



MAKING THE “PASS THROUGH” DEMAND FURTHER SETTLEMENT DISCUSSIONS

In construction defect matters generally the claimant property owner (“claimant”) sues its general contractor for construction defects in the construction of claimant’s real property. Claimant alleges construction defects/problems with its property such as failing to construct the property to prevent water intrusion into the interior of the structure, excessive stucco cracking or failing to construct the property structurally to withstand movement and problematic soil conditions. The general contractor then sues the subcontractors that allegedly performed the defective work in the construction of claimant’s property. The claimant has its experts prepare a preliminary defect list and preliminary cost to repair those claimed defects and provides them to the general contractor.

Claimant then initiates settlement discussions by making a settlement demand to the general contractor. Often times the general contractor will just “pass through” the claimant’s opening settlement demand to the subcontractors without analyzing and discounting the claimant’s settlement demand based on the general contractor’s evaluation of the claimant’s potential recoverable damages.

The “pass through” demand can have the effect of shutting down any settlement negotiations between the claimant, the general contractor and the subcontractors if the parties do not try to extract the useful information from the “pass through” demand. Do not give in to the easy temptation that the “pass through” demand is useless.

The initial reaction of the subcontractors who are asked to pay for the claimant’s alleged damages is that the “pass through” demand is useless, inflated, unreasonable and unsubstantiated. The “pass through” does not present a realistic amount that the subcontractors may be held liable for if the claimant’s lawsuit proceeds to trial. However, there is utility in the “pass through” demand if used effectively to start meaningful settlement discussions.

1. The “pass through” demand identifies and frames the defects the claimant is alleging against the general contractor and puts a price on those alleged defects which narrows the contested issues for the general contractor to allocate to its subcontractors.
2. The general contractor should identify the subcontractors whose scope of work is implicated by the claimant’s “pass through” demand. The general contractor needs to take each defect item alleged by the claimant and provide the subcontractors



- with a specific and detailed allocation containing the defect items that each subcontractor may be potentially responsible for if the lawsuit proceeds to trial.
3. The subcontractors share the general contractor's specific allocation with their expert consultants to evaluate their potential liability for the defect items that are being claimed against their scope of work.
 4. The subcontractors begin to place a monetary figure on their potential exposure for the claimant's alleged defect items.

The "pass through" demand will NOT settle the lawsuit, but if used effectively, it does not have to be a complete road block to meaningful settlement discussions. It has to be recognized for what it is: An opening salvo to start discussions toward settlement and identify the strengths and weaknesses of the parties' positions.