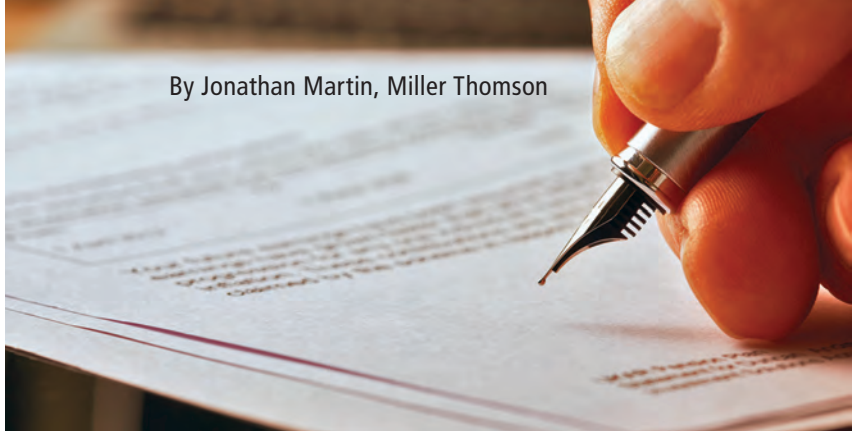


Wrongfully SUED?



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Options available if you have been wrongfully named in a construction lawsuit

Litigation arising from construction projects gone awry can be complex multi-party affairs. Because of the abundance of possible remedies under builders' lien legislation, not to mention the law of negligence, the tendency is for plaintiff's counsel to sue first and ask questions later.

This can often result in innocent parties being named. Parties may also be sued to grow the pool of defendants from which to obtain a settlement.

Though such litigation is a cost of doing business, the risk can be mitigated. Litigation insurance, indemnity provisions and liability cap provisions are some of the more common ways parties will seek to protect themselves. But these do not completely eliminate the problem.

Insurance premiums reflect the risk involved and will increase concomitantly with the number of claims. Sufficiently robust indemnity clauses cannot always be negotiated and do not enforce themselves.

Furthermore, liability caps are ineffective against third parties, which means they cannot be raised against a subcontractor, for example. None of these protections replace the need to understand all of one's legal options once sued.

The first thing a wrongfully named defendant will wish to do is examine the nature of the allegations against them to determine whether the claim could be summarily dismissed through an application to strike or an application for summary judgment.

Other summary procedures may be available, such as a summary trial of a specific issue or an application for a determination of a question of law, if the relevant facts are not in dispute. The obvious advantage of these proce-

dures is that a claim can be dismissed in less time and for a fraction of the cost of a conventional trial.

Key considerations in deciding whether such procedures are appropriate will include whether the claim is based on a legally recognized cause of action, as well as whether there is good documentary evidence available to determine the issues at stake.

The monetary amount of the claim and the complexity of the issues as a whole will also be relevant. If the issues are intertwined with the claims against other defendants, a summary procedure may be more difficult to access.

Summary proceedings are less expensive than a trial, but by no means cheap. Because there is no such thing as litigation damages for being wrongfully named in a civil suit, the main remedy available to a successful defendant will be their costs of defending the action.

The most common costs order rendered by a court will be for "party and party" or "partial indemnity" costs, which typically cover less than 40% of one's actual legal expenses. Less common are "solicitor and client" or "substantial indemnity" costs, where the losing party must pay the winning party's entire legal costs.

Courts are hesitant to order solicitor and client costs and will generally only make such an order if there is evidence of bad faith in naming a party or some scandalous allegation that was not proven.

A claim may not have legal merit, and may even be frivolous, and still not be the product of bad faith. On the other hand, solicitor and client costs have been ordered against plaintiffs for making allegations without "any foundation in law".

The distinction can be quite subtle but what the reader should understand is that being wrongfully sued does not automatically entitle a party to substantial indemnity costs.

The best mechanism for putting maximum cost pressure on the opposing party early on in the litigation process is to make an immediate Formal Offer to Settle.

Such offers are made to an opposing party using a specific court form. In the event the party making the offer achieves an equal or better result in court compared to what it offered previously, double party and party costs will be imposed on the losing party.

A Formal Offer to Settle should, in favourable circumstances, be followed by an application for summary dismissal. In this way, the wrongfully named defendant confronts the plaintiff with the prospect of a cost order against them in the near future unless the claim is discontinued.

Conclusion

Players in the construction industry should always be prepared for litigation by keeping good documentary records of all interactions. Such evidence may significantly increase one's chances of succeeding through summary judgment.

Good documentary evidence, combined with the cost consequences that result from an early Formal Offer to Settle, will put a wrongfully named defendant in the best position to negotiate an early discontinuance of the action against them on the best terms possible.

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Jonathan Martin, Associate, Miller Thomson, jomartin@millerthomson.com.