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Successfully Defending a Lawsuit

By: Justin Ward. ***Monday, December 12th, 2011***

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Anyone who has been a defendant in a lawsuit will tell you that the process is expensive, time consuming and stressful. I have spent the past twenty years defending businesses and individuals in courts throughout Virginia and can attest to the emotional and financial toll which a lawsuit can have on the litigant. This article will focus on what steps a business in general and a builder in particular can take to make this process as painless as possible.

There are some steps a builder can take to defend itself even before a lawsuit is filed. Frequently, a builder will have some inclination that a lawsuit is imminent. If that is the case, one should make sure to preserve all evidence, including putting a hold on all e-mails, correspondence and other documents which may be relevant. Courts can impose heavy sanctions when evidence is discarded, even unintentionally, when a party has reason to know that a claim might be filed. Taking photographs of the project is very important, especially since access to the property will be restricted once the case is in suit.

Once a plaintiff files a lawsuit, Virginia law allows the party to wait for up until one year before the complaint has to be served on the defendant or its registered agent. Once the defendant has been served, it is important to promptly notify your attorney and liability insurance carrier or agent. Notifying the insurance company, even as early as the time when a builder has reason to believe that a suit may be filed, could have the effect of having insurance company hire a lawyer at the insurer's expense to defend the law suit. An insurer's requirement to defend and indemnify a builder for a construction defect claim is a subject for another article, but placing the carrier on notice of a law suit is a step which a defendant should take.

After the lawsuit has been served, a defendant has twenty-one days to file responsive pleadings. These pleadings can come in a variety of forms, depending on the nature of the asserted claims and the defendant's available defenses. Some early responsive pleadings can focus on a discreet issue, such as whether the lawsuit was timely filed, and can allow a defendant an opportunity to dismiss a meritless claim early in the proceedings. In many lawsuits, a general contractor may want to assert claims against third parties not named as defendants, such as a sub-contractor whose work led to the defect at hand. If the lawsuit involves injury to an employee of a subcontractor, a plea asserting that the injured employee's sole remedy is through workers' compensation may also be pursued. In a defect case brought by a homeowner against a subcontractor, a valid dispositive defense may be that the lack of a contract between the parties is fatal to the homeowner's case.

The defendant will need to coordinate strategy with its lawyer to make sure that the proper defenses have been asserted in a timely manner.

After responsive pleadings have been filed and preliminary motions argued before the court, the parties will typically launch into the discovery phase whereby each side tries to learn what information the other side has. Our system is designed for the full exchange of documents and information between the parties. Construction lawsuits typically involve the exchange of hundreds or thousands of pages of documents. Many trees have died at the hands of construction lawyers. The parties will also be required to answer under oath written questions, referred to as “interrogatories.” The parties are also allowed to issue subpoenas to non-parties to obtain their records. Documents can also be sought from governmental agencies, such as building inspectors’ offices, through Freedom of Information Act requests.

Retaining the right expert witnesses is a critical step in the pre-trial process. Most construction cases involve engineering, architectural and building code issues on which expert witnesses can offer their opinions. There is no shortage of available experts of varying quality throughout Virginia. It is important not to rush into retaining an expert. Carefully checking the expert’s background, qualifications and ability to testify well in front of a jury are all critical steps.

Once documents have been exchanged, interrogatories answered and each side has become thoroughly familiar with the other side’s position and theories, the next stage in the discovery process involves the taking of depositions of the parties and important witnesses, including experts. At its essence, a deposition is a question and answer session in which the lawyer asks the deponent questions under oath. A court reporter is present, transcribing the testimony. The scope of questions which can be asked in a deposition is much broader than what would be admissible at trial. There is no judge present to rule on objections made during a deposition, and the parties are largely left to self-police their conduct. The vast majority of depositions, while they can certainly be contentious, run smoothly without the need for the lawyers to place a call to a judge for intervention. A deposition, however, can be very long, depending on such things as the complexity and quantity of issues, the amount of money at stake, the reasonableness of the lawyer and the amount of material to cover, among other factors.

By the time the discovery phase has been completed, and usually well before that time, the parties should be in a position to evaluate their strengths and weaknesses. Most cases will settle out of court. However, with the economy as it is, my experience of late has been that builders are frequently financially unable to settle cases which would require that they spend even modest amounts of money.

In the event that the parties are unable to reach a settlement, the case will generally proceed to trial. Under our system, either party may require that a court empanel a jury consisting of seven citizens to decide factual disputes. In my experience, juries have little patience for either plaintiffs or defendants in construction dispute cases and frequently will not be able to understand the subtleties of complex issues which frequently are found in such cases. For these reasons, the parties may well be better off having their case tried by a judge rather than a jury. Invariably, each side will have volumes of exhibits to introduce into evidence. Such exhibits can include documents, photographs, inspection reports and other records. The parties should give a lot of thought to stipulating to the admissibility of non-controversial exhibits in order to speed up the trial and allow it to run more efficiently. Of course, witnesses will also testify at the trial. Assuming the judge does not dismiss the case for one reason or another during the trial, the case would then be submitted to the court or jury for its consideration of the law and evidence after the lawyers have completed their closing arguments.

There is no question that law suits are expensive, time consuming and stressful for all. Knowing the process and having good communication with counsel can, however, help make the process more bearable.