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Do You Mean We are Going to Have to Try This Case?

I. Not All Construction Defect Cases Settle

A. Pitfalls in failing to appreciate the potential for trial in your case

Historically, the vast majority of construction defect cases reach a resolution prior to trial. While nationally very few cases are tried to verdict, even fewer construction defect cases seem to ultimately reach verdict. Part of this reality may be simply the fact that it has become a pattern. Complex multi-party cases are made for alternative dispute resolution. No judge wants one in his or her courtroom for trial. Although the disputes can include extremely high dollar figures, they are often less emotionally charged than personal injury cases. As a result, more pragmatic decision-making has a better chance of prevailing. With so few construction defect cases failing to resolve at mediation, how do you know if your case might be an outlier? What do you do to prepare yourself for that potential trial short of preparing every single case for trial?

Sometimes as attorneys and claims professionals we feel as though we are expected to prepare for the parade of horrors. Sometimes thinking about the worst-case scenario, and a few steps down the line can avoid actually having to endure some of these unpleasantities and expenses.

In many cases cost savings and efficiency can be achieved in sharing experts. There are risks in having too many experts. If multiple defendants retain separate experts who will essentially testify on the same opinion, there is a risk that one or more of the experts will not be able to testify at trial. Additionally, too many “hired guns” on the defense side can create not only the impression that there is something to hide, but that there are deep pockets or that the plaintiff’s damages are more significant than they really are. There are times, however, when having your own expert or expert team is essential. Where your client does not share a common interest with any other party, it is often essential to retain your own expert(s). When your client is a smaller player and a similarly situated party has retained an expert, there are times we may be tempted to rely on that expert’s expected testimony. This may work well at mediation or during negotiations. However, if that defendant settles and you have not formally joined in and retained that expert, your negotiated position will be significantly compromised. If you find yourself suddenly headed to trial, you will be doing so without an expert.

In construction defect and even construction accident cases, there often seems to be an endless list of potential witnesses. There is often an initial round of depositions to be completed before the parties regroup and assess potential settlement. Keeping the list of all potential witnesses in mind at every stage of discovery as you continually assess your client's role in the case is important. A witness thought to be ancillary may become more critical for further discovery. A defendant thought to be peripheral may suddenly be placed in the spotlight. Being able to adapt for discovery strategy will enable you to be prepared to try the case that does not settle.

Often there is pressure from the court, pressure from a regular or appointed mediator, or from counsel for plaintiff to get through the bare facts of discovery before engaging in what can be a long and protracted alternative dispute resolution process. It is essential to not allow the mediation or alternative dispute resolution process to take on a life of its own to the point that it prevents or distracts from completion of necessary discovery. In those cases that are appropriate for early resolution, completing written discovery and one or two depositions may do the trick. However, no one wants to find themselves in the case that is suddenly not going to settle, as the discovery end date approaches and meaningful discovery was neither accomplished nor seriously attempted. There is a risk in obtaining the bare minimum of discovery without a careful eye on the clock to ensure that you have the necessary. The necessary includes not only the information and evidence that is out there to assist you in defending and proving your case, but a way to get that testimony, document or the material into evidence.

It is the rare construction case that does not involve coverage issues. However, coverage issues which are not immediately apparent may arise as the matter proceeds through litigation. Additional discovery may unearth potential coverage issues. Likewise, the realistic prospect of trial may highlight potential conflict situations. Difficulties in allocating defense and indemnity responsibilities among insurers on the risk and potentially with respect to uncovered claims create real impediments to resolution.

While defendants and even the plaintiff may agree on the right number for the case, this is only half of the equation. Quite often true resolution of the case is thwarted by an inability to allocate among the defendants. This is where a bare bones discovery approach does not work. Plaintiff has no duty to apportion fault. In many cases it would be impossible for the plaintiff in a defect case to apportion fault or damages, because of the indivisible nature of the harm caused. So, you need that deposition testimony and those expert opinions to try and determine each parties' apportionment. If you take a bare bones approach and share experts, you run the risk of some defendants settling for less than their fair share and your insured/client being "last man standing" at trial. This is where a bare bones discovery approach does not work. Plaintiff has no duty to apportion fault. In many cases it would be impossible for the plaintiff in a defect case to apportion fault or damages, because of the indivisible nature of the harm caused. So, you need that deposition testimony and those expert opinions to try and determine each parties' apportionment. If you take a bare bones approach and share experts, you run the risk of some defendants settling for less than their fair share and your insured/client being "last man standing" at trial.

