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The Affluent Homeowner: Managing Emotions in Multi-Million Dollar Construction Defect Litigation

I. Utilizing the Pre-Suit Process

A. Early resolution is usually the most cost-effective way to deal with high-value single-family home cases.

Upon receipt of a Notice of Claim, once of the first steps defense counsel should take during an initial conference call with Plaintiff's counsel is asking for a demand. This early request for a demand will allow defense counsel to obtain information necessary to evaluate the overall claims being made, as well as targeted claims relating to the client's/insured's scope of work at the subject home. Additionally, by requesting a demand, this allows defense counsel to determine whether Plaintiff's counsel has performed a legitimate evaluation of the case or if the claim is destined for litigation due to a failure to thoroughly prepare the Notice of Claim. During the initial conference call with Plaintiff's counsel, it is also a good time to ask whether there are any underlying tensions between the homeowners and certain defendants as these unique characteristics may ultimately have a large impact on how the claim proceeds and counsel's authority to participate in settlement discussions. Defense counsel should also meet with the client/insured early on to try to determine the underlying factors driving the lawsuit. Frequently, the client/insured has information regarding the original construction process, including personalities of the players involved, that are not evident from legal documents or project plans.

B. An early mediation with all relevant parties and carriers may result in a pre-suit resolution.

After conducting an initial evaluation of Plaintiff's claim, defense counsel should discuss whether an early mediation might be beneficial with the claim's professional. If all relevant parties and their carriers and counsel agree to meet under the mediation privilege, a lot of headway and potentially settlement could be achieved without the cost of litigation. An early mediation will also allow all counsel and the claims professional to determine how contentious the case is likely to be based upon the parties and their counsel's behavior at mediation.

While a mediator may be beneficial, if timing does not allow for an agreed upon mediator, an informal meeting/mediation can occur without a mediator. It is also important to consider whether it is better to forego an opening session where all parties are in attendance as such statements may inflame the tensions between parties. Opening sessions and whether to conduct mediation in breakout rooms is often decided amongst counsel by considering factors such as how interactions between the client representatives could either benefit or harm negotiations, prior interactions between the parties, and concerns about client control.

II. Once a lawsuit is filed, tensions can escalate.

A. How to use discovery to facilitate early resolution and not as a means to antagonize emotions.

1. Experts

If not accomplished during the pre-suit process, it is critical to retain an expert early in litigation. Retaining an expert who has experience working on behalf of both Plaintiffs and Defendants in affluent homeowner litigation will benefit a client's defense as an expert who works on both sides of lawsuits gives further credibility to their opinions, as opposed to an expert who solely works for defendants. Additionally, retaining an expert who has particularly worked in multi-million dollar single-family home litigation matters previously will ensure the expert is aware of the impact emotions can play in these types of cases and manage the parties' expectations of the claims. Utilizing an experienced expert at the early stages of litigation can assist in bringing focus to the actual alleged defects from a design and construction position, while also managing the expectations as to damages which may actually be recovered. An expert who is well-versed in single-family home litigation can also help to educate a Plaintiff as to what are defects that must be repaired versus purely aesthetic issues, which could help facilitate a resolution.

2. Inspections

One of the necessary parts of discovery in a construction defect case is inspecting the property at issue. This can lead to interactions between the Plaintiff and the Defendants, which can escalate already tumultuous relationships. Prior to attending an inspection, it is important to consult with the client regarding a game plan for the inspection, including specifically advising the client not to engage in conversations with Plaintiff and Plaintiff's counsel as such an exchange can be used against the client in the future. It is also a good idea to meet with the expert and client prior to attending the inspection so that any questions regarding the client's scope of work can be addressed before the inspection and not while on the property. Further, results of the inspection should only be discussed offsite to limit any arguments between Plaintiff and Defendants about alleged defects, as well as preserving confidentiality.

3. *Depositions and Written Discovery*

Depositions and written discovery are a potential landmine in affluent homeowner cases. Prior to setting depositions, defense counsel should issue written discovery to the Plaintiff requesting detailed responses as to the allegations particular to the client/insured. This written discovery should be used as a guide in determining the depositions that are necessary to complete, including fact witnesses and expert witnesses, who will testify relating to the client's/insured's scope of work at the property. It is important to have client control over and consistency among the answers to written discovery as such answers can be a source of fodder at future depositions.

