2020 Construction Conference
September 30 – October 2, 2020
Chicago, IL

Good Deeds Rewarded! Maximizing Opportunities to Minimize Costs in Complex Construction Claims

I. Risk Transfer Techniques and Strategies Must be Diligently Pursued

A. Tenders

In complex claims, particularly those involving multiparty construction defect claims and construction accident claims, the risk transfer process is key to reduction of outside legal and litigation expenses. Most carriers are aware of the need to investigate their insureds' status as an additional insured under other policies, and to investigate their insureds' status as a named insured under other policies that may provide coverage for the loss. This investigation must be done early in the claim process and continue, particularly as to AI status, as claims are developed, and new parties are added.

Mechanisms that facilitate the insurance tender process include statutory requests for insurance information, such as Fla. Stat. Section 627.4137, which requires a response from the party on which it is served within thirty days disclosing insurance carrier and policy information for all insurance policies known to the party that may provide coverage for a loss. Statutory requests for insurance information submitted to an insurance carrier also require production of a certified copy of the entire insurance policy within thirty days.

Contractual tenders are another method to put a co-defendant or third party on notice of a claim and to demand indemnification for defense costs and liability. This step is critical to the "vouching in" process, which comes into play following payment of a settlement and post-settlement recovery actions.

B. **Third-Party Claims**

Best practices in risk transfer techniques are not limited to NI/AI/contractual tenders and follow up. The ability to minimize indemnity exposure and defense expense also extends to other legal mechanisms, which include third-party claims against other subcontractors, the insured's subcontractors, and third-party suppliers and product manufacturers. The causes of action may include

claims based on contractual and/or statutory warranty provisions, statutory building code violations, implied warranty, negligence, product liability, common law indemnity and contractual indemnity.

A key component of a successful contractual indemnity claim is whether the indemnity provision complies with applicable law. Most state legislatures have declared that certain types of indemnity agreements not based on fault are against public policy and invalid. Generally, each state treats indemnity agreements in one of the three following ways: (1) the state does not have an anti-indemnity statute; (2) the state has an anti-indemnity statute that prohibits an indemnitor from indemnifying an indemnitee for the indemnitee's sole negligence; or (3) the state prohibits an indemnitor from indemnifying an indemnitee for any of the indemnitee's own negligence, sole or partial. Dean B. Thomas and Colin Bruns, *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States,* 8 NO 2 ACCLJ 1 (2014).

California falls into category number three above along with the majority of other states. Specifically in California, any provisions contained in any construction contract and amendments thereto entered into on or after January 1, 2013, that purport to insure or indemnify, including the cost to defend, a general contractor, construction manager, or other subcontractor, by a subcontractor against liability for damages are void and unenforceable to the extent the claims arise out of the active negligence or willful misconduct of that general contractor, construction manager, or other subcontractor, or to the extent the claims do not arise out of the scope of work of the subcontractor pursuant to the construction contract. Cal. Civ. Code Section 2782.05.

Florida falls within the second general category, as its Statute 725.06 limits indemnity agreements in construction contracts to prohibit contracts purporting to indemnify against the indemnitee’s “gross negligence, willful, wanton or intentional misconduct,” including such acts of the indemnitee’s officers, directors, agents or employees. Fla. Stat. Section 725.06(1)(c). Most importantly, the statute requires that an indemnity agreement is void unless it contains a monetary limitation on the extent of the indemnification that “bears a reasonable commercial relationship to the contract.” Fla. Stat. Section 725.06(1). The statute contains additional requirements related to contracts involving an owner of real property and work for public agencies. *Id.;* Fla. Stat. Section 725.06(3).

California is also unique in that the anti-indemnity statute attempts to describe how a duty to defend would be determined the end of the cause if the duty were limited to a party's negligence. Cal. Civ. Code Section 2782.05(e). California allows the parties to agree to the allocation of defense costs, but if each party contests liability, such a stipulation is unlikely. Failing agreement, the beneficiary of a contractual duty to defend can bring an action to enforce the promise, but the beneficiary bears the burden of establishing the defendant's degree of fault in order to obtain the requested defense. Cal. Civ. Code Section 2782,05(e). However, for those relying on or subject to valid indemnity provisions, the duty to defend arises out of an indemnity obligation as soon as a suit is filed regardless of whether the indemnitor is ultimately found to be negligent. *Crawford v. Weather Shield,* 44 Cal. 4th 541 (2008).

