Tips & Tricks for Efficient Handling of CD Claims

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INTRODUCTION

“[E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project . . . Even the most painstaking planning frequently turns out to be mere conjecture, and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield”

Unfortunately, construction projects seem to lend themselves to disputes and, often, litigation. Fortunately, there are many tactics that may be implemented before, during, and after construction claims arise that may be utilized to maximize the efficiency with which such disputes can be resolved. This paper will touch on a select few of those tactics.

The Contract/Preconstruction Phase

Errors and omissions in contract documents have been reported to be the leading cause of construction disputes. While it is impossible to anticipate every issue that may arise, careful consideration and planning during the contract phase of a project can at least ensure that any problems that do arise are handled as quickly and seamlessly as possible. Following are some issues to keep in mind when drafting (or negotiating) the front end documents.

(i) Conflict Resolution Provisions – Where to Litigate?

The cost of litigation and the value of a particular claim can vary drastically between arbitration and litigation and from court to court, state to state, county to county, and judge to judge. And, of course, no one wants to get “home-towned.” Studies have shown that different venues can produce very different results in nearly identical cases. As such, parties should take the time to educate themselves on the various forum/venue choices for a particular project and endeavor to include contract provisions that will result in any disputes being heard before the trier of fact who is most likely to make the right decision in the most efficient manner.

Careful consideration should be given when drafting forum selection clauses to ensure they are enforceable as intended. For example, courts commonly examine the following issues when determining enforceability:

- Whether the clause was reasonably communicated to the party resisting enforcement;

- Whether the clause is permissive or mandatory.

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3 For example, in the Vioxx pharmaceutical litigation, manufacturer Merk litigated nearly 20 cases across the country through trial. These seemingly similar cases produced diverse verdicts: four defense verdicts and one plaintiffs’ verdict in federal court, seven defense verdicts and four plaintiffs’ verdicts in state court, and two mistrials in Los Angeles. C. Cohen, “Not in My Backyard!” & Juror Perceptions That Affect Verdicts, Am. Bar Ass’n (2015).

4 See, e.g., Jerez v. JD Closeouts, LLC, 943 N.Y.S.2d 392, 398 (N.Y. Dist. Ct. 2012) (refusing to enforce forum-selection clause that was not reasonably communicated because it was “buried” and “submerged” within the agreement in an inconspicuous manner).

5 Cardoso v. Coelho, 596 Fed. Appx. 884, 886 (11th Cir. 2015) (“Because the forum selection clause does not contain mandatory language, and because we resolve
• Whether the claims and parties involved in the suit are subject to the clause;\(^6\)

• Whether the clause is an “inbound” or “outbound” clause;\(^7\)

• Whether the clause should be found invalid because of fraud or overreaching;\(^8\)

and

• Whether enforcement would be unreasonable or unjust under the circumstances.\(^9\)

(ii) No Matter What You Decide, Be Consistent.

Construction projects invariably involve several contracts among and between the various parties. Inconsistent conflict resolution provisions in those contracts will lead to needless complication, protracted litigation, and increased costs all around. For example, it is not uncommon for an owner to include specific ADR procedures in its contracts with both a prime contractor and a design professional, while the various subcontracts and/or subconsultant agreements require litigation or are silent on the issue. In that situation, ambiguities in a written agreement against the drafting party, we hold that the clause at issue is permissive.”).

\(^6\) See Ex parte Soprema, Inc., 949 So. 2d 907, 914 (Ala. 2006) (rejecting plaintiff’s argument that claims were outside the scope of forum-selection clause, finding that the clause broadly applied to “any suit, action, or other proceeding which arises out of or is based upon the subject matter of this Agreement.” (emphasis added)).

\(^7\) See Ex parte D.M. White Const. Co., Inc., 806 So. 2d 370, 372 (Ala. 2001) (holding that outbound forum selection clauses are enforceable unless “affected by fraud, undue influence, or overweening bargaining power or . . . enforcement would be unreasonable on the basis that the [selected] forum would be seriously inconvenient.”).

\(^8\) See, e.g., Niemi v. Lashhofer, 770 F.3d 1331, 1352 (10th Cir. 2014) (refusing to enforce New York forum-selection clause for Colorado project where forum-selection clause was induced by fraudulent misrepresentation).

