Construction Damages: Separate or Joint Liability

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Insurance Law

From the Insurance Law Department at the practice in Madrid and as lawyers with expertise in **construction damages**, we will analyse the liability of the different stakeholders intervening in the building process when defects exist in construction.

Law 39/1999 of 5 November on Building Regulations regulates on section two of article 17 regarding public liability of construction stakeholders.

> *"Article 17. Public liability of construction stakeholders.*
> *2. Public liability shall be due personal and separate, both due to own acts or omissions, and due to acts or omissions by persons for whom, in accordance to this law, it is necessary to respond.*
> *3. Nevertheless, when the cause of material damages cannot be separated or contributory fault is duly proved without specifying the degree of engagement of each stakeholder in such damages, the liability shall be considered joint. In all cases, the developer shall jointly respond with the rest of stakeholders before the possible recipients of material damages in the building arising from vices or defects of construction."*

There has not been a consistent case-law regarding the separate or joint liability of the stakeholders intervening on the construction process.

In the first place, case-law interpreted that construction stakeholders, i.e. the different intervening parties in construction of buildings (developer, builder, architect, contractor, etc…), are joint-liable parties and, therefore, if a claim were addressed to them due to construction defects, limitation were interrupted and it might be claimed later, impacting also the rest of stakeholders.

Afterwards, the High Court decided that Building Regulations, particularly on article 17, sets the joint liability when faults cannot be separated or it is proved that there is contributory fault in defects among the building stakeholders.

Thus, High Court Ruling of 14 March 2003 creates third-party liability that arises from the nature of the wrong or offence and from plurality of subjects intervening at the production and that arise when it is not possible to separate liabilities without applying joint liability rules to this kind of liability.

In short, case-law, instead of regulation, leads to joint sanction, which has its origin not in the nature of the liability perfectly separated but in the indeterminacy of the cause that makes impossible to attribute each stakeholder their part of responsibility.

This joint responsibility, with which many rulings have dealt, has been also clarified by the High Court Ruling of 16 January 2015, among others, where it is said that it is a third-party liability, i.e. joint liability does not emerge from Law or agreement but from court ruling.

Thus we may conclude that building stakeholders' liability for vices and defects is generally separate depending on their part of fault on the construction of the building. Only when the latter cannot be determined, the joint sanction is applicable.

Therefore, General Liability insurances must consider this circumstance offering to cover each element of the construction chain for a possible joint liability or for an individualisation of fault that compels every stakeholder to respond if fault is determined in a legal process.


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