

AM I GETTING WHAT I PAID FOR?
AN OWNER'S LAMENT OVER UNFULFILLED
EXPECTATIONS

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I. Introduction

Every Owner enters into project development with a vision that drives expectations. In developing and constructing its project, the Owner expects to pay for a project that meets its vision and can be operated and maintained in the way the Owner intended. When confronted with significant design or construction defects the Owner's expectations go unfulfilled. Facing these circumstances, an Owner is likely to recall its vision, compare it to the project it is receiving, and wonder "Am I getting what I paid for"?

This paper takes the Owner's perspective of design and construction defects and briefly defines defects and describes the sources of various defects. The bulk of this paper, however, is devoted to summarizing a comprehensive strategy for avoiding and combating defects. In short, the best way for an Owner to avoid and combat defects is to remain actively involved in its project by taking a two phased approach that integrates prevention and recovery. This paper briefly discusses many strategies and related legal concepts, including contract drafting and interpretation, insurance and bonds. It is not the intent of this paper to provide the reader with a comprehensive analysis of these concepts or related issues; rather, the intent of this paper is to provide an introduction into this subject matter and to provide the reader with a basis for further thought, review and research.

II. What is a Defect?

Webster defines "defect" as "an imperfection that impairs worth or utility" or "a lack of something necessary for completeness, adequacy or perfection."¹ While in the construction

¹ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 302 (10th ed. 1996).

context perfection in the traditional sense is not a criterion for determining whether a defect exists, a failure to design to applicable codes or standards or a failure to construct in accordance with the contract documents or applicable codes and standards are the kinds of “imperfections” that amount to construction defects. Consistent with this definition, California’s “Right to Repair Law,” which applies to residential construction, defines construction defects by providing a comprehensive list of standards, the violation of which will subject design professionals and contractors to liability for damages.² A similar statutory scheme in Georgia states that “construction defect” has the meaning:

assigned by a written, express warranty either provided by the contractor or required by applicable statutory law; if no written, express warranty or applicable statutory warranty provides a definition, then “construction defect” means a matter concerning the design, construction, repair, or alteration of a dwelling or common area, of an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling or common area on which a person has a complaint against a contractor. The term may include any physical damage to the dwelling or common area, any appurtenance, or the real property on which the dwelling or appurtenance is affixed proximately caused by a construction defect.³

III. Sources of Defects

Defects have numerous origins, including design, material and construction deficiencies. For example, design deficiencies can take the form of mismatched materials, misapplication of materials, overly complex designs, or designs that violate applicable codes or standards. These types of deficiencies can result in building components and systems that fail to operate in accord with the Owner’s expectations or have truncated useful life spans.

Material deficiencies can arise out of the use of inferior materials or the installation of incompatible materials. Incompatible materials can cause the premature deterioration and failure of building components. For example, use of incompatible materials can arise in roofing work in

² Cal. Civ. Code §§ 895, 896.

³ O.C.G.A. § 8-2-36.

integrating roofing felts and flashings with certain sealants. Another common example is the incompatibility of certain concrete curing compounds with flooring adhesives.

Construction deficiencies can arise from inferior workmanship, insufficient supervision, other failures to abide by the requirements of the contract documents, and failures to construct in accordance with applicable codes, regulations or standards.

Though often described and discussed in distinct categories, the sources of defects have many overlapping aspects. It is important to recognize that defects rarely arise solely out of one variety of deficiency or another; rather, it is more often the case that the influences of several deficiencies converge to create a defect.

IV. The Consequence of Defects – An Owner’s Parade of Horribles

Design, material and construction deficiencies can all cause construction defects that have devastating effects upon the operation and maintenance of a building. For example, deficiencies in design and construction may result in a defective exterior façade that permits water intrusion into the building. Toxic mold can result from the intrusion and expose the Owner to personal injury lawsuits from building occupants and enormous remediation costs related to both correcting the defect and removing the mold. Similarly, an improperly designed and constructed building envelop and HVAC system may cause moisture to accumulate in building materials and result in sick building syndrome⁴ and expose the Owner to similar liability and remediation costs.

