

THE RECORDER

IN PRACTICE

Using special masters in Contra Costa

Complex construction defect cases often require a neutral to work with parties during the pretrial phase



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Litigation

Fourth article in a series that analyzes how different Bay Area courts utilize special masters in complex construction defect cases.

Contra Costa County Superior Court has approximately 180 cases pending in its complex litigation department. Class actions and cases involving eight or more parties are generally referred to the complex department. Counsel may also apply for a court order designating the case complex by checking the boxes on the civil case cover sheet. If there is a question as to whether a case belongs in the complex department, Judge Barry Goode screens the case and addresses the issue at the first case management conference.

Goode estimates construction defect cases make up approximately 25 percent of the complex department cases. More

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than 75 percent of these cases utilize the services of a special master.

Counsel often arrive at the initial CMC with a proposed order appointing a special master in construction defect cases. Plaintiff attorney Michael Cochrane of Hughes Gill Cochrane explains: “Lead lawyers sit down and decide which special master to use on a case. Good defense attorneys work with plaintiff’s counsel. We have to do it before the subcontractors get in the case. Otherwise, the appointment process becomes unmanageable.” Defense attorney Mary Kay Glaspy of Glaspy & Glaspy agrees: “It’s hard to get 25 attorneys to agree on a special master. It is less likely that they will usurp the process if lead counsel select a special master up front. Generally, the parties go along with lead counsel’s selection.” Goode recalls only a couple of cases in which subcontractors contested the appointment of a special master approved by the lead parties. If the parties have difficulty finalizing a proposed case management order, Goode will schedule a special hearing to hammer out the issues.

CASE MANAGEMENT

Goode wants a status report from plaintiff and lead defense counsel in construction defect cases at least 10 days before a CMC. Any other party that wants to add something may file its own CMC statement at least five days in advance. (“I do not need 42 CMC statements saying this is a construction defect case. They are just chaff.”) Counsel may

append a page at the back of the form CMC statement or submit a brief. Statements are e-filed. Orders should be submitted in word format at cxlit@contracosta.courts.ca.gov; any signed stipulations should also be submitted in PDF format. See online guide at www.cc-courts.org/_data/n_0003/resources/live/handyGuideToDept17.pdf.

Status conferences help the parties establish and maintain viable deadlines. They also allow the parties to resolve issues without filing motions. Glaspy expects the special master to confer with counsel every 60 days.

Plaintiff attorney Cochrane believes that good special masters have “the skill and knowledge to accurately assess what a case needs to settle or try and then to report that without bias to the court. Special master communications with the court help identify logjams and avoid wasting time. I want to hit the ground running, so I can bring energy to a case.” In lieu of formal CMCs, defense lawyer Glaspy anticipates a limited number of special master updates to the court during the first six months of a case, followed by updates every 30 to 60 days as significant tasks are completed.

Status reports to the court should identify key issues and a timeline for resolution. According to Judge Goode, “in construction defect cases, there is a myriad of picky factual stuff that parties have to work through to understand the strengths and weaknesses of their case. The parties have to review defect lists, cost estimates, scopes

of work, insurance issues and more. Often, these issues do not lend themselves to linchpin resolution.”

The court generally adopts the special master’s recommendations. Any proposed orders should be e-filed by the special master in Microsoft Word format.

In Glaspy’s experience, the judge listens to objections before executing any proposed order. “In Contra Costa’s complex litigation department, everyone feels he has a voice. Starting with Judge David Flinn who set up the department, if there is an objection, the court listens. An objecting party does not incur a judge’s wrath; there is great fairness. People are more reasonable if they have an opportunity to be heard.”

As to trial continuance requests, Goode emphasizes that trial dates are firm. “There has to be good cause shown for moving a trial date. People need to understand that when I set a trial, I am setting their trial and many others. When people ask to slip a case for two months, the continuance impacts other cases. If a trial date is continued, there is a good chance that the trial will slip many, many, many months. I am reluctant to slip a trial date.” Goode does not require that parties file a formal trial continuance request. Rather, the special master may request a conference call with Goode and all counsel to discuss the matter. “I value special master input, but a trial date is a sacred thing to me and I do not move it around lightly.”

DISCOVERY DISPUTES

Goode sees complex construction defect cases as “much more open and cooperative than other types of litigation. Most defense lawyers in other fields say that a plaintiff’s job is to hide the ball and keep defense guessing until close to trial. This is the one place where the plaintiff and defense put their cards on the table and call

in the experts. It’s a different species. In my experience as a litigator and a judge, this is really an extraordinarily cooperative way of dealing with cases.”

As part of this process, Cochrane believes that the special master should actively assist the parties in developing a case to the point where the parties have sufficient information to settle the case or to “get it ready for trial in an efficient way over an 18 to 24 month time period.”

If a discovery dispute arises, Glaspy notes that the special master can work with the parties to reach an efficient resolution without a formal hearing. In this regard, the parties “do not have to educate the special master as to the complexities of the case. It’s a good start.” Cochrane urges the special master to act as a decision maker. “Splitting the baby is not good enough. If I am entitled to a win, I don’t want half a win.” Any party may request *de novo* review of a special master’s discovery ruling.

Goode cautions that the special master and counsel should “be alert as to when a case is not settling and it is time to turn it onto a litigation path.” A discovery stay should be lifted with sufficient time to allow the parties to complete necessary discovery and avoid a “flurry of frantic *ex parte* activity” shortly before trial.

SETTLEMENT

The special master generally conducts most mandatory settlement conferences at private offices. Both Cochrane and Glaspy support having an agenda of start times to reduce the waiting time for counsel and their clients. If parties have not reached a settlement after two MSCs, Glaspy believes that all parties should be present for the duration of the conference.

Construction defect cases generally settle without a court MSC. In fact, Goode has not conducted an MSC in his courtroom

in a construction defect case with a special master. If counsel and the special master agree on the process, Goode will allow a special master to conduct a court MSC. In some cases, Judge Flinn is available to conduct a judicially supervised MSC.

There are no settlement conferences on the first day of trial. Goode’s rule is “when you are set for trial, we order up the right number of jurors, you come in, and that morning we call up a jury.”

In summary, Judge Goode is the complex litigation judge in Contra Costa County Superior Court. In the majority of complex construction defect cases, the special master works with the parties to move the case toward resolution through settlement or trial. The court generally adopts the special master’s recommendations. If counsel agree, a special master may conduct an MSC in Goode’s department. Trial dates are firm. A special master may propose a conference call with Goode and all counsel to request a trial continuance, but even with good cause shown, a continuance may not be granted. There are no settlement conferences on the first day of trial; counsel should arrive ready to try their case.

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