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Construction Defects
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Commentary

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One of the more frustrating aspects of defending subcontractors in construction defect litigation is the problem which arises in defending those subcontractors who from the outset clearly have little or no liability. The limited amount of liability can either be attributed to the nature of the work performed or the limited scope of that work. Examples might include a plumber who merely performed remedial repairs, a finish carpenter who merely installed glass shelves, towel racks or door handles, or a wrought iron fence installer who perhaps only erected a perimeter fence around a swimming pool. Oftentimes such subcontractors are small family owned businesses which were responsible enough to purchase insurance and are rightly concerned about the effect a claim may have on their future premiums. These defendants may often be able to demonstrate, to anyone who would listen, that they do not belong in the case and have simply been swept in with the broad brush of construction defect claims. Such minor players often find themselves in an analogous situation to the protagonist in Kafka's novel, "The Trial," waking up one morning and finding out that they've been accused, then having to spend the rest of their life trying to ascertain the nature of the allegations and obtain resolution.

Construction defect litigation has evolved to a point where it has almost become conspiratorial in preventing non liable parties from exonerating themselves. Subcontractors are often brought in by virtue of a developer or general contractor's cross-complaint solely due to the fact that their name appears somewhere in a document as one of the subcontractors which performed *some* work at the project. Developers are under significant pressure to bring all potential defendants in as soon as possible regardless of actual known facts. Shortly after the matter is underway, diligent plaintiffs' attorneys typically obtain a court order to have a case management order implemented. The cornerstone of these orders, of course, is to stay all discovery and thereby prevent those who would be inclined to obtain a quick exit based upon little or no exposure. Typically, the only meaningful discovery that a subcontractor can obtain is an inspection of the premises sometime down the road. Plaintiffs' counsel, as well as that of general contractors and developers, are typically too busy chasing down "target defendants" and determining what destructive testing they will perform to deal with the importunings of a small player who insists

it is entitled to a dismissal. Such pleas are typically met with comments such as "our experts have not had an opportunity to review your situation yet."

Eventually, plaintiffs promulgate a "preliminary" defect list supposedly setting forth defects and allocating specific defects or percentages of those defects to various subcontractors. However, even if there are no apparent allegations implicating the work of a particular subcontractor, the subcontractor may nevertheless remain powerless to expedite departure from the case. Preliminary defects lists are typically protected by the evidence code (§ 1152) and are therefore inadmissible. This effectively prevents any subcontractor willing to do so from filing a motion for summary judgment based upon the contents of a preliminary defect list. In the meantime, costs and fees continue to pile up for inspections, mediations, and CMO, "discovery." Such discovery typically does nothing except provide insurance information and the disclose scope of work of the various subcontractors on the project.

As the case progresses, the chances of obtaining a settlement and/or dismissal usually do increase. However, oftentimes, plaintiffs' counsel push for a "global settlement" and continue to focus their attention on the "big players" to structure a deal. Complaints of innocence by a non liable subcontractor are typically viewed as somewhat quaint by long-time practitioners of construction defect litigation who accept the system as it is and implicitly endorse the idea that if a subcontractor performs work on project that is eventually the subject of a construction defect action, that subcontractor *should* expect to be involved in the case for a considerable amount of time, notwithstanding the degree, if any, of its actual culpability. "That's just the way the system works."

If a subcontractor who is found to have no liability in a lawsuit is lucky, it may eventually be dismissed in exchange for a waiver of costs. Just as often, however, a subcontractor even one which has no exposure is often required to pony up nuiisance value money as part of an overall contribution required by the developer, in order to obtain enough capital to fund a global settlement.

Unfortunately, as any experienced construction defect practitioner knows, there is no simple solution to the institutionalized problem which is inherent in construction defect litigation. The problem is particularly acute for those subcontractors who likely have little if any actual liability and/or exposure. Nevertheless, there are a number of useful strategies that can be utilized by such subcontractors who, in truth, should probably not be in the litigation at all.