⁴ The United States Environmental Protection Agency states that “[t]he term ‘sick building syndrome’ is used to describe situations in which building occupants experience acute health and comfort effects that appear to be linked to time spent in a building, but no specific illness or cause can be identified.” See U.S. Env’t Prot. Agency Indoor Air – Pubs., *Indoor Air Facts No. 4 (revised): Sick Building Syndrome (SBS)* (2006), <http://www.epa.gov/iaq/pubs/sbs.html>.

A burgeoning area of defect litigation arises out of Title III of the Americans with Disabilities Act⁵ (“ADA”) and Federal Fair Housing Act⁶ (“FFHA”). Particularly, in the areas of multi-family and condominium development, special-interest groups, with the help of the Department of Justice, have become aggressive in seeking to enforce the requirements of the ADA and FFHA. Failures by design professionals to adapt their designs to the accessibility and construction requirements of the ADA and FFHA or failures by contractors to construct the work in accordance with the applicable regulations and standards can expose the Owner to enormous litigation and remediation costs.

V. Comprehensive Strategy to Avoid and Combat Defects

At its core, a comprehensive strategy to avoid and combat defects is about recognizing early in the development process the risk of defects and taking affirmative steps to prevent, and in the event of occurrence, to recover from defects.

A. Prevention – Assuring You Get What You Pay For

Affirmative efforts to prevent defects provide value to the Owner. In the early stages of project development, every dollar spent to prevent defects has the potential to later save the Owner several dollars that it would have had to spend attempting to recover from a defect. In acting proactively, the Owner must strike a delicate balance between asserting sufficient control over the process to assure it gets what it wants, yet allowing its design professionals and contractors enough freedom to perform their contractual obligations. Specifically, the Owner should act affirmatively to protect its interest in prevention, but should not assert so much influence over the design process or construction operations that it usurps control over these contract responsibilities from those responsible for performance. By exerting too much control,

⁵ See 42 U.S.C. §§ 12181–12189.

⁶ See 42 U.S.C. §§ 3601–3619.

the Owner can expose itself to liability for the failures of performance of its design professionals or contractors.⁷ The following are affirmative steps an Owner should consider taking to prevent defects.

1. Pre-qualify Your Team

Owners can carefully evaluate and pre-qualify all key participants in the design and construction process.

- a. *Design Professionals*

The Owner should assure that its primary design professional and all key sub-consultants are experienced in the kind of project the Owner intends to develop, including experience in the geographical area of the development and in those aspects of the construction which present challenging conditions or constraints. For example, if the construction site is restricted or has restricted access, the construction schedule is aggressive, or the construction is going to occur by fast-tracking the design and construction, these areas of experience should be thoroughly probed by the Owner before selecting its designer. The Owner's evaluation and pre-qualification of design professionals should include evaluation of proposed individual team members, especially managers and leaders, to assure that each player has the experience and skill set needed to meet the challenges presented by the Owner's proposed development.

⁷ See e.g., *U.S. v. Atlantic Dredging Co.*, 253 U.S. 1, 40 S. Ct. 423, 64 L. Ed. 735 (1920)(holding that where an owner had inspection and approval rights over the contractor's plant and equipment prior to allowing the contractor to proceed with the work, and exercised those rights, the owner was precluded from arguing that the contractor's interpretation of the scope of work and effort to complete it was inadequate); see also *Trs. of Indiana Univ. v. Aetna Cas. & Sur. Co.*, 920 F.2d 429 (7th Cir 1990)(finding that the owner's approval of brick materials precluded it from claiming the bricks were defective); *McCree & Co. v. State*, 91 N.W.2d 713 (Minn. 1958)(finding that where specified methods of construction fail to produce work that complies with the contract documents, the owner is precluded from arguing that work produced in accordance with the specified methods is defective); *C.J. Langerfelder & Son, Inc. v. Com. Dept. of Transp.*, 404 A.2d 745 (Pa. Commw. Ct. 1979)(finding where owner has extensive inspection and control rights over contractor's work, owner was precluded from recovering for delays caused by defects in materials inspected and approved by the owner).

