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Breaking Out of the Pack:
Strategies to Extricate the Subcontractor

I. Identifying the Subcontractor or Fringe Defendant

Identifying Your Role

In some cases, it may be immediately apparent that your client or insured is a small player or a subcontractor. Just because an entity is a small contractor does not necessarily mean, however, that the company's role in the project or the litigation is minimal. Subcontractor claims often involve complicating factors such as contractual indemnity or additional insured issues. An assessment should be made early on by the claim professional, together with outside counsel regarding whether the client is a potential candidate for early resolution or dismissal. Certainly, there will be cases where at the outset it appears that the client is only in the case or has only been placed on notice of the claim under a shotgun approach. In certain jurisdictions, virtually every contractor involved in a project will be placed on notice of an impending claim.

Factors to consider when making an initial assessment as to whether a client/insured may be a good candidate for early dismissal include:

1. The known or alleged role the contractor played at the site;
2. Whether there are any contractual indemnity or other contract issues;
3. Any additional insured issues;
4. What is known and can be documented about the contractor's role in the project versus the allegations in the complaint or preliminary expert reports.

With respect to the contractor's role at the site, the client may simply be the roofing subcontractor who made $12,000 on the project but who is alleged to have failed to install flashing throughout causing significant damage. On the other hand, where it is known what damages plaintiff claims, you may be able to recognize at an early stage that the matter is appropriate for early disposition. For example, where your client the plumbing subcontractor only installed dryer vents, but the majority of the plaintiff's claims relate to leaking windows and other major penetrations the damages and liability issues are fairly well defined.

Additional insured issues do not necessarily preclude early resolution or disposition strategies and in fact in certain circumstances, may be beneficial. The same is true for indemnity provisions.

The important task is to look at every case at an early stage and consider under the above and any other case-specific relevant factors whether the defendant is a candidate for early resolution or early disposition as a subcontractor or other ancillary party. Even if early disposition or resolution strategies are not immediately successful, or because of lack of information from the insured or from the plaintiff, early resolution or disposition strategies cannot be effectively undertaken at the outset, this issue should be revisited within a few months. As appropriate, the issue can be reviewed periodically throughout the claim or the litigation.

Everyone knows a construction defect litigation is extremely expensive litigate. This is the case whether you are the target developer defendant, or whether you were the smallest sub-subcontractor on the site. As a consequence, these cases can become the bane of the claim professional and the insurer's existence. In addition to voluminous document production, countless party and witness depositions, there are the costs for experts. Do not forget expert depositions, pre-trial evidentiary hearings and motions. It is not uncommon for cost of defense including expert fees to reach or even exceed the amount of a settlement. So often it takes months or longer of pre-litigation investigation coupled with up to three years of litigation before a case is “ripe” for mediation. The purpose of this panel is to discuss potential solutions for early disposition and resolution in those cases involving subcontractor or nominal defendants. In order to proceed with an early resolution or disposition strategy, as discussed above, the first and most important step is identifying those cases where such a strategy can be pursued.

Approaching plaintiff about early resolution where you have a middle tier contractor who likely has some liability but the scope of same is hazy, is not likely to result in an early resolution. If plaintiff does not know the true scope of the contractor’s work and alleged damages, then it will be difficult to persuade counsel that they should accept a fixed sum early on. Counsel for plaintiff will be concerned that they may leave a “hole in the case.” Accordingly, do your homework upfront by attempting to identify those cases who are best suited for early resolution or disposition. Likewise, as additional information becomes available either through defense counsel’s proactive search or through the ordinary course of litigation, opportunities for earlier disposition or resolution should be reviewed periodically.

II. Types of Early Disposition

The most preferable and definitive type of early disposition is dismissal with prejudice. This is often the most difficult type of disposition to achieve particularly early on in the litigation. The success rate in attempting to obtain early disposition by way of dismissal with prejudice will depend on a host of case-specific factors as well as sometimes the reputation and credibility of your defense counsel. Dismissals can also be without prejudice. As discussed below, there are advantages and disadvantages to a dismissal without prejudice. Some clients and insurers are understandably hesitant to accept a dismissal without prejudice.