B. Potential Signs That Your Case May Try

Coverage issues can be one of the most significant impediments to resolution of the case. While the parties may agree on the value, funding that contribution is an entirely different challenge. Coverage issues can be even more difficult to resolve when there is the potential for other cases during the same

policy period(s) where either the insured or the insurer may seek to rely upon the allocation in the current action as a basis to support an identical allocation in a separate action.

Everyone wants their client to be involved in the process. It makes responding to discovery and developing a true understanding of the facts much easier. I would almost always rather have an over-involved and “present” client than an absent client. However, client involvement does not always translate to client cooperation. Likewise, some clients have a difficult time accepting that the litigation is not personal or that business decisions will sometimes be made by the insurer or risk manager. Involved risk managers can often be helpful allies to the claim professional and outside counsel. These individuals are generally litigation and claims savvy and are intimately familiar with the insured’s operations and philosophy. However, there are cases where an overly involved insured rather takes the litigation personally, or has just enough knowledge to be dangerous. They can steer the litigation in counterproductive directions. Sometimes the insured’s counterproductive behavior is just enough to create extra work and tension in the defense of the case. Sometimes these counterproductive efforts can actually frustrate the best interest of the insured whether that be settlement or trial. Frequent and open communication with the insured regarding the litigation process, the associated delays, and end goals is important in maintaining a positive relationship with the client, and having the entire team working toward the same goal.

An overly involved adversary can sometimes be even more problematic. Whether it is the plaintiff with a sprained ankle, catastrophic injury, or the homeowners’ association with infinite time on a crusade to ensure that every piece of caulk is replaced. Over engaged plaintiffs pose a challenge to both to the defendant and to plaintiff’s counsel. Involved clients on either or both sides can push a case at least to the courtroom steps, and perhaps beyond.

How often have you been involved in a construction defect case where the sub-subcontractor is long gone, insolvent and was the party who actually performed the work at the heart of the building envelope issues? Insolvent or absent key players can leave a significant hole in your case and the funding of any settlement. Some states have procedural tools to deal with parties who were joined but subsequently became insolvent. State laws differ with respect to who bears that shortfall at trial. Upstream contractors, property owners and the like are often unwilling, at least initially, to pick up the slack for their absent or insolvent contractors or manufacturers.

A key point to this panel is the notion that some cases fall outside of the norm. We often litigate construction defect cases in our familiar jurisdictions, encountering a varied but familiar cast of co-defendants and even plaintiff counsel. While we may not be buddies with our adversaries, familiarity does bring some level of predictability to the litigation. Parties and their counsel who are familiar with local construction defect litigation practices, settlement values, judges and trial assignments can reduce unpleasant surprises.

II. How and when to prepare

There are some cases that will arrive on your desk as a transfer file, or where your client was served later in the litigation and the prospect for trial immediately presents itself. The majority of cases, however, will evolve over time. Each new file or claim should be carefully reviewed for any unusual factors which might make it more likely to try or for factors which could complicate resolution. Coverage issues, insolvent insureds or other parties, unusually high damages, unique theories of liability, unusual complaints or new plaintiff's firm's or third-party plaintiff firms without a history of litigation in the jurisdiction can be red flags. While these factors individually or in combination do not necessarily mean the case is more likely to proceed to trial, the presence of one or more may complicate the litigation and resolution of the case.

Even where no unusual factors are present and there is no indication that a case is unseizable or particularly likely to proceed to trial, a certain base level of preparedness must be completed. Obtaining the insured client's complete project file and meeting with its key personnel about the project are essential. Propounding and responding to written discovery particularly on key points likely to impact the liability and damages pertaining to the insured/client are necessary. Depending upon the issues in the case, the prospects for early resolution, the other parties in the case and their discovery efforts, it is sometimes appropriate to take a phased approach to written discovery. Sometimes serving a notice to produce which is narrowly tailored to your issues in the case can be beneficial in planning your future discovery strategy. Once you have the basic information you can determine whether you have follow-up requests and when to serve those follow-up requests. Responses to a notice to produce can often be helpful in allowing you to serve the most productive supplemental interrogatories.

While it is not necessary to prepare your entire case for trial at the earliest opportunity, it is important to remember that any case might proceed to trial and at the appropriate time, a "back-up plan" should be created in case it does. Having a plan to reevaluate the trial potential of your case at various benchmarks is an excellent way to safeguard against being caught unprepared for trial. We already discussed the initial evaluation which looks for red flags or potential problems. After the first round of written discovery, an updated report should be prepared which addresses not only potential damages and liability, but a proposed plan for resolution and any concerns the claim professional or outside counsel have with respect to potential trial. Although experts need not be retained at this stage, some initial thought should be given to the expert team (or expanded expert team) that would be recommended if the matter were to proceed to trial. Outside counsel should also provide a scalable and flexible plan.