\(^9\) See, e.g., Barletta Heavy Div., Inc. v. Erie Interstate Contractors, Inc., 677 F. Supp. 2d 373, 378 (D. Mass. 2009) (refusing to enforce subcontract’s forum selection clause where it was invoked “way too late in the proceedings,” and it would “not result in the dismissal of the entire case.”).
unless all parties consent to a particular forum, parties may be forced to litigate the same or similar issues on parallel tracks. This can lead to inconsistent testimony, evidence, and results. It will lead to increased costs.

Safeguards should be implemented to ensure all claims between all parties will be heard before the same trier of fact. This typically starts with a provision in the prime contract requiring the prime contractor to bind its subcontractors to the same or similar conflict resolutions contained in the prime contract. An example of such a provision follows:

Subcontracts between the Contractor and subcontractors for construction services hereunder shall be in accordance with the provisions set forth below, unless otherwise authorized in a written directive from the Contractor.

(a) Such subcontracts shall contain a provision regarding the resolution of disputes between the subcontractor and the Contractor. Such provision shall conform to the requirements set forth below:

(1) All claims, disputes, and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, if not settled or agreed on pursuant to other provisions of this Subcontract, shall be decided by binding arbitration in the same manner and under the same procedures as provided in the General Contract.10

The prime contractor, in turn, should take care to address the issue in its subcontracts. An example of a provision that may be included in subcontracts follows:

Dispute Resolution. If Contractor is compelled to arbitrate with Owner any dispute that involves Subcontractor’s Work, Contractor may, at its option, require Subcontractor to participate in such arbitration, in which event Subcontractor shall be bound by the result to the extent as Contractor.

10 This example language is adapted from the contract at issue in Industrial Window Corp. v. Fed. Ins. Co., 565 F. Supp. 2d 513, 514 (S.D.N.Y. 2008).
Contractor may also require Subcontractor to participate in any mediation of disputes with the Owner that involve Subcontractor’s Work.

(iii) The Bankruptcy Caveat

If arbitration is the chosen conflict resolution vehicle, parties should be aware that they still may end up in court if an adversary files for bankruptcy protection. This is because the dictates of arbitration “must give way to the manifest objectives of another statute . . . the Bankruptcy Code.” *In re Merrill*, 343 B.R. 1, 7 (Bankr. D. Me. 2006).

If it is anticipated that a party may file for bankruptcy protection, other affected parties should consult competent bankruptcy counsel due to the unique nature of bankruptcy proceedings. For example, a party-in-interest to a bankruptcy proceeding has a wide range of discovery available under Rule 2004 of the Federal Rules of Bankruptcy Procedure. Rule 2004 broadly allows an examination of any entity on motion of any party in interest and further allows a party in interest to compel testimony and discovery of any entity under examination *without the traditional discovery limitations* of the Federal Rules of Civil Procedure. *See In re Dinubilo*, 177 B.R. 932 (E.D. Cal. 1993).

Moreover, under Rule 2004 “the witness has no right to be represented by counsel except at the discretion of the court; there is only a limited right to object to immaterial or improper questions; there is no general right to cross-examine; and no right to have issues defined beforehand.” *In re Dinubilo*, 177 B.R. 932, 939-40 (E.D. Cal. 1993). Simply put, “Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions.” *In re Enron Corp.*, 281 B.R. 836 (S.D.N.Y. 2002).
Rule 2004 is only one example of how a bankruptcy filing may up-end an agreed-to dispute resolution in a construction contract. Again, it is highly recommended that competent bankruptcy counsel be consulted as soon as possible when a bankruptcy filing is anticipated.

(iv) Additional Insured Provisions

More often than not, construction contracts include additional insured (“AI”) provisions. Care must be taken, however, to ensure that the AI coverage obtained is comprehensive. There are many AI coverage forms floating around that appear to have subtle differences, but in actuality those differences can have enormous consequences. Take for example the difference between CG 026 and CG 20 10, two commonly used AI endorsements. CG 20 10 provides coverage with respect to “liability for ‘bodily injury,’ property damage,’ or ‘personal and advertising injury’ caused, in whole or in part by: (1) [the insured’s] acts or omissions; or (2) the acts or omission of those acting on [the insured’s] behalf in the performance of [the insured’s] ongoing operations for the additional insured(s).” Endorsement CG 026, on the other hand, provides additional insured coverage only “with respect to [the insured’s] negligent actions which cause liability to be imposed on [the additional insured] without fault on the part of [the additional insured], caused by [the insured’s] ongoing operations performed for [the additional insured].” CG 026 thus limits coverage to the sole negligence of the insured while CG 20 10 gives broader protection for acts involving contributory negligence. Depending on the facts of the particular claim, this difference could have significant impacts in the potential for coverage for the claim.
Furthermore, just because the contract documents require AI coverage does not mean that it is always obtained and/or maintained. Care must be taken to ensure that the proper AI coverage has been procured and remains in place. As such, it is recommended that affected parties designate someone to be responsible for obtaining and reviewing proof of AI coverage. Beware: A simple certificate of insurance is not enough. Certificates can easily be created and passed along. The designated person should obtain actual endorsements and/or other confirmation from the carrier to ensure that the necessary coverage is in place.

