential liability exposure well in excess of available funds, limiting the potential recovery for plaintiffs. Combined with the current mortgage/credit crisis, the *Millers Capital* decision also puts the viability of many of these companies in serious risk.

The defendant builder in *Millers Capital* has filed a petition for allowance of appeal with the Pennsylvania Supreme Court. One of the primary reasons cited by the defendant builder in the appeal is a March 10 decision by the South Carolina Supreme Court in *Auto Owners Insurance Company*

Inc. v. Virginia T. Newman and Trinity Construction Inc., in which it held that there is coverage under a standard CGL policy for water infiltration claims on stucco homes causing damage to the sheathing. The *Auto Owners* court underwent a detailed analysis of its prior decision in *L-J v. Bituminous Fire & Marine Insurance Co.*, which also addressed what is an "occurrence" under a CGL policy, noting that there has been confusion in other courts' interpretation of the ultimate holding in *L-J*. The *Auto Owners* holding and comment about confusion over *L-J* are extremely interesting since the *Kvaerner* court relied heavily on *L-J* in its decision, finding *L-J* "instructive in our analysis."

If the Pennsylvania Supreme Court decides to hear the *Millers Capital* appeal, and continues to follow the South Carolina Supreme Court in its analysis of this issue, it appears logical that it would overturn the *Millers Capital* holding and find that water intrusion damage to sheathing and other material underneath and around stucco cladding would be covered under the standard CGL policies held by most contractors. Thus, what the Pennsylvania Supreme Court decides to do with the *Millers Capital* case will have widespread implications for homeowners, builders, contractors and subcontractors across the commonwealth of Pennsylvania.

In defending water infiltration lawsuits relating to stucco and stone clad homes, subcontractors should aggressively defend

themselves, especially on causation. Whether the lawsuit is brought by a homeowner or builder, it can be document intensive and expensive to prosecute, often resulting in large attorney's fees that dissipate any potential recovery. For the builder, angry homeowners with new homes that have severe water infiltration problems make sympathetic plaintiffs. Builders should seriously consider trying to remediate these homes when first notified of water infiltration problems. These problems are usually initially limited to only a few areas of the home. Early remedial action may prevent further, more extensive, problems and circumvent costly litigation and a potential, larger judgment.

Builders and subcontractors also should not hesitate to let potential plaintiffs know that litigation will be costly to prosecute and that they should opt, instead, for a modest settlement at the outset of the litigation, if possible. Homeowners also need to be careful when remediating their homes not to spoliage potential evidence. Due to the plethora of potential causes of water infiltration at different areas of each home, homeowners should notify the builder and subcontractors about water problems and any planned remediation as soon as possible, so they have an opportunity to inspect the home. Homeowners are more likely to obtain an amicable and acceptable resolution if they engage the builder and subcontractors before rather than after repairs have been made. •

Damages

continued from CL8

STATUTORY CLAIMS AND REMEDIES

What if you are a contractor or subcontractor and the party with whom you have contracted is wrongfully withholding payment? Do you have additional statutory rights and remedies depending on whether you are working on a public or a private project? In Pennsylvania, the answer is "yes."

For example, pursuant to Pennsylvania's Contractor and Subcontractor Payment Act (CASPA), contractors and subcontractors may be able to recover statutory interest (at twice the normal rate of interest in Pennsylvania), statutory penalties (upon a showing of payment being withheld in bad faith) and reasonable attorneys' fees (to the extent that the contractor or subcontractor

is the substantially prevailing party).

What constitutes "bad faith" for purposes of CASPA is a fact-intensive determination, but Pennsylvania's courts have recently been providing pertinent parameters. For example, in *Imperial Excavating & Paving v. Rizzetto Constr. Mgmt.*, the Superior Court of Pennsylvania reaffirmed that monies withheld for a purported deficiency item on a construction project must bear at least a reasonable relation to the value of the item and that the withholding of twice the value of a purported claim exposes the withholding party to CASPA penalties.

Furthermore, although the determination of whether a party "substantially prevailed" under CASPA may be a discretionary determination based upon the facts of the case at issue, Pennsylvania's courts — for example, the Imperial Excavating court — appear to be more frequently enforcing the express language of CASPA providing that reasonable attorneys' fees "shall" be

awarded upon a finding that payment was improperly withheld.

In like manner, the Commonwealth Procurement Code provides for statutory interest and a discretionary (as opposed to mandatory) award of penalties and attorneys' fees if monies are wrongfully withheld from payment and a claim must be pursued. To that end, in the James case, the Commonwealth Court recently held that an award of attorneys' fees in excess of recovered, contract damages was proper. Moreover, in *Department of Gen'l Servs. v. Pittsburgh Bldg. Co.*, the Commonwealth Court noted that the penalty and attorney fees provisions of the Procurement Code are not necessarily limited to the wrongful withholding of progress payments, but rather also apply to the arbitrary and vexatious withholding of payment for costs incurred as a result of a suspension of work or due to unsuitable soil conditions.

KEEPING AN EYE ON DAMAGES

Contractors and subcontractors plainly want to be paid contract or subcontract monies that are rightfully due and owing. That said, contractors and subcontractors should be aware that they may have other damages claims for which more detailed claims calculations are necessary, and project participants should be aware of potential exposure to such claims. Likewise, owners, contractors and subcontractors must always be aware of statutory rights, remedies and potential liabilities.

The recent cases discussed above are certainly an indication that Pennsylvania courts are now expressly embracing and/or explaining these avenues of construction damages. Knowing and understanding current developments in Pennsylvania construction damages law is essential to presenting or defending against construction claims under both common law and statutory theories. •

**Electronic
Data Discovery
is a necessity in
today's techno
age!**

The Legal Intelligencer and Pennsylvania Law Weekly Present

E-DISCOVERY SUPPLEMENT

**Issue Date:
August 25, 2008**

**Space Closing:
August 14, 2008**

**Material Deadline:
August 19, 2008**

Call 215-557-2300 for more information.

**Reserve
your ad
space
today!**