b. General Contractor / Construction Manager

The Owner should pre-qualify all of the bidders or competitors for the award. Like with its design professionals, the Owner should assure that all bidders are experienced in the kind of project the Owner intends to develop, including experience in the geographical area of the development and in those aspects of the construction which present challenging conditions or constraints. The pre-qualification process should, at a minimum, confirm that each bidder 1) has a proven track record of success on similar projects; 2) has a bona fide quality control program in operation; and 3) is financially capable of performing the work. The Owner's inquiry into the contractors' quality control programs should verify that each contractor's program has operational vitality and is organized and managed separately from project management. The Owner's inquiry into financial capability should confirm each bidder's capability of performing in the face of unexpected or challenging circumstances and ability to obtain payment and performance bonds from a surety acceptable to the Owner. It is also advisable to conduct the same kind of pre-qualification inquiry on key subcontractors such as exterior skin, HVAC, plumbing, electrical, structural frame, roofing and any subcontractor that will be asked to perform unique elements of the project design or perform under challenging conditions. Last, when the field of prospective bidders or competitors has been narrowed, and certainly before award, the Owner should evaluate the contractor's proposed team, especially project executives, project managers, superintendents and quality control managers, to assure that each proposed team member has the experience and skill set needed to meet the challenges presented by the project.

2. Contract Terms

The terms of contract agreements between the Owner and design professionals and contractors should be tailored to promote performance of quality work. Likewise, in the event of defects in design or construction, the terms should also promote full recovery by the Owner. Below is a summary of key provisions that Owners should consider including in contract agreements with contractors and design professionals. Examples of provisions addressing the suggested requirements are contained in industry form contracts such as the AIA Documents and are footnoted for reference.

a. Design Professionals

In its contract agreements with its design professionals, the Owner should consider including provisions imposing the following key requirements:

- 1) Indemnification – With the storm of litigation that is currently erupting from violations of the ADA and FFHA, Owners should consider seeking indemnification and defense obligations from its design professionals for any claims asserted, or damages incurred, by the Owner arising out of any designs that fail to meet the requirements of these acts.
- 2) Third-Party Peer Review or Constructability Review of Unique or Project Critical Designs – The Owner should consider requiring peer reviews or constructability reviews of novel designs and project critical design elements by outside design firms and contractors, including requiring its designer to review and respond to the comments generated by the review effort. Review of critical design elements could include structural frame, roofing and waterproofing, and exterior curtainwall or façade. Imposing this requirement gives the Owner a preemptive “sanity check” on

critical project design elements and can preclude “big ticket” defects on these sensitive systems and elements.

- 3) Observe the Work and Report Defects – The Owner should require its primary design professional to regularly and routinely observe the performance of the work and report any non-compliant work.⁸ On projects that present difficult conditions or unique design elements, the Owner may consider employing a third-party inspection service to oversee and inspect work having critical or stringent quality requirements or that may be otherwise susceptible to defects. Inspection and observation of the work is a corollary to the contractor’s obligation to perform the work in strict compliance with the contract documents. It amounts to the Owner’s first line of defense in the battle to combat construction defects and provides the Owner with a set of eyes and ears where the work is being performed. Early detection of non-complaint work affords the Owner its greatest opportunity to avoid defects and minimize the cost and schedule impacts of non-complaint work.
- 4) Approve the Work at Various Stages for Payments to the Contractor – As part of its duty to review and approve the contractor’s periodic and final requests for payment, the Owner should require its primary design professional to confirm that the work for which it is approving payment, complies, to the best of its knowledge and belief, with the requirements of the contract documents.⁹ This requirement complements the foregoing requirement to routinely observe the performance of the work and is another component of the Owner’s first line of defense in combating construction defects.