Determine Whether There Is An Express Indemnity Or An Additional Insured Obligation

At the outset, the first and most important thing that any subcontractor needs to determine is whether there is a written subcontract agreement and whether that subcontract agreement contains an express indemnity provision redounding in favor of the developer and or general contractor. While it is also important to determine the type of express indemnity provision, (e.g. whether it is a type 1, 2 or 3) that is the subject of another article. In truth, general contractors are becoming increasingly sophisticated in drafting subcontracts, and one should expect the great majority of such contracts to now typically include Type 1 indemnity agreements, since these are the most favorable to general contractors and the most oppressive to the subcontractors.

Such express indemnity provisions in a subcontract can be the biggest roadblock to obtaining an early dismissal or settlement, since it prevents unilateral settlements with the plaintiffs. Conversely, if there is no express indemnity agreement, the subcontractor who can demonstrate early on that it has little or no liability may be able to negotiate an agreement with the plaintiffs subject to an order determining that the settlement is in a good faith. Such an order allows a subcontractor to not only to obtain a dismissal from the plaintiffs, but obtain a dismissal of all indemnity based cross-complaints pursuant to CCP 877.6.

The situation is much different if there is an express indemnity clause contained in the subcontractor's agreement. The general contractor and/or developer are typically just as hungry for defense dollars as they are for indemnity dollars, especially early on in the case. Accordingly, to the extent that the subcontractor has a written obligation to provide them with a defense, the general contractor and/or developer may be unwilling to enter into an early settlement with such a subcontractor if there's even the slightest possibility of a finding any negligent performance of that subcontractor. Courts have found that under a typical Type 1 agreement, the slightest percentage of negligence on the part of the subcontractor is enough to trigger a defense obligation.

The situation is worsened if the contract agreement also requires the subcontractor to name the general contractor or developer as an additional insured on the subcontractor's own insurance policy. A subcontractor can find itself damned if it complies and damned if it does not comply to this particular provision. If the general contractor and/or developer are named as AI's on a subcontractor's insurance policy, these entities may also be reluctant to enter into an early settlement with a subcontractor, even if it appears the subcontractor has little or no exposure. This is because as long as there is some potential exposure against a subcontractor, that subcontractor's carrier usually has an obligation to fund the defense of the general contractor and developer. This effectively inflates the value of those claims against what are oftentimes smaller players. Conversely, if a subcontractor has failed to comply with the requirement of naming the general or developer as an additional insured on its applicable CGL policy, it is even in worse shape. Now, in addition to being unable to quickly extricate itself from the litigation, it is actually accruing an even ever larger potential exposure for those damages arising out of its failure to provide insurance dollars to contribute to these entities' defense which, of course, is ongoing.

In short, express indemnity agreements along with contractual AI requirements have become the 100-pound gorilla in construction defect litigation, especially for small subcontractors who would otherwise stir little interest. Thus, to the extent that subcontractor has not entered into one of these agreements, they are in a much superior position to obtaining an early reprieve from the long drawn out and expensive construction defect litigation process.

Determine Whether The Subcontractor's Trade Overlaps With That Of Others

Another important area of investigation for seeking early dismissal is to determine whether the subcontractor in question performed work which overlaps with that of other trades. The classic examples would be a framer who may be linked to a number of alleged defects involving other trades such as leaking windows and roofs, cracks with regard to stucco, flooring and drywall. Moreover, it is often difficult if not impossible to obtain a

reasonably precise allocation as to the percentage of fault which should be attributed to any one of these trades. This is partially due to the economic considerations of plaintiffs who wish to limit their costs in performing destructive testing to prove up their case. Developers and general contractors similarly don't often want to perform additional destructive testing since it may simply help establish what amounts to the plaintiff's burden of proof. Obviously, to the extent that the particular trade overlaps others, it becomes more difficult, but certainly not impossible to extricate that subcontractor, from a construction defect case, early on.