Notably, Nevada recently enacted its own anti-indemnity statute in 2015. Before, 2015, Nevada had no anti-indemnity statute. Thomas, *supra.,* n.1. Presently, Nevada law only prohibits indemnity and defense provisions that require a subcontractor in indemnify and defend the general contractor or the

developer for their own negligence or intentional acts. In fact, the law specifically states that it does not apply to indemnity and defense agreements that require a subcontractor to indemnify and defend the general contractor or the developer for claims based on the subcontractor's scope of work. Nev. Rev. Stat. Section AB 125, subsection 2 (2015).

C. Contribution Actions

Historically, all states but Florida and Minnesota historically allowed for contribution actions between carriers whose policies provided coverage for the same loss. Florida joined the majority with the passage of HB 301, which added Section 624.1055 to Florida's Insurance Code, in July 2019. The statute provides that a "liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action, provided that contribution may not be sought . . . for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action." The statute applies to any "claim, suit or other action" initiated on or after January 1, 2020. The statute allows for defense costs to be allocated by the court "in accordance with the terms of the liability policies," and to apply "equitable factors" as deemed appropriate in making the allocation.

D. Joint Defense Agreements

Insurers seeking to avoid contribution litigation may join in the defense of a named insured or additional insured, or both, via joint defense agreements. Additionally, different parties to a suit may enter joint defense agreements with each other to share costs, develop joint defense strategies, and to share in the retention of expert witnesses. These agreements, and materials and information exchanged pursuant to such agreements, are protected as attorney-client privileged and work product under the joint defense privilege or common interest doctrine under most circumstances. *See, e.g., In re LTV Securities Litigation,* 89 F.R.D. 595, 603-04 (N.D. Tex. 1981) (discussing joint defense privilege (citations omitted)); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 90 F.R.D. 21 (N.D. Ill. 1980) (same); *Selby v. O'Dea,* 90 N.E.3d 1144, 1149-66 (Ill. Ct. App. 2017) (discussing common interest exception to waiver of attorney-client and work-product privileges when there is a common interest agreement between parties and/or their attorneys, citing to multiple jurisdictions). The information is protected even when the parties' interests may be adverse to each other, but they are aligned on an issue or one side of the case. *Id.; see also U.S. v. McPartlin,* 595 F.2d 1321, 1335 (7th Cir. 1979) (finding that statements made to co-defendant's investigator were privileged); *Shenwick v. Twitter, Inc.,* 2019 WL 3815717 (N.D. Cal. 2019) (recognizing common interest doctrine, applying to conversations of nonparty and counsel and counsel for defendant in preparation for nonparty's deposition); *and see Biovail Laboratories, Int'l v. Watson Pharmaceuticals, Inc.,* 2010 WL 3447187 (S.D. Fla. 2010) (denying motion to compel production of joint defense agreement containing boilerplate terms protecting exchange of privileged information on the grounds the agreement was not relevant to claims or defenses for discovery purposes).

II. Case Management Strategies

Managing discovery is a key component to reducing litigation expenses. Although most rules of civil procedure place certain presumptive limits on written discovery and the length of depositions, even where limits are followed, discovery in complex cases can take on a life of its own. The nature of a complex claim (i.e., number of parties, nature of claims, value of exposure, the need for multiple experts), mandates that counsel have a plan for discovery and case management in place. A well thought-out discovery plan can reduce overall expenses and can facilitate efforts at resolution.

A. Complex Case Designation

Some states have specific procedural rules that allow for a case to be deemed complex. *See, e.g.,* Fla. R. Civ. P. 1.201, Complex Litigation (providing factors for designation of a matter as "complex" and setting forth procedural rules for timing and content of issues to be considered; timing for case management conference; issues to be included in case management order related to discovery, experts, and deadlines for motions and conducting alternative dispute resolution); Ariz. R. Civ. P. 3.12 (setting forth complex case designation procedure). *See also Hernandez v. Superior Court,* 112 Cal. App. 4th 285 (2003) (holding that individualized case management orders in complex cases are not preempted under Cal. Rules of Court, Rule 3.20, which prevents local rules related to, *inter alia,* pleadings, motions, and discovery).

Cases designated as complex are typically assigned to a specific judge or court division that maintains jurisdiction over the life of the matter. Normally, complex judges have knowledge of the particular issues involved in a particular type of case, which can expedite rulings. However, complex case dockets can tend to be crowded, which can sometimes delay obtaining a hearing time or trial date. Also, once a trial date is set in a complex case, it typically is not subject to continuance.