⁸ See, e.g., AIA Document B151 §§ 2.6.5, 2.6.6, 2.6.10 (1997 ed.); AIA Document B141 § 2.6.3 (1997 ed., Part 2); AIA Document A201 §§ 4.2.2, 4.2.6 (1997 ed.).

⁹ See, e.g., AIA Document B151 §§ 2.6.9 (1997 ed.); AIA Document B141 § 2.6.2 (1997 ed., Part 2); AIA Document A201 § 9.4 (1997 ed.).

- 5) Determine When Substantial Completion Occurs - The Owner should require its primary design professional to determine the stage at which substantial completion occurs, to issue a certificate documenting its determination, and to generate a punchlist of incomplete or non-conforming work for completion by the contractor.¹⁰ Substantial completion is a crucial stage of the project because it establishes the initiation of warranty periods, transfers responsibility for certain insurance requirements from the contractor to the Owner, triggers certain payment obligations of the Owner to the contractor, and in many states starts the clock on the statutes of limitation and repose.

b. Contractors

In its contract agreement with the contractor the Owner should consider including provisions imposing the following requirements:

- 1) Strict Compliance with the Contract Documents – This requirement is important to protecting the Owner’s interest in receiving what is required by the contract documents. Importantly, it precludes the contractor from arguing that it has substantially performed even though its work is not in strict compliance with contract requirements.¹¹ It is also advisable to supplement the requirement for strict compliance with a “Correlation and Intent” provision stating that the contract documents are complementary and include all items necessary for the proper performance and completion of the work.¹²

¹⁰ See, e.g., AIA Document B151 § 2.6.14 (1997 ed.); AIA Document B141 § 2.6.6 (1997 ed., Part 2); AIA Document A201 §§ 9.8, 9.10 (1997 ed.).

¹¹ Under certain circumstances, the doctrine of economic waste will preclude recovery of certain damages where the owner demands strict compliance. See, e.g., *Granite Constr. Co. v. U.S.*, 962 F.2d 998 (Fed. Cir.1992) *reh’g denied*, (May 29, 1992); see also *Small v. D.J. Lee & Bros.*, 461 S.E. 831 (Ga. App. 1908); *Ideal Pool Corp. v. Hipp*, 370 S.E.2d 32 (Ga. App. 1988).

¹² See, e.g., AIA Document A201 § 1.2 (1997 ed.).

- 2) Key Personnel – The contract should identify the contractor’s team for the project and require the identified personnel to be employed upon the project and devoted full time to performance of project duties. This provision will prevent the contractor from interviewing its “A” team and sending its “C” team to build the project. The provision should also designate which personnel are to be stationed on the project site. Additionally, the contractor should be prevented from removing a key person without Owner approval and the Owner should retain the right to remove, upon written notice, any of the contractor’s personnel it finds unacceptable. The Owner should also include a like “key personnel” provision in its contract agreements with its design professionals.
- 3) Key Subcontractors – The Owner should require the contractor to propose key subcontractors to the Owner. The contract agreement should identify which areas of work are considered key and give the Owner authority to reasonably refuse any subcontractor proposed by the contractor. In the event the Owner unreasonably rejects a proposed subcontractor, the Owner should be responsible for any increase in cost required to award the work to an alternative subcontractor. The Owner should also include a similar “key consultants” provision in its contract agreements with its design professionals.
- 4) Warranty – The contractor should be required to warrant that the work is free from defects and complies with the requirements of the contract documents.¹³ Even if this warranty includes a fixed duration obligating the contractor to respond to the Owner’s demand for repairs and to perform corrective work, the contract agreement should provide for enforcement of the warranty to the full extent permitted by the applicable

¹³ See, e.g., AIA Document A201 § 3.5 (1997 ed.).

