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To sub in or not to sub in

A review of the questions to be answered before you substitute in as plaintiff's counsel

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Plaintiff attorneys substitute out of cases. It happens a lot, most commonly after mediation fails. There are many legitimate reasons to substitute out of a meritorious case. Even highly skilled sole practitioners may wish to substitute out of a very valuable case where time and expense may create undue burden on the attorney's remaining cases. Large defense firms will frequently try to exploit their superior resources by serving excessive discovery; noticing marginally relevant depositions; and hoping to gain settlement advantage through a war of attrition.

This article assumes you are approached to substitute in on a case after mediation and where discovery remains open. You must identify the pertinent issues to make an informed decision: Do damages warrant involvement? Are there adequate insurance policies, or identifiable and collectible assets, to compensate for plaintiff's injuries? Have the prior strategic decisions/evidence adduced hampered the case? Is the complaint adequate – are all appropriate defendants named? Can they be Doe'd in? Are all causes of action alleged? Do additional causes of action "relate back?" How will inertia of earlier litigation impact the case going forward?

Hypothetical facts of case

Thirty-six-year-old single female in an MBA program sustained severe facial scarring from a dog bite (seemingly a German Shepherd mix) when visiting a friend at a large apartment complex. Plaintiff had a full thickness laceration from the left corner of her mouth extending below her jaw line in a curvilinear fashion; slight scarring/defect to left ear; and well-healed puncture wound to her lower lip. The complaint alleged negligence and strict liability filed against the dog owner and DOES. The dog owner was uninsured and had few assets.

The apartment complex had a dog policy prohibiting certain breeds and mixes of these breeds, including German Shepherds, as well as any dog with a history of aggression. The dog bite occured about seven months after tenancy commenced and there were no incidents in intervening period.

Evaluating damages

Evaluation of whether damages warrant investigation is probably the easiest issue to resolve. An attorney much smarter than I once told me, "Plaintiff is either injured or she isn't. Liability and insurance can most certainly be found for sufficient injuries." [Thanks to Tim Tietjen for that nugget of wisdom.] Determining the extent and value of injuries is a function of medical-record analysis and consultation with experts.

In the dog-bite case, general damages were potentially tremendous. Plastic surgery could not improve the appearance of the permanent scarring. However, this meant special damages for medical treatment were limited. Plaintiff was working toward her MBA to become a sales person in the Life Sciences industry.

Plaintiff received psychotherapy to address the first-person issues caused by the scarring. Plaintiff retained a nationally renowned psychologist on the correlation between appearance and income to establish the third-person dynamic that would persist into the future. Literature establishes audiences comprehend less and retain less when listening to disfigured speakers. Plaintiff argued this would curtail her earning capacity and advancement as an account manager responsible for sales. The psychologist and psychiatrist worked together to explain the impact of plaintiff's appearance upon her as well as people she interacted with both professionally and socially.

The Apartment Complex was owned by a Real Estate Investment Trust ("REIT"). Plaintiff assumed there would be a large commercial policy and/or substantial assets from management of hundreds of apartment complexes nationwide.

Evaluating the file

Having determined damages warrant further inquiry, review the mediation briefs. If well done, these should provide a good overview. Consider contacting the mediator to get their assessment of the case. If still interested, you must analyze liability. Are there any incident reports or documentation of the incident – Traffic Collision Report, Cal/OSHA report, Unusual Incident Report or any other documentation of investigation of the incident? Review of the medical records with particular attention to obvious defense arguments re: alternate cause or pre-existing condition should be performed. Next, review all of the remaining evidence – depositions and whatever else may exist. Finally, determine whether all appropriate defendants have been identified and all appropriate causes of action have been alleged.

Determine the established facts as well as those likely to be established through further discovery. Then, determine which, if any, additional defendants and/or causes of action can be alleged.

In the instant case, research showed a landlord could only be held liable for a

dog bite where the landlord had actual knowledge of the dog's violent propensities. (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1370.) Recognizing it was unlikely such evidence could be established, plaintiff alleged apartment complex had assumed a duty to prohibit such dogs and plaintiff was injured as a consequence pursuant to *Paz v. State of California* (2000) 22 Cal.4th 550, 559. Plaintiff also alleged the landlord's violation of its own dog policy constituted evidence of negligence. As we stated in *Dillenbeck . . . ,* '*(t)he safety rules of an employer are . . . admissible as evidence that due care requires the course of conduct prescribed in the rule*. Such rules implicitly represent an *informed judgment as to the feasibility of certain precautions* without undue frustration of the goals of the particular enterprise.' Also, the manual was admissible 'on the ground that an *employee's failure to follow a safety rule* promulgated by his employer, regardless of its substance, *serves as evidence of negligence*.' (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 587-88, emphasis added, citing, *Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, 478, 481; see also, *Hartford Acc. & Indem. Co. v. Bank of America* (1963) 220 Cal.App.2d 545, 561 ["violation of a rule of care established by a party to the litigation is likewise evidence of negligence"].)

