

LITIGATION

By: Brandon K. Bains



Before the pandemic, I had jury duty and found myself sitting on the front row of the courtroom; I was prospective juror number 9 out of around 60, which in Texas, meant there was a high likelihood I would be picked – unless I was struck by one of the parties. I was asked by defense counsel (after he noted that I was lawyer) if I handled predominantly plaintiff or defense work. I said that it was about a 50-50 split, which puzzled the attorney. I explained that in the surety context, we often find ourselves defending claims, but there are any number of avenues for recovery, and thus the even split. Unfortunately, I was not picked for that jury, even though I am certain it would have been a fantastic adventure. It does, however, serve as a useful lead into the topic of this newsletter – litigation strategies for pursuing affirmative claims. There are **three items in the litigation toolbox** that can prove useful in the right circumstance:

1. ***The pre-suit deposition.*** Both the Texas and federal rules permit a pre-suit deposition as a means of investigating whether a lawsuit is proper. Indeed, Texas is even a bit stronger in permitting express investigation of potential causes of action, even if there are not otherwise existing facts that give rise to a claim. This can be particularly useful if there is the possibility of fraud, which requires a heightened pleading standard in most cases. It also could be useful when suing an auditor for a negligent misrepresentation claim, as it would allow for an investigation into what lies behind the audit – something typically revealed by the workpapers, which usually are not produced until after suit is filed.

2. ***The creative assignment.*** We have all seen projects with design issues. In some cases, the owner/obligee elects to sue the architect directly, which is a good thing and brings design issues front and center. Yet, there are other cases where the owner/obligee does not want to sue the architect because of a concern that it could detract from defective work claims against the principal. In this scenario, it is generally difficult for a surety to directly bring a claim against an architect retained by an owner based on a lack of privity. That said, a surety would have standing to pursue an architect for any problems on a project if it otherwise was assigned those claims by the owner/obligee. While there are business reasons why an owner may be reticent to assign these claims, even if that is the case, it can prove to be a useful bargaining chip for a surety in exchange for other, perhaps more important, items. As an aside, this same approach can be useful in terms of pursuing CGL coverage for the owner or the principal.



Texas • Florida
Oklahoma • Arkansas

Dallas

P.O. Box 94075
Southlake, Texas 76092
(214) 722-7160

Miami

1200 Brickell Avenue
Suite 1950
Miami, Florida 33131
(305) 961-1691

info@l-llp.com

www.langley.law

To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

Well done is better than well said.

- Benjamin Franklin



3. **Bankruptcy and the payment bond.** In certain bankruptcy situations, a principal may try and reorganize such that is continuing to prosecute work post-petition. Traditionally, this is a pretty challenging road to navigate, which is why many cases result in a conversion to a Chapter 7 liquidation. In that interim period, often we see subs and suppliers that perform work for the benefit of the estate, but ultimately miss out on payment – whether because the company moves quickly to liquidation or because of preference issues. To the extent the payment bond is called to perform, the surety can be in a position to obtain an assignment of the administrative claim priority rights of those subcontractors. This can be important inasmuch as a contract surety usually only has an unsecured claim in the bankruptcy. By paying these vendors under the payment bond, it can leapfrog other creditors and move to the front of the line to the extent of those payments.

As with most claims, it is important to consider all options early, ideally with a group of professionals that can provide input on construction, accounting, and legal considerations.

Brandon K. Bains is a Partner at Langley LLP and may be contacted at bbains@l-llp.com.

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