statute of limitations or until the Owner's claim for breach is extinguished by the applicable statute of repose.¹⁴

- 5) Obligation to Cure or Perform Corrective Work – The contractor should be required to perform corrective work at its expense upon notice from the Owner. This obligation should exist before and after the occurrence of substantial completion.¹⁵
- 6) Owner's Right to Stop Work or Perform Work – During construction, in the event that the contractor fails to respond to the Owner's notice and demand for repairs, the Owner should have the right, after notice and opportunity to cure, to stop either the entirety of the work or portions of the work or, in the alternative, to take over portions of the work and implement required repairs at the expense of the contractor.¹⁶ The right to stop work gives the Owner the ability to preserve the status quo and prevent the installation of more defective work or to prevent the covering up of defects by subsequent work. The right to perform work itself gives the Owner the ability to act affirmatively in the face of contractor incompetence or obstinacy. These remedies are extreme and Owners should use extreme care to follow contract formalities when invoking such rights.
- 7) Owner's Right to Require Additional Testing and to Uncover Completed Work – In the event that the Owner is concerned that the performance of certain work may not meet the requirements of the contract documents, the Owner should have the right to perform additional testing over and above any testing that may be required by the contract documents.¹⁷ This right should include the right to perform destructive testing, dismantle work performed, or uncover work covered by subsequent work.

¹⁴ See, e.g., AIA Document A201 §§ 3.5, 12.2.2 (1997 ed.).

¹⁵ See, e.g., AIA Document A201 § 12.2 (1997 ed.).

¹⁶ See, e.g., AIA Document A201 §§ 2.3, 2.4 (1997 ed.).

¹⁷ See, e.g., AIA Document A201 §§ 13.5.2, 13.5.3 (1997 ed.).

Generally, if the tested work is found to comply with the contract documents, the Owner should be responsible for the cost of testing and repair or replacement of work damaged, destroyed or disassembled to perform the additional testing. Alternatively, if the tested work is found not to comply with contract requirements, the contractor should be required to bear these costs. These rights give the Owner the opportunity to confirm compliance with contract requirements during performance of the work and properly allocate the risk of the cost of testing and repairs amongst the parties. These contract rights permit the Owner to avoid paying increased remedial costs commonly incurred when either the contractor or Owner is forced to remedy concealed defective work after the work is complete.

- 8) Right to Withhold Payment – The Owner’s right to withhold payment from the contractor, either progress payments or final payment, should include the performance of defective work or failure to remedy defective work.¹⁸ This right is a corollary to the contractor’s obligations to perform the work in strict compliance with the contract documents and to correct defective or non-conforming work. It is both a safety net for the Owner and an enforcement mechanism. It gives the Owner the right to not pay for non-conforming work, thereby, protecting the Owner from overpaying the contractor and puts pressure on the contractor to perform in accordance with the contract documents or to take remedial measures to conform the work to the contract documents.
- 9) Indemnification – The Owner should require the contractor to indemnify and defend it from claims from third-parties for property damage, personal injury or death arising

¹⁸ See, e.g., AIA Document A201 § 9.5 (1997 ed.).

out of the contractor's performance of the work.¹⁹ In the context of defects, such an indemnification and defense obligation may insulate the Owner from liability for such claims brought by third parties that rise out of allegedly defective work. Many states have enacted anti-indemnity statutes that limit the degree to which a contractor can be required to indemnify another party for that party's own acts or omissions where the party's conduct contributed, in whole or in part, to the property damage, personal injury or death which is the basis for a claim asserted by a third-party. These requirements vary from state to state, and Owners should verify the applicable state requirements to ensure the enforceability of any such provision included in its contract agreement with the contractor.²⁰

10) Termination For Cause – The Owner should have the right to terminate the contractor's right to proceed with the work in the event the contractor materially breaches its contractual obligations. If the contractor performs defective work or refuses to correct defective work to the degree that its failure to perform constitutes a material breach, the Owner should have the right to terminate and, subject to any prior rights of a surety under a performance bond, perform the work in a manner it chooses. Careful drafting of such a provision is required and the various bases for termination for cause should be enumerated.²¹ Termination for cause is a remedy of last resort and should only be considered in the most extreme cases. Additionally, in invoking this right, the Owner must be extremely careful to strictly follow the contract formalities.