Acceptance of a client/insured's tender to another party in the litigation is another avenue of early disposition.

Motion practice can also serve as an avenue for early disposition. Motions on jurisdiction, failure to state a claim, and even occasionally summary judgment based upon abundantly clear circumstances may be an option early in the case. Finally, early settlement efforts can also result in timely case closures.

III. Strategies for Dismissal

A. Dismissal/Discontinuance

Dismissal with prejudice is the gold standard. Counsel and the insurer as well as the client can be assured that a case is fully resolved and off of their respective plates when a stipulation of dismissal with prejudice is obtained. In multiparty cases this is often a daunting task. Circulating a stipulation of dismissal with prejudice among 20 or more parties can take months of follow-up. At the outset, however, it is necessary to convince either the plaintiff or the developer defendant who joined the contractor that dismissal is appropriate and in particular that dismissal should be with prejudice. Clients routinely request that defense counsel get them dismissed from the case because they have done nothing wrong. Often coordinating counsel or in-house counsel or an insurer will make a similar request. It is important to have a frank discussion regarding the likelihood of success on this request so that all parties have a realistic expectation. While the purpose of this panel is to discuss early resolution or disposition, there may be times when deferring that phone call or frivolous litigation letter a few weeks or even months to ensure that you have all of the information to support your assertions is warranted. Strategies regarding attempts for dismissal should be discussed with defense counsel. Corporate counsel, coordinating counsel and the claim professional should place significant weight on the recommendation of local defense counsel regarding timing and strategy for dismissal. Local defense counsel likely has experience with the players in the plaintiff's bar in construction litigation in that jurisdiction. He or she has probably dealt with those same counsel on other cases and has a sense of their operations. For example, counsel may know that the plaintiff or counsel for the developer never countenances early dismissals until at least written discovery has been received or may know that sending a frivolous litigation letter as your first communication will set the wrong tone. Counsel may make recommendations regarding a courtesy phone call in advance of sending such a letter or advise that the request for dismissal should be made at a specific point in time where it is more likely to be received favorably.

Dismissals without prejudice are generally less favored. At a minimum, counsel must stay involved and continue to monitor the case. Depending upon the insurer and the client, it may be necessary to continue to participate in all facets of the litigation including depositions. Under these circumstances why would anyone take a dismissal without prejudice? There may be several reasons. First, once you have the plaintiff in the frame of mind that they are willing to give up their claim against your client even if without prejudice, they are typically no longer actively looking to build a case against your client as discovery proceeds. Second, they are generally not going to request any discovery from your client.

Third, unless someone really has a reason such as a contractual claim or you are their subcontractor, the other defendants are likely to put your client on a back burner as well. You will typically only want to take a stipulation of dismissal without prejudice where the claim professional agrees that you will continue to participate in key depositions and appearances and monitor the case for any changes. You will likely not want to agree to a stipulation of dismissal without prejudice with a tolling agreement. You want to know that at some point in time your client really is off the hook and the file can be closed. Additionally, if you have any significant concerns that the client may have liability, a stipulation of dismissal without prejudice is not a good option. Where you have a frank and candid conversations with the client and are comfortable with the materials and information they have provided, and are a position to gauge their liability as none to unlikely, a stipulation of dismissal without prejudice may be a viable opportunity. Generally, however, we prefer to obtain stipulations of dismissal with prejudice.

When accepting a stipulation of dismissal without prejudice, defense counsel should diary the matter ahead for a reasonable period of time, perhaps as little as 60 to 90 days. At that point in time, defense counsel should consider filing a motion for summary judgment based upon the absence of any evidence in the case and also cite to the stipulation dismissal without prejudice. It is best to do this as the initial discovery end date approaches so that at least that procedural benchmark can be cited in the moving papers. This tactic can backfire with opposition from the plaintiff or another party. Typically, it results in a letter from the plaintiff saying that discovery is ongoing, and that the stipulation should remain without prejudice. However, in the absence of any definitive facts to support the opposition, the courts sometimes grant these motions. As a result, the defendant is dismissed earlier in the litigation than would typically occur, albeit not as soon as the defense would have initially preferred.