In many cases a single expert who is unlikely to testify at trial will be sufficient to get the case through resolution in mediation. There may be situations where sharing an expert will also work. Claim professional and defense counsel need to consider whether the shared expert will work not only for purposes of settlement discussions and potential motion practice but whether the shared expert will work at trial. If you are sharing one expert with a co-defendant who is adverse, this may not work at trial. We also know that there are experts that we select in a case that is more likely to go to trial and experts we will retain in those cases or trial is highly unlikely. There may be a cost difference. There may be an availability issue. It may be that the expert you normally use in these types of cases has already been retained by another party and you have to go with a second-tier expert. Often construction defect actions utilized a team of experts which may be comprised of consulting experts and testifying experts. You may

wish to consider retaining your experts in stages with a more general expert issuing an initial report to assist in the alternative dispute resolution process with other experts retained but not actively engaging in report preparation or other work until necessary.

Reevaluation of Key Defense Strategy Such as Expert Retention

A damages expert is often overlooked or rejected for fear of setting a floor. This is less of a concern in a construction defect case as the plaintiff is almost certain to have some form of damages. Whether those damages are within your client's scope of work or responsibility is certainly another issue. Damages experts can be shared by subsets of defendants in many cases and this is a good opportunity for scalability.

Experts can be requested to review key information in the case and provide preliminary verbal opinions for purposes of evaluating your case. As a matter proceeds toward alternative dispute resolution, limited preliminary reports can be prepared. Depending upon your jurisdiction, counsel may be able to enter into an agreement or with the assistance of court obtain an order that preliminary expert reports shall be inadmissible and are solely for the purposes of mediation.

A preliminary assessment on experts should be made upon receipt and analysis of the initial round of written discovery. As depositions commence, the initial decision should be made on which expert(s) to retain. These experts should be retained as soon as possible to avoid an adversary retaining same. Outside counsel, in conjunction with risk managers and claims professionals should carefully evaluate those cases in which limited case information can initially be sent to the expert. Where the strategy is appropriate, additional information can be provided at a later date once it becomes apparent that a full report will be necessary, or the matter appears likely to proceed to trial.

Site inspections and preliminary versus larger scale destructive testing are also areas where scalability can be considered. To get a sense of a layout for the overall quality of construction, a site inspection for you and your expert may be appropriate. Some preliminary testing including destructive testing in select areas may be sufficient to prepare a case for settlement or remediation. However, your expert may need to perform wider skill testing to avoid significant cross-examination and challenge to her methodology if the case is to proceed to trial. Destructive testing can be one of the more challenging items to scale not only because it will require coordination through access with other parties including the plaintiff but because other parties will be aware of your scope of testing and evaluation as well as your timeline. If other parties are looking to do wider skill testing and do not have subsequent access, your hand may be forced to make a decision on the scope of your testing sooner rather than later.

In theory, the deposition and testimony of your own client, its employees and witnesses remains within your control. However, be mindful that key employees/witnesses may leave impairing your ability to control and have access to those witnesses. Likewise, senior members of the company may pass away or become unable to testify due to health issues. Always reach out to your client earlier rather than later to ascertain the status and long-term availability of witnesses and corporate representatives.

Although liability may be disputed, alternative economic solutions can assist in resolving a case. More significantly, providing a jury with an alternative figure significantly lower than that of the plaintiff can be

a viable trial strategy. In addition to the factual basis obtained through discovery, you will need a damages expert in your stable.

III. Use of Technology

Over the course of the past five years, the use of technology both in discovery and at trial has grown exponentially. E-discovery is an entirely different topic and could take at least another hour to explore. The focus of our technology discussion is use of technology for communication during discovery and trial. Videoconference depositions have been available for at least 15 years. Previously they were cumbersome and expensive tools to be used when only when absolutely necessary. In the past 10 years, they have become more commonplace with many court reporting services offering videoconferencing at a relatively nominal increased fee or at no fee at all. In the past several years with the advent of various services such as RingCentral, GoToMeeting, Zoom, Skype and others, videoconferencing depositions without video recording were on the verge of commonplace before the current global health crisis.

