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Introduction to Construction Law:
What You Need to Know When You Are Just Starting Out

I. Introduction to Construction Law: What You Need to Know When You are Just Starting Out

By developing a basic understanding of the key elements of handling a construction file, you will be able to focus your resources accordingly and avoid any unnecessary expenditure of your time and resources. All too often, defense counsel believes the issues discussed herein are tasks to be handled by the insured, insurance carrier, insured TPA or insured risk manager, and as a result, they miss crucial elements in their client's defense. This discussion is intended to provide you with a few very basic tips to assist you in these efforts.

Communication is crucial to effectively handle a construction defect loss. You need to make sure you regularly advise your client and the carrier regarding the status of the litigation. Additionally, you need to develop a plan of action for handling the loss with constructive input from your client and /or the claims representative. Remember you are not handling the litigation in a vacuum. Your ability to report to the carrier is one key element which will impact your handling and success of the file from inception forward.

II. Reporting to Carrier

Upon assignment of the file, immediately contact the claims representative to advise you have received the file and provide all your contact information (if the adjuster does not already have) and generally discuss the file. You need to make sure you have a current copy of the litigation claims handling guideline from the carrier. Almost all carriers have detailed reporting guidelines with crucial reporting dates you do not want to miss.

You need to calendar these dates at the inception of the file just as you would calendar any court, deposition appearances. These dates are just as important, do not arbitrarily change

them.

If you handle work for multiple carriers, make sure you have the correct reporting format for the carrier you are writing. Even though the basic handling and information to be reported is relatively the same you want to make sure to complete any special requirements each carrier may have.

Your reports should be comprehensive and detail what has occurred, what is scheduled in the litigation and your plan of action for the upcoming matters.

All reporting does not need to be written. You need to find time to call and talk to the claims representative and the client. Verbal communication with all parties is just as important as having the written reports.

Make sure your claim reports are detailed and comprehensive; discuss the venue, judge, opposing counsel, damages, liability and potential exposure to the client for this loss. It is important to detail to the claims adjuster all pertinent dates and time periods such as dates of both the construction work, scope of work performed and the alleged injury and damage for which your client is facing liability. Make sure to obtain a complete job file from your client and from any other party who may have information in relation to your client's work at issue in the suit. All these details are important to coverage determination and claims handling of the loss.

Explain what each item of alleged damage is so that the insurer can fairly evaluate whether there is any covered "property damage" and, if so, to what extent

Separately discuss each type of property damage, exactly what property has been damaged and to what extent, based on what has been alleged in the pleadings and what has been identified in discovery and/or defect reports. Do not simply report to the insurer only what the expert(s) may conclude regarding the nature and extent of the damage. Be as detailed as possible, as the claims adjuster needs as much information as possible to be able to properly reserve the file and request settlement authority, especially for large exposure losses. Avoid "under reporting" to the insurer, as this may result in the insurer deciding that there is no coverage obligation at all, or that its indemnity obligation is very limited. Report all facts as they are.

Make sure to include with your reports all necessary pleadings for the file *i.e.* copy of operative pleadings, cross- complaints, discovery responses, motions for summary judgment etc... unless the claim representative advises they do not need these items.

III. Litigation Management Guidelines

Another area which is an important element to handling your construction file is your understanding and ability to follow the litigation management guidelines required. These guidelines are interconnected with any reporting guidelines provided by the carrier. You need to ensure that you and the firm have the most recent version of the guidelines in effect. These guidelines are put in place to provide counsel a framework for proper handling and billing of the

file. It is very important to make sure you and your billing departments are aware of billing guidelines in effort to avoid unnecessary redactions for billing entries outside of the allowable costs and fees. Improper billing entries can send a negative message to the claim representative and insured company regarding your ability to be organized and competently handle the matter for your client, their Insured.

IV. Risk Transfer – Tenders & Additional Insured Tenders

As defense counsel you need to minimize the exposure to your client by maximizing the risk transfer available for the loss. It is important for you to have a general understanding of the type of insurance available to your client. Knowing this will aid in understanding what exposure your client may have personally as a result of the loss, even though they have commercial general liability insurance. It is important to tender the defense and indemnity of your client as soon as possible in order to avoid late notice issues and a duty to defend is not incurred until the end. Your client may have a few different policies which they purchased in order to protect themselves from economic and business risks associated with construction.