The “Pre-Claim” or Claim Phase

Despite careful planning and execution, disputes will inevitably arise on large, complex construction projects. Recognition and proper handling of claims during the project is the next step in successfully avoiding litigation. Indeed, next to contract-drafting issues, mishandling of claims has been reported to be the second leading cause of construction litigation. Following are a few suggestions that may be implemented once a dispute occurs.

(i) Use of Independent Consultants (Early Retention of Experts)

Independent experts, when properly used at this stage, can be instrumental in resolving disputes. The role of the “expert” during the project is not necessarily to

advocate for his/her client and rebut the adversary. Rather, it is to objectively analyze the issues and provide constructive input with an eye toward resolution. Typically, each of the affected parties will retain their own expert. Consideration should be given, however, to an arrangement in which all affected parties agree to share the cost of one agreed upon expert. The ultimate opinion of the expert under such an arrangement may or may not be binding depending on the terms of the agreement.

Care should also be given to ensure that the proper experts/consultants are retained. Be wary of the “jack of all trades” expert and choose someone who has specialized knowledge in the area(s) at issue. A little due diligence can go a long way here. Ask for references, Rule 26 disclosures, and prior reports; and an in-person meeting before retention is usually a good idea.

(ii) Use of “Project Counsel”

On larger projects, it may be advisable to retain “project counsel” to oversee the project from start to finish. Project counsel may be retained to advise one party or multiple parties on a collaborative project. While the retention of project counsel is, of course, intended to benefit the project at all stages, project counsel can be particularly helpful when disputes arise. The combination of historical project knowledge and the trained skills of mediation and negotiation of a lawyer can lead to the expeditious resolution of disputes before they escalate to the next level. Project counsel is also particularly useful

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to handle such things as providing proper notice to affected parties/carriers, document retention, and identifying spoliation issues.

(iii) Take Advantage of Pre-Claim Insurance Products.

Project participants and insurance carriers alike recognize that time and money can be saved by implementing a strategic claim handling process. Toward that end, many carriers now offer “pre-claim” investigation insurance products to project participants. Examples of such provisions follow:

Until the date a claim is made against the Insured, we may investigate, at our sole discretion, a possible claim reported to us by the Insured in accordance with SECTION VII. B. We will pay for all expenses we incur as a result of our investigation. Expenses we incur will not reduce the Limit of Liability—Each Claim or Limit of Liability—Aggregate. The Insured must not make any payment, admit any liability, investigate or settle any possible claim or assume any obligation without prior consent from us. We will not reimburse the Insured for any expenses or payments incurred without our prior approval.

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Pre-claims Assistance. Until the date a claim is made, the Insurer may pay for all costs or expenses it incurs, at the Insurer’s sole discretion, as a result of investigating a circumstance that the Insured reports in accordance with the Section of the Policy entitled CONDITIONS, the condition entitled The Insured’s Rights and Duties in the Event of a Circumstance

There are several advantages to such products. First, the carrier typically incurs the cost of the investigation, including the retention of experts and counsel. Without the aid of the insurance product, a project participant may be hesitant to incur such costs and forego an opportunity to resolve a dispute outside of litigation. Another advantage is that if it is determined a covered claim exists, the carrier can make an educated decision early on before incurring the costs of litigation. In the event the dispute does end up in litigation,
the insurer, insured, experts, and counsel involved in the “pre-claim” process are fully educated on the issues and are one-step (or more) ahead of their adversaries.

(iv) Tolling Agreements

Often the spirit of compromise disappears once a lawsuit is filed. Filing a lawsuit simply to comply with the statute of limitation may, therefore, not be advisable in all instances. Tolling agreements can be used in such instances to keep negotiations on track.