Videoconference depositions are perhaps not ideally suited for the construction defect world but in some construction defect cases, may be necessary. The videoconference deposition admittedly works best when the focus is limited to the witness's testimony and not for cases involving voluminous and/or oversized documents, such as architectural drawings. However, as scanning and storage ability as well as Wi-Fi bandwidth speeds have increased, the ability to share screens and allow a witness to virtually "point-to" what they are looking at or referring to on an exhibit has provided helpful workarounds when marking and viewing numerous exhibits. There is sometimes a reluctance to pre-mark and share exhibits in advance of a deposition for fear that it will telegraph a line of questioning to your adversary. Sometimes it is necessary to do so, however, such as is the case with videoconferencing depositions. However, in a case where a set of 50 documents are pre-marked for potential utilization at a given deposition, it is certainly possible that not all of those exhibits will be utilized by the questioner or in the order in which they have been marked. This can allow for an efficient deposition with limited surprises but provide for some spontaneity if desired.

Under current circumstances, videoconference depositions may no longer be optional, nor a function of cost of travel restriction. They are likely to be the norm for the foreseeable future. One of the biggest challenges posed by videoconference depositions is preparing your witness. In the past even at videoconference depositions, the attorney for the witness and the court reporter were physically present with the witness. In the short term at least, counsel will not be able to be physically present with their witness either at the time of the deposition or perhaps more significantly, for purposes of preparation. There are a few tips for preparing a witness for deposition remotely. First, prepare early and often. It may be more difficult for a witness to retain the information or instructions when you prepare remotely. A witness' focus is equally important in the remote deposition as it is in a traditional deposition. Thus, a preliminary preparation session well in advance of the scheduled deposition date can be helpful and allow the witness to digest and retain the necessary information. The preliminary session can be followed by an additional session with a final session right before the deposition. At least one of these sessions must be via videoconference so that you and your witness get comfortable talking into the camera and interfacing through whatever system you will be using at the time of the deposition. You can also

undertake the unenviable task of addressing any quirks that your witness may have which are highlighted by the focus videoconference as distinguished from being in a larger room with other sounds and objects.

Although utilizing virtual or videoconferencing depositions may require a lot more preparation and work up-front, this investment earlier on in the case can often be helpful and save valuable time later on, especially during trial and trial prep. Since there will already be a universal set of exhibits saved and organized in electronic form in the case, this will allow for a more streamlined way for counsel to easily review and determine which exhibits can be stipulated into evidence at trial. Additionally, in this day and age after the advent of smartphones and social media, jurors now expect to be impressed or “wowed” by “Instagram worthy” quality photos, videos and other multi-media or you can risk them literally sleeping through and missing the presentation of your case. Often times, the party who can show the jury their side of the case the most clearly and memorably in the courtroom will prevail on the verdict sheet. Therefore, strive to try to utilize either better technology or use it to your advantage in a more strategic fashion than your opponent. Showing jurors high-resolution photographs, drone videos, or 3-D computer renderings and models on a high-resolution screen, as opposed to relying on drawings and blueprints on a fuzzy projector screen, can make all the difference in the world at trial. Try to use technology however available to remove the complexity from your complex construction defect case and you may be pleasantly surprised with the result. Use it to your advantage to help educate not only jurors, but also mediators and opposing counsel and their claims professionals, particularly in cases involving allocation issues. Often times, the small investment in the technology and other similar tools upfront both in discovery and in the courtroom can go a really long way to reducing the overall damages allocated to your client—whether it be on a verdict sheet or in a global settlement facilitated through a mediator.

Your experience in taking the case through discovery using technology and remote depositions where necessary will aid you in preparing for the real show, trial. Increasingly courts are moving to videoconference proceedings whether for settlement conferences or motion practice. This too is likely to continue for the foreseeable future. Although there may be a temptation to dress down for the settlement conference or motion hearing done via videoconference, remember you are still before the court. The court continues to evaluate you on your skill, the facts of the case, the strengths of your argument and all aspects of your professionalism.

Jury trials when they resume will likely be very different. Additional use of technology in the courtroom is nothing new. Counsel have relied upon programs to enhance their presentation, and courtrooms have relied upon technology to assist in communicating with and engaging a jury for a number of years. This is likely to continue. Courts are likely to encourage out-of-town witnesses to appear remotely. Similarly first responders and medical personnel are likely to be encouraged to appear remotely as well. This may include your expert. This means you will also need to prepare your expert remotely. Unlike your own client, you will only have one meeting to prepare your expert in all likelihood. You will need to ensure that your expert is familiar with the remote conference procedure, familiar with being in front of the camera in the absence of an obvious videographer, and that he or she comes across effectively via video. Your expert is likely to have demonstrative evidence which you will need to receive ahead of time to incorporate that into your use of courtroom technology.

It is unclear how and to what extent social distancing will find its way into the courtroom and more significantly into the jury box. At least in the short-term, jurors are likely to be even less enthusiastic about spending their time in court with you, so try to use their time wisely by presenting electronic evidence in a way that is easy to see and understand.