Rather than immediately amending the complaint to add the landlord as a defendant, plaintiff chose to depose the rental agent that approved the application of the dog owner. Plaintiff hoped to get his deposition without "attorney filter." Luckily, this was successful. Rental agent admitted a great number of rules of the road: Safety ahead of profits; dog policy was safety rule; dog policy was for benefit of everyone at apartment complex, including guests such as plaintiff; employees had to err on side of caution and ban dogs if uncertain as to breed.

In preparation for the rental-agent deposition, plaintiff obtained photographs of breeds of dogs prohibited at complex. Plaintiff then serially showed rental agent the photographs which he readily recognized and testified could not be allowed. When shown the grainy photo of the dog from landlord's file that bit plaintiff, rental agent balked at recognizing the breed; however, he acknowledged it "looked like" a German Shepherd. He also testified he had to err on the side of caution and could not allow such a dog at the complex.

Fortuitously, rental-agent deposition established he received $50 per approved rental application. He also testified the apartment-complex manager received bonus tied to profitability of complex. Thus, plaintiff had evidence of motive to flout dog policy. Finally, rental agent testified dog owner had a short-term lease; furnished apartment; reserved parking spot; and of course, the dog. Each of these items garnered increased rent, even more evidence of motive to allow dog in violation of policy.

Amended complaint/pleadings

Where the statute of limitations has not run, plaintiff has great latitude. An entirely new complaint can be filed and the cases can be consolidated. If the statute has run, an amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts. (*Day v. Western Loan & Bldg. Co.* (1940) 42 Cal.App.2d 226, 231.) "[Even] if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause[s] of action stated in amended pleading can trace its descent from the original pleading." (*Vallera v. Vallera* (1944) 64 Cal.App.2d 266, 272.) Thus, plaintiff can add defendants and causes of action provided these amendments reasonably flow from the original allegations.

Plaintiff specifically chose not to plead apartment-complex defendants had actual knowledge of dog's violent propensity to invite a demurrer. Plaintiff wanted judicial determination of the alternate theories: assumption of duty and violation of landlord's dog policy, stated a cause of action. However, no demurrer was filed. Plaintiff hoped a Motion for Summary Judgment would be filed. Again, none was forthcoming.

Initial interaction with defense counsel

Predictably, defense counsel will provide the standard defense psycho-babble, "Why are you subbing in on this case? It has no value." Be prepared to substantiate your claims and explain your theory early on. Consider providing a demand package with expert reports early on. The insurer may have set very low reserves. When this occurs, it can be difficult to overcome this initial assessment to get appropriate settlement.

Prepare a discovery package and begin conducting pointed depositions to marshal evidence to support your theories. Defense counsel should report back to the claims adjuster these new developments. Consider offering up early expert disclosure or invite defendant to identify items desired to facilitate analysis.

Proportionate fault

Plaintiff recognized the REIT would always argue that the dog owner was solely responsible for incident. Plaintiff assumed REIT would argue the dog owner lied to them and committed fraud when he signed the pet policy addendum re breed. So, plaintiff had to marshal evidence to establish REIT's proportionate responsibility. Plaintiff established landlord required inspection of the dog, which was not documented; landlord did not provide its agents exemplar photographs of prohibited breeds for comparison; did not require agents acquire dog's veterinarian records nor certification from a veterinarian as to breed. REIT employees lived at the complex, a common industry practice. All employees were duty bound to report any suspected or perceived violation of safety rules,

including the dog policy. Dog owner regularly walked his dog through the lobby where leasing offices were located and employees congregated for months prior to incident.

Plaintiff deposed dog's veterinarian who testified upon receipt of authorization he would have provided apartment complex his complete chart on the dog, which included reference to breed: German Shepherd mix. Plaintiff established REIT could have insisted on such authorization and dog owner would have executed it.

Motion to amend complaint to add punitive damages

During discovery, plaintiff discovered evidence suggesting apartment complex defendants "looked the other way" regarding the dog to generate revenue. The complex manager's bonus was tied to the profitability of the complex; the REIT had changed its initial policy of banning all pets following the "dot Com" crash to be more competitive in leasing; the dog owner was a "high revenue" tenant with many add-ons; tenant's dog application was approved prior to inspection of the dog; and the complex had recently added but not leased a number of new units. Plaintiff also located out-of-state case law upholding an award of punitive damages against a landlord for violating its own dog policy leading to severe bite wounds. So, plaintiff prepared and filed a Motion to Amend the Complaint to add a Prayer for Punitive Damages.

Plaintiff filed and served a Motion to Amend Complaint to allow prayer for punitive damages against the rental agent, apartment complex manager and corporate owner. A case from the Supreme Court of Alaska supported such a claim where defendant violated dog policy related to the small community to which it was applicable. The trial judge took the matter under advisement and the case settled on the third day of jury selection.

Conclusion

Subbing in can be rewarding but is not without risk. Diligent analysis may allow you to resolve a case quickly; help a deserving plaintiff and a colleague in need of assistance with a potentially complicated case.

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