Depositions are where the problems due to personalities can really get out of hand and result in unnecessary fees and costs. Be wary of the fact that a tactic by other counsel may be to set depositions for an untenable amount of time. This is also a time where opposing counsel may move for sanctions based on conduct in written discovery and depositions, which could lead to further entrenchment in the respective parties' sides. If you are faced with an opposing counsel who engages in combative conduct and the filing of unnecessary motions to compel or motions for sanctions, it is critical to fully evaluate the benefits and potentially costly harm that could come from getting wrapped up in such conduct. Not only could the confrontational behavior amongst counsel result in unnecessary fees and costs that do not benefit the defense, such actions could also be sanctionable by the Court. Unless the matter at hand directly involves the defense of the client/insured, it is usually best to refrain from becoming involved in a battle that is driven by personality versus a legitimate legal basis.

B. Outside forces, including the Court, media, and client's/insured's business, must be considered when litigating affluent homeowner claims.

1. *The Court*

Seeking the Court's involvement at an early stage to set case management deadlines will provide a framework for all parties to move the case forward. More rigorous deadlines can usually be sought for single-family home litigation as opposed to high-rise condominium defect cases as the size of an individual home is usually more manageable to address on a time sensitive basis. Court deadlines should include a deadline for Plaintiff to disclose full and final expert opinions, including Plaintiff's expert deposition, prior to the disclosure of any Defendants' expert opinions. If a Plaintiff gives pushback on the request for early Plaintiff expert deadlines, this is usually an indication that Plaintiff failed to fully investigate their case prior to filing suit. To the extent multiple Defendants can come to an agreement and present a joint case management deadline proposal to the Court, this usually assists in getting deadlines that are more in line with a defense schedule as opposed to a Plaintiff's requested schedule. Intermittent status conferences approximately every 60 days can also assist the parties in bringing issues to the Court's attention to keep the case on track, and usually results in a more substantive involvement by the Court at the regularly scheduled hearings as opposed to addressing matters on a large first-come, first-served motion calendar.

While certain motions must be addressed by the Court, counsel should limit the Court's involvement in excessive motions such as motions to compel discovery in an effort to maximize defense counsel's credibility with the Court. Prior to joining in any motions for sanctions or other motions that could be seen as retaliatory, defense counsel should consult with the carrier and client to discuss the ramifications of such motions.

2. Media and Political Pressures

Litigation involving affluent homeowners is frequently accompanied by media attention. Plaintiffs may utilize newspapers, news stations, or other sources such as social media to bring attention to their lawsuit in an effort to put pressure on defendants to settle a case. In recent years, numerous affluent homeowners brought multi-million dollar construction defect lawsuits that ended up as headlines including the following:

- Palm Beach County, Florida (2013) *Vecellio mansion trial continues after \$79,000 jury award* – “The Vecellios reportedly are seeking nearly \$14 million related to their home, which was built on “spec” without a specific buyer. Their lawsuit claims they discovered serious construction defects, including water intrusion, after they bought the 25,000-square-foot house and guesthouse in 2008 for a price upward of \$40 million. They claim they were forced to spend more than \$11 million on renovations to remedy mold growth, fix roof and window problems, and make other repairs to the property at 589 N. County Road.” See <https://www.palmbeachdailynews.com/news/national/vecellio-mansion-trial-continues-after-000-jury-award/HTzrbyYCNKSY17kDsDdndI/>.
- Sarasota County, Florida – Armour (2014) – *Six years in, the disputes over 4449 Bay Shore Road are still raging, and seem unlikely to end any time soon* – “One of the region’s most dramatic real estate sagas of recent times — involving the area’s biggest privately owned mansion — has devolved into a series of lawsuits and arbitration cases that show few signs of ending. Six years in, the disputes swirling around water damage at 4449 Bay Shore Road have likely cost millions of dollars in legal fees — still a fraction of the \$18.84 million the house sold for in October 2008.” See <https://www.heraldtribune.com/article/LK/20140531/News/605186765/SH/>.
- Manhattan Beach, California (2005) – *Family wins record settlement over toxic mold* – “A family who claims toxic mold in their home caused brain damage in their baby has reached a \$22.6 million settlement against a lumber company and 16 other defendants.” http://www.nbcnews.com/id/9926761/ns/health-health_care/t/family-wins-record-settlement-over-toxic-mold/#.XPWishZKiUk
- Beverly Hills, California (2011) - *Rihanna files lawsuits over mansion’s ‘structural defects’* – “According to the lawsuit, filed in LA County Superior Court, Rihanna is accusing the former owner of her \$6.9 million mansion of failing to disclose the waterproofing defects and other construction defects of the property when the transaction took place. The singer claims that during a rainstorm in January 2010, water leaked into a number of rooms and left the house “uninhabitable”. <https://www.johnheath.com/news/rihanna-files-lawsuits-over-mansions-structural-defects/#.XPWljBZKiUI>