Counsel should beware that some states may limit the scope of tolling agreements, or ban them in certain instances. For example, Mississippi permits statute of limitation tolling agreements only if: (1) it is not prohibited by statute; (2) it contains a definite and reasonable time period; (3) it is formed after the cause of action has accrued (or, in the instance of a statute of repose, after the plaintiff has notice of the action); (4) it is not made at the same time as, or part of, the obligation sued upon; and (5) it is entered into before the expiration of the applicable limitations period. Townes v. Rusty Ellis Builder, Inc., 98 So. 3d 1046, 1054 (Miss. 2012). In Townes, the Mississippi Supreme Court invalidated a tolling agreement because, although the agreement provided a date when tolling should begin, it provided no end date. Id.; see also Bayridge Air Rights, Inc. v. Blitman Const. Corp., 599 N.E.2d 673 (N.Y. 1992) (finding statute of limitation tolling agreement unenforceable as it extended accrual period beyond the date allowed by statute law). Counsel should review any relevant statutory language that may govern a tolling agreement as the statutes may give rise to unintended consequences. For example, in California (prior to 2012), a pre-litigation tolling agreement between an HOA
and a developer tolled the statute of limitations for all parties potentially at fault (including the builder, contractor, and subcontractors). See Landale-Cameron Court, Inc. v. Ahonen, B190309 (Cal. App. 2d Dist. Oct. 10, 2007). This is because a (now-repealed) California statute governing claims by an HOA against a builder, developer, or contractor, provided that the HOA’s notice of intent to file suit “shall toll all applicable statutes of limitations . . . against all potentially responsible parties . . . [for] a period not to exceed 180 days . . . which can be extended . . . upon mutual agreement.”

Similarly, jurisdictions vary in terms of whether relevant statutes permit parties to toll a statute of repose. Courts in some jurisdictions have permitted tolling agreements to waive a statute of repose. See, e.g., ESI Montgomery County, Inc. v. Montenay Int’l Corp., 899 F. Supp. 1061, 1066 (S.D.N.Y. 1995) (upholding an express waiver of period of repose in a federal securities action); First Interstate Bank of Denver v. Central Bank & Trust Co., 937 P.2d 855, 860 (Colo. App. 1997) (upholding written agreement tolling statute of repose pending a final adjudication on federal claims); One North McDowell Assoc. v. McDowell Dev. Co., 389 S.E.2d 834, 836 (1990) (holding under North Carolina law that a construction statute of repose is subject to an express waiver by written agreement extending statute of repose for two years to see if corrective measures were successful). However, other courts have found statutes of repose to be non-waivable. See, e.g., Stone & Webster Engr. Corp. v. Duquesne Light Co., 79 F. Supp. 2d 1, 8 (D.

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The Litigation Phase

Some disputes just cannot be resolved short of litigation, but litigation does not always have to be protracted and costly. Some best practices may be adopted to ensure that the litigation process, when it does arise, is as smooth as and efficient as possible.

(i) Early Identification of Indemnity Issues and Third-Party Claims

If not done during the claim stage, counsel should take care to identify potential indemnity issues and third-party claims early in the litigation process. If these issues are not identified early and parties/claims are added later in the litigation process, the ultimate resolution will likely be delayed. Judges and arbitrators alike tend to allow newly added parties/counsel/insurers time to “get up to speed” which generally stalls the case in general. Additionally, a delay in the identification of additional claims and parties may lead to other hurdles such as carriers invoking notice provisions, statute of limitation arguments, and lost evidence.

In addition to contractual indemnity claims, consideration should be given to indemnity claims under common law. Common law indemnity seeks to make whole a
party found vicariously liable to another through no fault of his own. Central to common law indemnity in most jurisdictions is the concept of “active” versus “passive” negligence: a party found to be at fault is not entitled to indemnity unless the party was only passively negligent and did not actively participate in the wrong. Courts recognize that one is actively negligent if “he participates in some manner in conduct or omission which caused injury,” while one is passively negligent (and, therefore, possibly eligible for implied indemnity at common law) “if he merely fails to act in fulfillment of duty of care which law imposes upon him.” *Titus v. Williams*, 844 So. 2d 459, 466 (Miss. 2003) (quoting Black’s Law Dictionary).

(ii) Offers of Judgment/Proposals for Settlement

In the proper case and in the proper jurisdiction, offers of judgment/proposals for settlement can be useful tools to steer a case towards resolution. There is a wide disparity, however, among individual states’ offer of judgment rules. Some jurisdictions adopt robust offer of judgment rules that can have a true impact on the outcome of a case, others are less generous, and some are frankly useless.

