

A Primer on the Sinister Mysteries of Litigation

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We recently had a call from a subcontractor who found himself involved in litigation – for the first time in over 30 years of practicing his trade. The matter began when his general contractor filed a lawsuit against a homeowner for breach of contract of a home improvement contract and damages. The homeowner then filed a cross-complaint against the general contractor and all of his multiple subcontractors - including our client - for breach of contract.

Generally Speaking. This kind of litigation is unfortunate but not uncommon. I call them “rich tech guy versus general contractor and the universe” cases. (The homeowner in this case may or may not be a tech fellow; I don’t know.)

Chronology/Procedure. Here, my subcontractor had been sued by the homeowner as a “**named**” cross-defendant in the homeowner’s cross-complaint.

We went online to review the county Superior Court’s Register of Actions for this case. The Register is a list of the various legal papers the various parties have filed with the court. The court record of filings thus far, even at this early stage in the case, was copious. It is six pages of probably a hundred-plus documents. (Zounds!)

The “**complaint**” was filed by the general contractor against the homeowner. A complaint is the first document that formally commences a lawsuit. The general contractor alleged a breach of contract by the homeowner and requested approximately \$200,000 in damages. (There was also a mechanic’s lien by the general contractor previously recorded on the homeowner’s property.)

Thereafter, there was a lot of legal jousting by counsel over mostly preliminary and technical matters. These include who should properly be a party in this litigation.

As a result of this jousting, the general contractor then filed a “**first amended complaint**” . The original complaint was amended by the general contractor to include and exclude parties and modify its theory of its case.

Then the homeowner filed a “**cross-complaint**”. A cross-complaint is what it sounds like. It is where the defendant in the original complaint brings his own lawsuit. Our subcontractor’s company was named as a party, as a “**cross-defendant**”, in this cross-complaint.

Why was the subcontractor named as a cross-defendant? The subcontractor was probably included by the homeowner’s attorneys in both an abundance of caution and as a tactical/strategical maneuver.

The abundance of caution is that the subcontractor might have done something that constitutes a breach of contract and/or negligence. The tactical/legal strategy for the homeowner is one to get as many other parties into the lawsuit involved as possible.

Insurance. Subcontractors in these kinds of lawsuits are often named in the hope that they will “**tender**” the claim to their liability insurance. If the insurance accepts the claim, it will then provide counsel for the course of the lawsuit. Generally, the greatest expense in this kind of litigation is not a settlement dollar amount but the cost of counsel.

The insurer may also offer money to settle the case and be dropped from the lawsuit. Settlement sums offered may be small but contribute to an overall bigger pile of money.

If a subcontractor’s insurance does not accept the claim, then the cross-complainant is hopeful that the subcontractor itself will still contribute some kind of payment to extract itself from the lawsuit.

Service of Process. To formally engage another person or entity as a party in a lawsuit, the complaining party in either the complaint or the cross-complaint must “**serve**” the party it wishes to bring into the action. “Service of process” is the formal title this action. It can be achieved in a number of ways. A process server will often “**personally**” serve the legal papers on the party – that is, hand the documents to the person.

One usually has 30 days from that date of service of process to respond to the complaint (or cross-complaint) in some fashion – usually an “**answer**”. It thus is important to be vigilant; once served, contact your attorney immediately.

What’s Next After Service of Process? In this instance there are about 25 parties (by my count) named in the action at this time. That includes the general contractor, the homeowner, and 23 subcontractors and/or consultants. Typically, once all parties are served and properly in the lawsuit (or dismissed and properly out of the case), the parties will commence “**discovery**”.

Discovery is the process of gathering information and can be lengthy. A party may request documents from the other parties, ask written questions, and take “depositions”. A deposition is the questioning by counsel of a party and/or a witness, which is recorded.

At the end of discovery – which can go on for many months - the matter is ready to go to trial. A case can be (and usually is) settled before an actual trial. The trial date is usually at least a year after the complaint was filed.

Your Liability Insurance. Should you inform your insurer of the lawsuit (if you have not already done so)? This is called “**tendering the claim**”.

We advise you to do so (although talk to your attorney first, and immediately after being served with a lawsuit). Indeed, an insured is typically required to report a lawsuit by the terms of its insurance policy. You are also required to give your insurance folk your full cooperation.

Tender Early/Tender Often. As stated, we suggest you contact an attorney to help you with tendering the claim. Then, you can call your broker and explain what has happened, and ask your broker where the tender should be sent. When you speak with your broker, take notes

of the conversation. And then follow the call up with a written communication so that the reporting of the claim is memorialized.

An important question is whether your insurance carrier will accept your “tender” and provide counsel. This depends on the insurance policy itself and the types of claims that have been made. An attorney can help you frame your tender letter in a manner most likely to get you an insurance appointed attorney to defend you in the action. More on this in a later article.

Conclusion. This article is of course overly simplistic. However, we hope it gives you the gist of what has happens initially in litigation and what might happen next. While we hope you never are involved in a lawsuit, it does happen – be sure to take steps to protect yourself. If you are served with a lawsuit, you should contact an attorney immediately.

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