B. Tender

Acceptance of a client or insured's tender is always a positive way to extricate a contractor from the litigation. Where a tender is accepted, issues may remain regarding prior counsel fees. Any reservations of rights or tender agreement should be reviewed carefully for exclusions or opportunities for bounce back. If there is any chance that the case could wind up back on the insured contractor, or the insurer, it is recommended that original defense counsel be retained to monitor the case and that counsel for the party accepting the tender be requested to provide regular status updates to defense counsel and, depending upon insurer preference, the claim professional. By monitoring the case you can at least have a heads up regarding issues that may result in the matter being sent back because of newly developed factual or liability concerns. Additionally, monitoring counsel can remind substituting counsel to pursue opportunities for early dismissal as appropriate.

C. Motions

Often dispositive motions including particular motions for summary judgment require that the parties reach some level of discovery before the motion is considered "ripe." In a number of jurisdictions incomplete discovery alone may result in a denial of the motion. There are circumstances, however, where the facts are so clear and so one-sided that an early motion for summary judgment may be appropriate.

Likewise, there may be circumstances where a motion to dismiss as a first pleading or an early pleading are warranted. These include jurisdictional issues. In the case of a manufacturer of a product who may have limited contacts with the state, a Daimler type motion may be warranted. Likewise, where the plaintiff's complaint is fairly specific regarding the allegations and those allegations do not set forth a cognizable claim against the defendant, a motion to dismiss for failure to state a claim may be appropriate. Tender issues and additional insured issues are very difficult to resolve by way of motion particularly at an early stage of the litigation. Nevertheless, you may have the unusual circumstance where such a motion would be appropriate.

D. Settlement

Although not nearly as palatable as a dismissal or an agreement for another entity to undertake the client/insured's liability, early settlement can sometimes be an attractive option. Early settlement may be appropriate where the client had a small role in the case, its liability can be clearly defined, it had little to no liability, or where the insurer or client is willing to pay a premium to extricate itself from the case without the need for submitting to extensive and invasive discovery and incurring significant legal expenses. Several methods can be employed for early settlement. These include direct communications either between the claim professional and opposing counsel or defense counsel and opposing counsel. As early settlement agreements may require some form of indemnity from the plaintiff or more likely indemnity from the developer who joined the subcontractor, it is advisable to at least include defense counsel in these discussions. Unless the claim professional has had prior settlement, discussions and has built up some type of a rapport with opposing counsel, typically it is better to have defense counsel broach the subject of early settlement with opposing counsel. The concern is that without a track record of negotiating with plaintiff or developer counsel, there is a potential concern that initial contact from the claim professional could be viewed as an open checkbook.

Settlement efforts from defense counsel could be as simple as a phone call, or a letter suggesting early mediation or ADR. As an aside, some judges try to push these cases into binding arbitration. We typically resist these efforts particularly where the client has strong liability defenses. Early settlement efforts can also involve mediation either globally or with a subset of defendants. Some jurisdictions will schedule construction defect matters for early mediation with a court-appointed mediator. Some courts have early settlement programs or early disposition days. As discussed below, some insurers have alternate resolution programs as well. Finally, as a result of your request for an early dismissal, plaintiff may approach you about an early buyout. Sometimes this is a relatively nominal number where plaintiff is simply looking to get rid of low hanging fruit and build a war chest to fund the discovery which will be taken against the remaining parties. Sometimes this is an opportunity to settle out early at something of a premium. Obviously whether to pay a premium to resolve the case early or continue to aggressively defend the case is a business decision to be made by the insurer.

There will be cases where settlement and case-handling decisions will not rest entirely with the insurer because of high deductibles or self-insured retentions.