Defense counsel must be aware of the potential involvement of the media in lawsuits as statements by counsel, clients, or experts could be quoted in future news stories. The affluent homeowner may also have political connections with the city, county, or other governmental entity that could potentially impact

3. Client's/Insured's Business Considerations

As with all construction defect litigation, a client/insured was involved in the construction of the subject property to make a living. When dealing with single-family home lawsuits that are frequently driven by emotions as opposed to the legitimate issues in a case, defense counsel cannot forget the impact litigation may have on a client's/insured's business and its business relationships. Care must be taken to preserve relationships necessary for the client/insured to continue to operate the business. Especially in high profile lawsuits that involve media coverage, managing how a client/insured is portrayed publicly is critical to ensure the reputation is not harmed and that the client/insured does not lose future business due to an ongoing lawsuit. Defense counsel should advise a client/insured that if the media contacts the business for comment regarding a lawsuit, the client/insured should direct the media to defense counsel and make no further comment. It is recommended that defense counsel advise no comments will be made due to the ongoing litigation.

C. Mediation

Similar to the selection of an expert, selecting a patient mediator who will allow the parties to express their "side of the story" but also has significant experience in affluent homeowner cases will allow the parties to make progress at mediation as opposed to mediation serving as an impediment. Defense counsel should be involved in the selection of a mediator and consider factors such as time for subsequent mediations and willingness to participate in conferences prior to mediation to ensure all parties have the necessary demand and backup documentation to have a fruitful mediation.

Defense counsel should request that Plaintiff issue a written settlement demand targeted to the client/insured at least 45 days prior to mediation. The early demand will allow defense counsel to evaluate the demand with the client/insured, carrier, and expert, as well as follow up with Plaintiff's counsel to request additional supporting documentation for the demand. If the settlement demand is reasonable, it is beneficial to make the initial offer prior to mediation so that the parties can utilize mediation to close the gap as opposed to waiting until mediation to begin negotiations. However, if the settlement demand far exceeds the defense expert's evaluation of the potential damages, defense counsel should schedule a pre-mediation conference with the mediator to convey the unsupported and unrealistic demand.

If the matter does not resolve at mediation and there is little support for Plaintiff's demand, defense counsel should obtain authority to issue a proposal for settlement or other fee shifting mechanism to force Plaintiff's counsel to have a heart-to-heart with his/her client regarding the viability of claims against the client/insured. While the uncertainty of trial is a large motivating

factor in most construction defect cases settling prior to trial, if the first mediation is not successful the parties should consider whether a second or multiple mediations would be beneficial, or if the delta between Plaintiff and Defendants is too high to overcome.

D. Trial

In the event a matter does not resolve at mediation, preparing a client/insured for trial will take time as it is important that the client/insured present well to the jury. When there is a high-emotion case which frequently happens with individual homeowners, always being the reasonable party in comparison to an attorney or a party that gets overly emotional and appears unreasonable could win favor with the jury. For instance, preparing a client/insured to testify will include making sure he/she appears confident, comfortable, and honest in order for the jury to find the client/insured credible.

Counsel should also be conscious of his/her interactions with other counsel, witnesses, and the Court in front of a jury. This includes limiting unnecessary sidebars, flippant comments, nonverbal reactions, and overall demeanor. Professionalism in these highly emotion cases can take a lot of patience. However, the benefit will likely result in a better, more organized and coherent case that will resonate more with a Jury.