¹⁹ See, e.g., AIA Document A201 § 3.18 (1997 ed.).

²⁰ See Allen Holt Gwyn and Paul E. Davis, *Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law*, 23(3) Constr. Law. 26 (2003).

²¹ See, e.g., AIA Document A201 § 14.2 (1997 ed.).

11) No Waiver of Claims – The contract should provide that the making of final payment by the Owner does not constitute a waiver of claims by the Owner for defective or non-conforming work.²²

3. Insurance and Bonds

In its contract agreements with the contractor and design professionals the Owner should provide for, or require provision of, the following key insurance coverages and require the contractor to provide a performance bond:

- 1) Performance Bond – A performance bond is not insurance. Rather, a performance bond operates as performance security guarantying the contractor’s full performance of the contract.²³ The contract should grant the Owner approval rights over the contractor’s surety. Thus, before giving its approval, the Owner should assure that the contractor’s proposed surety is financially capable of performing the contract, or securing performance by another contractor, in the event of a default by the contractor. Additionally, the Owner should make sure the bond form incorporates all contract documents, including all warranty requirements, as part of the surety’s obligation and that the bond form does not impose a limitations period shorter than the applicable statutes of limitation and repose in the state where the project is located. It is important to have the surety responsible for all contract warranties to the full extent of the warranty period.
- 2) Property Insurance – Builder’s Risk – Builder’s risk insurance covers the insureds for losses from property damage occurring during the course of construction. So that it can assure proper coverage is purchased, avoid needless duplication of coverage, and

²² See, e.g., AIA Document A201 § 9.10.4 (1997 ed.).

²³ ²³ See, e.g., AIA Document A312 (1984 ed.).

control both the filing of claims and the distribution of claims paid, the Owner should provide builders risk insurance for the project under an “all-risk” policy. Many riders and exclusions are available and apply to builder’s risk policies that have material affect on the scope of coverage. Careful review of applicable riders and exclusions is required when purchasing coverage. Based on typical policy exclusions, it is not likely that builder’s risk insurance will respond to correcting a defect itself, however, the policy may cover a claim for property damage to surrounding property caused by the defect.

- 3) Commercial General Liability Insurance – Commercial general liability (“CGL”) insurance provides insureds indemnification from tort liability and defense to claims asserted by third-parties for bodily injury or property damage arising out of performance of the work. Many riders and exclusions are available and apply to CGL policies that have material affect on the scope of coverage. Again, careful review of applicable riders and exclusions is required when purchasing coverage. Generally, to protect its interests in combating defects, Owners want to require design professionals, contractors and subcontractors to provide CGL policies covering their operations on and related to the project. Moreover, the Owner should be named as an additional insured on all such policies and each policy should include a completed operations rider providing coverage for a period of five (5) years after project completion. Whether CGL policies respond to defects or damage to property arising out of defects are heavily litigated issues, the determination of which varies from state to state.²⁴ Like builder’s risk policies, even if the CGL policy does not respond to the

²⁴ See Clifford J. Shapiro, *The Good, the Bad, and the Ugly: New State Supreme Court Decisions Address Whether an Inadvertent Construction Defect is an “Occurrence” Under CGL Policies*, 25(3) Constr. Law. 9 (2005); James

defect itself, the policy may respond to property damage occurring to adjacent or surrounding property caused by the defect.