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15 See *Stuart v. Hertz Corp.*, 351 So. 2d 703, 705 (Fla. 1977). “[A] right of indemnity has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.”; see also *Borne v. Est. of Carraway*, 118 So. 3d 571, 588 (Miss. 2013) (“[W]hen one person is required to pay money which another person in all fairness should pay, then the former may recover indemnity from the latter in the amount which he paid, provided the person making the payment has not conducted himself in a wrongful manner so as to bar his recovery.”).
For example, some states’ offer of judgment rules, including Alaska, Florida, Idaho, Michigan, New Jersey, and Texas include attorneys’ fees within recoverable costs. When used early in the litigation process, such statutes actually have “teeth” and may well result in early resolution. Many states, however, including Alabama and Arkansas do not allow recovery of attorneys’ fees, and only allow for the recovery of “costs,” exclusive of attorneys’ fees. “Costs” include things such as court fees, copying costs, deposition costs, witness fees, and travel expenses. Depending on when an offer is made under such a statute, it may have little to no effect on the recipient.

Additionally, State rules vary as to when a party may make an offer of judgment. While most states allow an offer of judgment to be made up to either 10 or 15 days before trial, other states require that the offer be filed as early as 45 or 30 days before trial.

\[16\] Alaska Statute § 09.30.065.
\[17\] Fla. Statutes § 768.79.
\[18\] Idaho Rule Civ. P. 68.
\[22\] Ala. Rule Civ. P. 68.
\[23\] Ark. Rule Civ. P. 68.
trial. A handful of states, including Iowa, Nebraska, Ohio, and South Carolina, allow an offer of judgment to be made at any time before trial.

Counsel litigating in various jurisdictions should beware that some offer of judgment rules may favor plaintiffs in various circumstances. For example, Connecticut, New Jersey, and Wisconsin allow or require substantial amounts of interest to be added to the judgment following a plaintiff’s offer of judgment. The results can be substantial in a jurisdiction such as Connecticut, where the statute provides that a plaintiff who recovers a greater amount at trial than a rejected offer of judgment shall recover 12% interest on top of the judgment.

Finally, the form and substance of the offer itself can be important. For example, a Florida appellate court recently invalidated an offer of judgment that did not strictly conform to Florida’s statutory requirements. In *Deer Valley Realty, Inc. v. SB Hotel Associates LLC*, 190 So. 3d 203 (Fla. 4th Dist. App. 2016), the defendant developer’s offer of judgment stated, “This proposal for settlement is inclusive of all attorney’s fees and costs incurred by Plaintiff or Defendant.” Id. at 207. However, the developer “neglected to include a statement that ‘attorney’s fees [were] part of the legal claim.’”

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29 Iowa Code Ann. § 677.4-10.
31 Ohio Rule Civ. P. 68.
33 Conn. Code § 52-192a.
35 Wis. Stats. § 807.01(3).
36 Conn. Code § 52-192a(b). The 12% interest is computed from the date the complaint was filed if the offer of judgment was filed no later than 18 months from the filing of the complaint. Otherwise, interest is computed from the date the offer of judgment was filed with the court.
ld. (emphasis in original). Because the proposal failed to include the necessary language that the agreed attorneys’ fees were “part of the legal claim,” the court found the proposal “invalid and unenforceable.” ld.

(iii) Choose the Right Mediator for Your Case.

Whether by contract, choice, or court order, most cases end up in mediation at one time or another. Construction cases have unique issues that may be foreign to even the best mediators who simply do not have construction experience. If you spend half the day educating your mediator on AIA contracts, “your work” exclusions, and/or how the EIFS system works, you have wasted your time.

In addition to having industry knowledge, a good construction mediator must be creative. There are typically a number of moving parts at a construction mediation. The mediator must be willing and able to anticipate obstacles and find ways to overcome them. No “paper pushers” allowed.

Depending on the amount of money at issue and the complexity of the case, it may be worthwhile to search outside of the normal “go-to” mediators in a particular area. There are many sources to search for quality mediators, but the ALFA Construction CPG should be at the top of your list.

CONCLUSION

As long as there is construction, there will be construction disputes. Each stage of the construction process, from the planning/contract phase, to the pre-claim/claim
phase, to the litigation phase, however, is ripe with opportunities for participants, counsel, and insurers alike to creatively and strategically prevent, mitigate, and efficiently resolve disputes among construction project participants. This paper highlights just a few of the various “tips and tricks” that may be implemented along the way, and the authors hope that some of these practices will be useful in your next project.