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Possible Defendants: Defendant's Viewpoint

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POSSIBLE DEFENDANTS: DEFENDANT'S VIEWPOINT

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THE SUBJECT given to me is somewhat nebulous and broad and I have, therefore, interpreted the subject according to my own whims and desires. Perhaps I am taking too much liberty in my interpretation of the subject and if so, I can only apologize.

My conception of what I am supposed to do is to relate to you some of my notions and ideas (necessarily based on my own experiences) as to whether a Defendant should bring in others as third party defendants and the things which, in my view, should enter into your consideration of this problem.

This is not a matter for legal discussion nor citation of authorities since the law in this regard is so well settled and so rudimentary that its discussion would not be fruitful and at its very best would be extremely boring. You may and/or can, if you so desire, bring in third party defendants. *You are not required to bring in third party defendants.*

If you do not bring in third party defendants, your cause of action against them does not accrue until you have become finally adjudicated to be liable. The statute of limitations on any cause which you may have against others does not begin to run until there has been a final adjudication of liability against you and you have paid the sums which you seek to recover.

From a legal standpoint, it makes no difference whatever whether you bring other parties in or leave them out. Your sole consideration as to what you do is one of tactics.

Of the parties named as possible defendants: airlines, other operators, manufacturers (including manufacturers of components), the United States of America, overhaul/repair facilities and lessors,

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all fall in the same general category insofar as this discussion is concerned, save and except the United States of America.

With reference to all of the possible defendants named, save and except the United States of America, there are two situations:

(1) When Plaintiff has sued multiple defendants and the question is whether the filing of a cross-action is proper or not;

(2) Where Plaintiff has not sued a particular defendant or defendants and the question is whether to bring that defendant or defendants in as third party defendants.

Where the first above-named is considered, there are both advantages and disadvantages:

A. *ADVANTAGES*

1. The possibility of additional jury strikes from the standpoint of the defendants, which should, at least, theoretically, result in the selection of a more conservative jury, and which would, in theory, reduce the amount of the verdict. This advantage is often completely obviated (particularly in federal courts) where the judge, in his wisdom, decides to simply divide the defendant's strikes among all defendants or decides to give the plaintiff an equal (or greater) number of strikes than all the defendants put together.

2. The possibility of calling employees of other defendants as adverse witnesses so that you are given the right to cross-examine and hopefully are able to elicit favorable testimony from them without being bound by any unfavorable testimony such witness might give.

3. Whatever advantage there may be (or disadvantage) to having more attorneys from the defendant's standpoint in discovery and in the courtroom during trial.

4. The possibility of a wider, more comprehensive discovery from a party than could be obtained from a non-party (this is purely theoretical and very likely, in view of the great latitude given by most courts, in permitting discovery, is no advantage at all from a practical standpoint).

5. The possibility of more time in argument from the standpoint of the collective defendants. (Here again, as in the case of additional jury strikes, you may wind up with no advantage at all.)

6. The possibility that the Plaintiff may see his way clear to go along with your contentions so that you simply ride Plaintiff's

coat-tails. It, of course, goes without saying that the exact converse of the above is equally true and you may find yourself, much to your everlasting consternation, being the "non-coat-tail riding defendant."

B. *DISADVANTAGES*

1. All of the converse possibilities listed 1 through 6 above are, of course, applicable.

2. If there arises a full scale fight between the defendants, and if plaintiff maintains a "you bet" attitude, saying "amen, brother," to whatever bad is said by either defendant about the other, the only advantage is to the plaintiff and the most likely result in this situation is that the jury will also say "you bet" and put it on both defendants in an amount some two or three times higher than they would put on either individual defendant. In this situation the defendants will attempt to curry the favor of plaintiffs and soft-pedal any defenses either might have against plaintiff, giving the plaintiff a path paved with gold to the glory hole. Contributory negligence, assumption of risk by plaintiff, misuse of a product, are completely inconsistent with an attempt to put it on another defendant.

If either defendant has the gross tenacity to argue that the amount of damages sought by plaintiff is ridiculous and absurd, then the defendant runs the risk that in plaintiff's closing argument, if another defendant has not pursued this line, plaintiff will almost always see fit to stab the defendant in the back who has been so grossly unfair as to make these charges.

In the situation where plaintiff sues only one defendant and you are considering whether to bring in others (particularly in the situation where plaintiff's cause of action against the other is barred by limitation, or where by any reason plaintiff cannot or will not file his action against the other) all of the above discussions are actually apropos. Perhaps more so, as our experience dictates, even though plaintiff may try to be impartial or even friendly to you, a jury may get the indication that by reason of the fact that plaintiff has not sued others but has sued you, that plaintiff has indicated that he does not really feel the others are liable, and in a case where a jury is committed to the plaintiffs they will likely not pay any attention to your attempts to put it on others.

C. *SUMMARY RECOMMENDATIONS*

In short, don't do it. If you have an overwhelming urge, think carefully:

(i) What is the likelihood of getting additional jury strikes?
(ii) What testimony will you be able to get from so-called adverse witnesses that you couldn't get otherwise?
(iii) What is the practical advantage of not being bound by witnesses' testimony?
(iv) What additional discovery will you actually get?
(v) What is your chance of getting additional time in argument and if you get it, what will you do with it?

If you have carefully considered all of the above and have concluded that the advantages outweigh the disadvantages, then be friendly, helpful, kind and obedient. Win friends and influence people. In short, get yourself a partner (plaintiff, defendant, court reporter, bailiff, clerk—just anyone). In any event, try not to alienate anyone within the sound of your voice and if you do, you are, in our opinion, hung, drawn and quartered.

With reference to the United States of America, the situation is somewhat different. We have heard a very learned and competent trial judge make the assertion that the United States of America is involved in every aviation case. He bases his reasoning on the fact that no airplane can fly without the permission, consent and complete acquiescence of the United States of America. For example, in order to fly, any airplane must be type-certificated. This is a function of the United States of America. Each airplane which flies must have an airworthiness certificate. This is a function of the United States of America. Permission to take off from all major airports must be granted by the United States of America. In all commercial aviation flights, flight plans must be filed and approved by the United States of America. Traffic separation of aircraft is a function of the United States of America. Permission to land at most airports must be granted by the United States of America and taxiing instructions from the point of landing on the runway to other parts of the airport must be obtained from the United States of America. It does not tax one's imagination too far to believe that the United States of America is involved in the aviation industry from the cradle to the (pardon me) grave.

The United States is suable only in the United States District Courts and the judge presiding is the judge, jury and executioner. It is possible, no, reasonably probable, no, an absolute certainty, that you will get some additional time by bringing the Government in.

I make no recommendation whatever with reference to the propriety or wisdom of bringing the United States of America in as a third party defendant. I have done this only once and I absolutely refuse to discuss that matter. In this connection, I can only say to you, look around you carefully to determine where you are and let your conscience be your guide.