When you are representing the interests of a defendant or cross-defendant in a lawsuit complaining of construction defects and your client is, or may be, an “insured” under one or more insurance policies affording liability coverage regarding the suit, you will need to:

- Explore what insurance benefits may be potentially available to your client by virtue of both liability insurance maintained by your client and liability insurance available to your client under a policy maintained by a third party, and
- Do everything possible to obtain the maximum defense and indemnity benefits for your client from all such liability insurance

Additionally, it is important to know if your client’s policy contains an SIR or a deductible in order to determine if the policy has been triggered yet.

V. How to Identify and Obtain Policy Information

Information regarding liability policies in which your client is the “named insured” (named as an insured in the policy Declarations) should be available through the client and the client’s insurance agent(s).

Your client may be an “additional insured” under a liability policy issued to another party involved in the construction defect project pursuant to an Additional Insured Endorsement which is part of that policy. Owner/ Developers /General Contractors will often require a subcontractor to have the general contractor named as an “additional insured” under the subcontractor’s insurance policy.

Ask the client and check the client’s records for Certificates of Insurance and Additional Insured Endorsements referencing the client as an “additional insured”, and review pertinent contracts to see if another party agreed to name the client as an “additional insured” under its liability insurance. If you find an Additional Insured Endorsement that either names or generally

describes your client, whether or not your client would qualify as an “additional insured” with respect to the construction defect suit in issue depends on the terms of the particular endorsement as applied to the underlying factual situation. Check the endorsement to determine what restrictions may apply, such as:

- Is coverage limited to ongoing operations only?
- Is coverage limited to a specific location?
- Is a written contract required for coverage to apply?
- Once you obtain your client’s insurance information, it is essential that you tender the defense and indemnity of your client to each such insurer, including any carriers providing excess coverage.

A delay in tendering can limit, and in some cases entirely preclude the insurer’s potential coverage obligation. It is the general rule in many, if not all states, that, even if, pursuant to the terms of the policy, the insurer owes a duty to defend its insured, the insurer does not owe a duty to pay defense costs incurred by the insured prior to the date of tender. Additionally, most commercial General Liability Conditions provisions require that a named insured provide written notice to its insurer of a claim or suit “as soon as practicable” and “immediately” provide the insurer with copies of legal papers the insured receives concerning the claim or suit. In many states, a delay in complying with these requirements that results in prejudice to the insurer will void the insurer’s coverage obligations. In others, the insurer will owe no coverage obligation even if it has not been prejudiced by the delay.

VI. What Coverage Trigger Applies?

Depending upon the state in which the claim or suit arises, the trigger for coverage may be different. It is important for you to understand the trigger of coverage to make sure your client or insured is provided all coverage available for its exposure and all carriers provide/share in the defense of your client or insured. There are four trigger of coverage theories that apply to construction defect losses. They are:

- Injury-in-fact (aka Actual injury)
- Manifestation
- Exposure
- Continuous

Injury-in-fact trigger: This trigger is also referred to as the “actual injury” trigger. States that recognize an injury-in-fact trigger find that all policies in effect when damages actually occur are the policies which provide coverage. The date(s) on which damages occur is often difficult to determine and often requires an inspection and perhaps an expert. This may include any time from exposure to manifestation inclusively. If the state in which your case or claim is pending recognizes an injury-in-fact trigger, you need to discover when the damages took place and ensure that all carriers providing coverage to your client or insured have been properly and timely notified and a tender is timely made on their behalf.

Manifestation trigger: Under a manifestation trigger theory the policy in effect at the time the property damage is discovered, or manifests, is the policy that provides coverage. This will typically only involve one policy. You need to make sure that the proper carrier has been placed on notice so as to avoid an issue with late notice.

Exposure trigger: States that recognize an exposure theory find that only those policies in effect at the time of actual exposure to the damage causing defect or event would provide coverage. In the construction defect context, this trigger is often used to trigger coverage on the date of installation.

Continuous trigger: Under a continuous trigger theory, all policies in effect from the date of the first exposure continuing through any period of latency and ending at the time the damages are discovered or become manifest are triggered. In the construction defect context, this usually means that all policies from the date of installation to the date of manifestation are triggered. Again, it is important for you to understand what coverage trigger is recognized in the court or state in which you are handling a matter so that all possible coverage for your client or insured is available. There has been much litigation over what triggers coverage and you should be aware of how the courts in your state have interpreted the trigger of coverage.