- 4) Errors and Omissions Insurance – Errors and omissions insurance (“E&O”) provides an insured design professional indemnification for damages for which it becomes legally liable arising out of its negligent acts, errors or omissions committed in performance of professional duties and provides defense of the insured in the event of an alleged covered claim. In the context of defects, E&O coverage includes the cost of correcting both the defect itself as well as damage to other work or property caused by the defect. Owners should require all design professionals providing professional services to the project to provide E&O coverage. This requirement should include any specialty subcontractors, such as fire sprinkler or curtain wall subcontractors that provide professional services. While many design professionals maintain E&O policies that cover their entire book of business, Owners should attempt to acquire project specific coverage.

B. Recovery – Seeking to Recover What You Paid For

In encountering a defect, or what appears to be a defect, quick, decisive, affirmative action is required. Step one is an evaluation of the work thought to be defective and at least a preliminary determination of the source of the defect. Does the defect derive from design deficiencies, material deficiencies, or construction deficiencies? At this early stage, the answer to this question may be “yes” to all. This is also the stage at which the Owner must take steps to document the defect through photographs and videos and to set up cost accounting records to

Duffy O’Conner, *Construction Defects: “Property Damage” and the Commercial General Liability Policy*, 24(2) Constr. Law. 11 (2004); James Duffy O’Conner, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21(1) Constr. Law. 15 (2001).

track the costs associated with repair as they occur and, ultimately, quantify the total amount expended in its remedial effort.

Step two is a thorough review and analysis of the Owner's contract rights, including warranties, insurance and bonds, and a determination of which contract notice provisions are implicated. In practice, this step will likely occur concurrently with evaluating the work thought to be defective and should include a thorough review of insurance policies that may respond to the defect, including any property damage, personal injury or death that occurred arising out of or related the defect. In the residential context, this step should also include analysis of notice requirements necessary to comply with any applicable "Right to Repair" act.²⁵ Additionally, in reviewing and analyzing the contractor's involvement in the work thought to be defective, such an analysis necessarily involves consideration of the severity of the defect, whether a contract default has occurred, and whether the surety should be notified and possibly be called upon to perform.

Based on its review and analysis of the implicated contracts, insurance policies, bonds and statutes, the Owner should timely issue the notices required, in the form and by delivery methods required, to preserve its rights of recovery against any party that may have caused or contributed to a deficiency that lead to the defect. In terms of notices issued to insurers, at this early stage, it is important to notify all insurers that issued policies of insurance that may respond to the defect or any property damage, personal injury or death that may have arisen or derived from the defect.

If the defect occurred or was discovered after the completion of construction, particularly if some period of time has passed since the project was completed, an immediate review and analysis of applicable statutes of limitation and repose must be conducted. Depending on the

²⁵ See, e.g., O.C.G.A. §§ 8-2-35 - 8-2-43; Fla. Stat. Ann. §§ 558.001-558.005.

relevant state law, this analysis may include a determination of when the defective work was performed, when the defect was discovered or through reasonable diligence should have been discovered, and when substantial completion of the project occurred. From this analysis a determination can be made whether a lawsuit must be immediately filed to preserve the Owner's claims for recovery.

Step 3 of recovery involves the ongoing effort to recover against responsible parties, possibly through litigation, and the pursuit of claims against implicated insurance policies, which also may involve litigation. This stage also involves the remediation process whereby the Owner should caucus with designers and contractors to fully identify and quantify the defective work and establish a work plan for remediation of the defect.

VI. Conclusion

The Owner can avoid and combat defects by being actively involved in its project and taking a two phased approach to project development that integrates prevention and recovery. By taking this approach the Owner may be able to avoid asking itself "Am I getting what I paid for"?

Prevention adds value to the Owner's development and focuses on the Owner taking an active role in selecting its project team, structuring and negotiating its contract agreements with project team members, putting in place proper bonds and insurance, and having an active oversight presence on the project during construction through its design professional and contractor's quality control program. Conversely, recovery is the process of seeking to recover what has been paid for and is invoked upon the occurrence of a defect. In such an event, swift and decisive action on the Owner's part provides the best opportunity for an optimal resolution.