B. Case Management Orders

The form and content of case management orders vary based on jurisdiction, case type, and the number of parties involved. In most cases, at the minimum, a complex case management order will include deadlines for the parties to make witness disclosures, expert disclosures, participate in mediation, complete discovery, file dispositive motions and pretrial motions, and set a trial date.

Additional terms that can be included in a case management order include designation of a document depository, terms related to electronic discovery, terms regarding a designated court reporter and mediator, terms related to cost-sharing of court reporters and mediation expenses, mediation location and deadlines for premediation demands and designation of parties whose participation is mandatory. The case management order can also provide for waiver of certain procedures for nonparty subpoenas and providing copies of documents obtained from nonparties, and the parties can agree to certain standardized written discovery for all parties, which minimizes the time associated with having to individually propound and respond to multiple sets of interrogatories and

requests for production of documents. Finally, the case management order can include deadlines for the parties to meet and confer related to a deposition schedule for corporate representatives, experts, and third-party or outside party witnesses, and provide terms related to set aside weeks for depositions and release dates.

III. Resolution Strategies

In addition to the procedural activities listed above, other tactics can be used to help resolve a complex case and minimize expenses. The purpose of the tactics listed below is to potentially narrow issues in dispute, or eliminate them altogether. Alternatively, working with opposing counsel and co-defendants' counsel can be beneficial in determining areas that need further development in order to prepare for formal mediation.

A. Expert Meetings

Joint expert meetings can be very helpful in clarifying issues related to defect claims. These meetings are typically agreed to between counsel and the parties, and are treated as mediation privileged. In some cases, an informal discussion between the plaintiff's expert and the builder's or developer's expert(s) can result in an agreed scope of repair. Obtaining buy-in by subcontractor counsel can be beneficial in facilitating either performance or funding of an agreed scope of repair. Alternatively, simply having the experts meet face to face can often result in clarification of issues that require additional investigation by the parties or elimination of issues that may have been listed preliminarily.

B. Defense Only Meetings

Defense only meetings, which may or may not include an actual company representative in addition to defense counsel, are beneficial in resolving issues related to scope of work discrepancies. Further, these meetings can be helpful in identifying defenses to defect claims, location of missing documents, and location of additional insurance policies on an informal basis, which is beneficial in reducing unnecessary formal discovery expenses. Finally, early defense meetings can be beneficial in resolving potential areas of in-fighting. These meetings, like the joint expert meetings described above, are typically subject to mediation privilege and/or a joint defense agreement.

C. Low Hanging Fruit and Issue Releases

Most experienced construction defect claims professionals and counsel are able to identify discrete issues/claims that are subject to early resolution. Cooperative plaintiff's counsel is key to eliminating smaller parties early on so as to streamline discovery and motion practice. Normally, release of a discrete issue includes a release of the plaintiff's claims against the remaining parties related to that issue, and should result in a corresponding reduction in the damages claimed. To the extent the released party's carrier is also participating in the defense of the builder/developer, an early issue release may also impact the obligation to continue a defense of the AI portion of the claim.

D. Standing Motions

In cases involving multifamily residential properties, the community's governing documents often include provisions related to maintenance and repair obligations. Additionally, some states, such as Florida, have enacted statutes that govern the scope of a condominium association's standing to sue for defects. *See, e.g.,* Fla. Stat. Section 718.101, *et seq.,* and Fla. R. Civ. P. 1.221. Depending on how the case is styled (i.e., the community association is the named plaintiff vs. individual unit owners suing as a mass action), and what damages are sought, the declarations and state-specific statutory and common law may provide a basis for dismissal of certain claims based on lack of standing to sue for damages. *Id.; see also Woodside Village Condominium Ass'n, Inc. v. Jahren,* 806 So. 2d 452 (Fla 2002); *Turnberry Court Corp. v. Bellini,* 962 So. 2d 1006 (Fla. 3rd DCA 2007).

IV. Special Considerations for OCIP/CCIP Policies

Minimizing litigation expenses is particularly important when an Owner Controlled Insurance Program ("OCIP") or Contractor Controlled Insurance Program ("CCIP") is involved. Some OCIP or CCIP policies may contain language that provides that coverage limits are eroded by defense costs. Additionally, these policies may contain endorsements that provide for exclusion of claims between named insureds and that require the parties enrolled in the OCIP or CCIP to engage in a joint defense in the event of litigation arising out of the construction of the project subject to the coverage. The potential damages exposure in complex construction claims under such programs can also be at a level triggering exposure beyond the primary policy's limits. Therefore, it is important to remain vigilant in not only minimizing litigation expense, but also in pursuing alternate sources of coverage and indemnity from others.