In these cases, obviously defense counsel will work with the client and its risk manager in setting strategies including efforts at early dismissal or settlement.

IV. Alternative Programs

Increasingly, insurers and third-party claim administrators are utilizing outside defense counsel to review claims and litigation in bulk to identify early disposition opportunities. Sometimes the mere announcement of such a program will result in batches of closed files which have simply languished due to other priorities. In other instances, having a fresh set of eyes who is not particularly vested in the defense of the case but looking at it from the perspective of resolution or disposition can identify new strategies. Often having matters reviewed from a macro standpoint can identify patterns, overall case values, trends with different plaintiffs' firms in various jurisdictions, and open up the prospect of early resolution or disposition from a group standpoint. That is, to the extent a particular multi-jurisdictional developer has joined an insured subcontractor in numerous cases over three states, there may be the possibility for a group disposition involving certain dismissals and settlements as part of a package. It is essential to work with local counsel as well as the insured's risk management team on any type of alternative resolution program.

V. Discovery?

While one of the major goals for early disposition resolution is to avoid both the time and economic costs associated with lengthy discovery, there may be occasions where producing discovery may further your goals of either early dismissal or early reasonable settlement. These cases are typically reserved for when counsel is convinced that the subcontractor's liability is either nonexistent or fairly limited. That is, you have to be really sure. In these circumstances, it might be advisable to have a client prepare a certification outlining its limited involvement at the site or whatever fact or issue is believed to exculpate the client. You do run the risk of this certification being out there in the case and being an exhibit, which is shown to the client either at deposition or trial. Accordingly, you must be certain of the information being provided by the client and confident that it will withstand the test of time as the litigation proceeds. Additionally, you may have your client's project file or a portion thereof which clearly establishes your client's limited role at the site or identifies the party who would actually be responsible, or some other critical information. In the right circumstances, you might agree to produce your client's project material prior to the discovery deadline set in the case accompanied by a letter to counsel for plaintiff requesting dismissal. In the alternative, if you had some limited discussions with counsel for plaintiff regarding early resolution for something in the range of nuisance value but are getting pushback about possibly leaving a hole in the case, you may want to produce your client's project file. Again, you only want to do this if the project file for other documents are largely exculpatory, and will support whatever argument you are making, whether it be for dismissal or nominal settlement.

In very rare circumstances, you may wish to have your client's deposition be one of the first depositions taken in the case. Obviously, no one wants to go first, you typically want to get the bigger players' depositions first so that you have a full understanding of the picture.

However, where you are certain and have received adequate assurances from your client both in terms of documentation and assurances from your client including documentation, you may wish to offer your client's deposition sooner rather than later where you plan to file a motion for summary judgment, for example. Again, it is the rare case that you want to have your client be one of the first parties deposed in the case but there may be some circumstances where it aids you in extricating the client sooner rather than later. Keep in mind, however, you really are not risking much as in most instances you are going to have to produce your discovery and witnesses at some point in the litigation.

VI. When it's All Your Fault

Much of the presentation focuses on extricating the client from construction defect litigation where it has limited or no liability. However, extricating yourself from a case at an early stage when you have significant liability may be even more important. It is obviously a harder sell to the plaintiff or party who joined the client and is going to cost more. However, approaching opposing counsel about early resolution at a practical number where you know the client has significant liability may nevertheless be beneficial. In addition to the obvious avoiding expensive litigation costs, including expert fees, you may avoid or limit release of the client's documents. There may be particularly damming documentation, e-mails, correspondence regarding value engineering or something similar that you simply do not want out in the litigation. This may be particularly significant where the insured is in multiple cases or suited various jurisdictions. If it is a single case and discovery is likely only be relevant in the present action, early settlement for a target defendant may not be as attractive an option. In either event, early settlement may also avoid subjecting former employees who may no longer be friendly to the company to deposition. This strategy may avoid exposing officers or other management of the company to deposition or potentially avoid unwanted publicity for a larger company where a confidentiality agreement can be incorporated.