Propound Early Discovery Before Implementation Of CMO

If a subcontractor is named in a case early enough, often times plaintiff's or developer's counsel has not yet obtained a court ruling implementing a case management order. As such, no discovery stay exists which would prevent the subcontractor from quickly propounding discovery to plaintiffs, developer entities and the general contractor. Preferably these would be contention rogs seeking facts, evidence and witnesses justifying the filing of the complaint and/or cross-complaint. Often times responding parties attempt to stall providing responses knowing that soon there will be a case management order preventing them from having to respond. For this reason it is important to be careful when granting extensions to ensure that verified responses will be provided notwithstanding any subsequent implementation of a case management order. The receipt of verified responses could form the basis for an eventual motion for summary judgment even if they contain little or no information. Responding parties will typically state that they have not yet had an opportunity to investigate possible claims against the particular subcontractor. While it would be premature to file a motion for summary judgment at the early phase since it is likely to be denied without prejudice pending further discovery, the verified discovery could be used at a later date when the plaintiffs have had ample to time to pursue their claims, but have failed to do so. Under those circumstances the early responses can be used as a basis for a motion for summary judgment pursuant to Union Bank vs. Superior Court and would force plaintiffs and/or developer to present their case if they have one. Alternatively, the failure to provide any substantive evidence or factual basis for bringing in the subcontractor in the case could also form the basis of an early Code of Civil Procedure § 128.7 motion since pursuant to that section the allegations and other factual contentions contained in a pleading must "have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[1]

Hire An Expert Early On If Appropriate

There can be no doubt that one of the chief reasons construction defect litigation tends to be so expensive is because it is expert driven. One's defense is often only as good as one's ability to present expert testimony in support of its position. Even though experts are expensive, it is generally wiser to obtain the services of an expert if appropriate early in a case for those smaller subcontractors who are attempting to orchestrate an early exodus.

Take the example of a fire sprinkler subcontractor. Such a subcontractor may have virtually no exposure in a typical construction defect case. Plaintiff and/or developer's counsel may be sympathetic to this likelihood but insecure about providing a dismissal

outright or entering into an early release. This insecurity could arise primarily out of ignorance; that is, the plaintiffs or their experts simply don't have a good enough grasp of the dynamics of a fire sprinkler system to know if there is a potential set of defects which could be later identified. Under such circumstances, early retention of an expert by the subcontractor's counsel could be highly beneficial. Such an expert could provide an early blessing of the fire sprinkler's system and freely providing early expert analysis sufficient to reassure those concerns that an dismissal is warranted.

Obtain A Dismissal Without Prejudice

Another means for procuring an early dismissal involves the use of tolling agreements in conjunction with a dismissal without prejudice. Under this scenario, the Developer agrees to dismiss without prejudice, subject to being re-named if further discovery warrants.

Although obtaining an early dismissal subject to the possibility of being renamed in a lawsuit has its pitfalls, it can be especially helpful in extricating the small player from expensive construction defect litigation. Under the terms of such agreements, a plaintiff and/or general contractor/developer agrees to dismiss a particular subcontractor without prejudice and subject to a tolling agreement. This means that if further discovery uncovers new facts which at a later date demonstrate liability on the part of a defendant not otherwise known at the time of the agreement, the plaintiff is entitled to immediately bring the particular subcontractor back into the action and return to the status quo. It should be acknowledged that such agreements have their downside and can be downright dangerous for defense practitioners. This is because if a subcontractor is released early on in a case only to be brought in at the conclusion of extensive discovery including destructive testing, counsel for that subcontractor might find him or herself at a distinct disadvantage, having not participated or defended during the period that the discovery was occurring. This is less of a concern, however, with respect to the small player who either by the nature of the work performed or the scope of that work has limited upside exposure. Under those circumstances the gamble of entering into such agreements may be worth taking. Moreover, just as the small or insignificant player is often ignored during the course of construction defect litigation preventing it from obtaining an early dismissal, this is also potentially the consequence of an early dismissal itself. The departure of a small player can result in an out-of-sight, out-of-mind situation whereby no one concerns themselves with that particular set of issues, and therefore if for no other reason, no facts are ever uncovered which would provide a basis for re-naming that particular defendant.

Hopefully the above provides some ideas as to ways in which the smaller players can begin to take back control of what is now clearly an out of control system. If smaller subcontractors, with little or no liability, began applying more pressure on plaintiff's and developer's attorneys, the system might be forced to evolve into something which is more fair to all concerned.

ENDNOTE

1. It should be noted that early Code of Civil Procedure §128.7 will be repealed effective January 1, 2003 unless extended by the Legislature. ■

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