VII. Allocation of Damages

Once the trigger of coverage has been decided, the issue of allocation must be addressed and is often tied to the trigger of coverage. Allocation in construction defect cases can be similar to allocation of damages in asbestos and environmental cases. There are two basic methods of allocation:

- Joint and Several (sometimes referred to as “all sums”)
- Pro Rata

Joint and Several: This method of allocation often goes hand-in-hand with the continuous trigger theory. If coverage under a policy is triggered, the insurer is required to provide a defense and indemnity to the insured to the extent of its policy limits. The insurer may then have a right of contribution from any other carriers whose policy would be triggered but it is incumbent upon the insurers to allocate the damages among the policies. This method allows for vertical exhaustion of policy limits.

Pro Rata: There are various methods used to allocate damages on a pro rata basis. Under the pro rata method, each policy triggered is allocated only a portion of the loss. The portion allocated is dependent upon the method used by the court. Some of the methods used include: time on risk, proportion of the policy limits when compared with the total of all policy limits available, proportion of the injuries sustained within the policy period, etc. This method allows for horizontal exhaustion of policy limits.

VIII. Additional Insured vs. Indemnitee

It is important to understand whether your client qualifies as an additional insured under the policy of another, is owed a defense and/or indemnity pursuant to contract with another or both. This may allow for the transfer of the risk to another carrier, another entity or both. To determine whether your client or insured is an additional insured under the policy of another, you need to obtain copies of all contracts involved in the construction project and all certificates of insurance that may identify potential sources of additional coverage. You then need to obtain copies of all insurance policies if possible. You next have to analyze these contracts/policies to see whether your client's or insured's risk can be transferred to another carrier or another entity. It is preferable to have the ability to transfer the risk to both another carrier and another entity. This provides the most protection for your client or insured. If your client or insured qualifies as an additional insured on the policy of another, you may be able to tender the defense and/or indemnity of your client or insured to that carrier. If your client is owed a defense and/or indemnity pursuant to contract, you may be able to tender the defense and/or indemnity to the other contracting party. Both provide other sources of revenue to protect your client or insured. Additional insured status is granted by way of endorsement to an insurance policy. Dependent upon the type of endorsement, additional insured status may apply to ongoing operations only, completed operations only or both ongoing and completed operations. Also dependent upon the type of endorsement, additional insured status may be primary and non-contributory or may be subject to the Other Insurance clauses in the policy or policies. You need to be able to understand what coverage is available to your client or insured.

Some states have anti-indemnification statutes which apply specifically to construction contracts. You need to know whether your particular state has an anti-indemnification statute that would apply to your client or insured's contracts. These statutes may make indemnification clauses in your client's or insured's contracts void. If your state does have an anti-indemnification statute, make sure you understand how it applies to your client's or insured's contract and what affect it will have on your ability to rely on the transfer of risk pursuant to that contract.

IX. Retention of Experts

Retention of the proper experts is key to successfully defending a construction defect claim. It is crucial that you retain the experts as early in the litigation process as possible. In addition to attending site inspections, reviewing and drafting cost of repair, you're expert can be a valuable resource to you during discovery. The expert can be instrumental in determining what trades are responsible for the defects, are there design issues, was sequencing an issue on the job site etc... Just because you retain an expert as a resource does not mean you automatically need to designate the expert as part of the formal litigation. The type of expert(s) that you retain will depend on your client and their scope of work on the project. It important to have discussions with your client at the time of assignment as to what scope of work they performed on the project as just because your insured appears to install roofs does not mean they installed the roofs on this particular project. The type and scope of experts that you retain will differ depending on who you are defending the general contractor, construction manager or a subcontractor trade in connection with the type of defects alleged.

X. Conclusion

When you initially begin to handle construction files, especially a construction defect matter, the entire process can be challenging and overwhelming. Do not panic, use the framework provided above to guide you through the early stages of handling keeping in mind each file has its own set of individual facts. Remember Communication is key as the matter moves through litigation and is essential to resolving the matter whether at mediation or at trial.