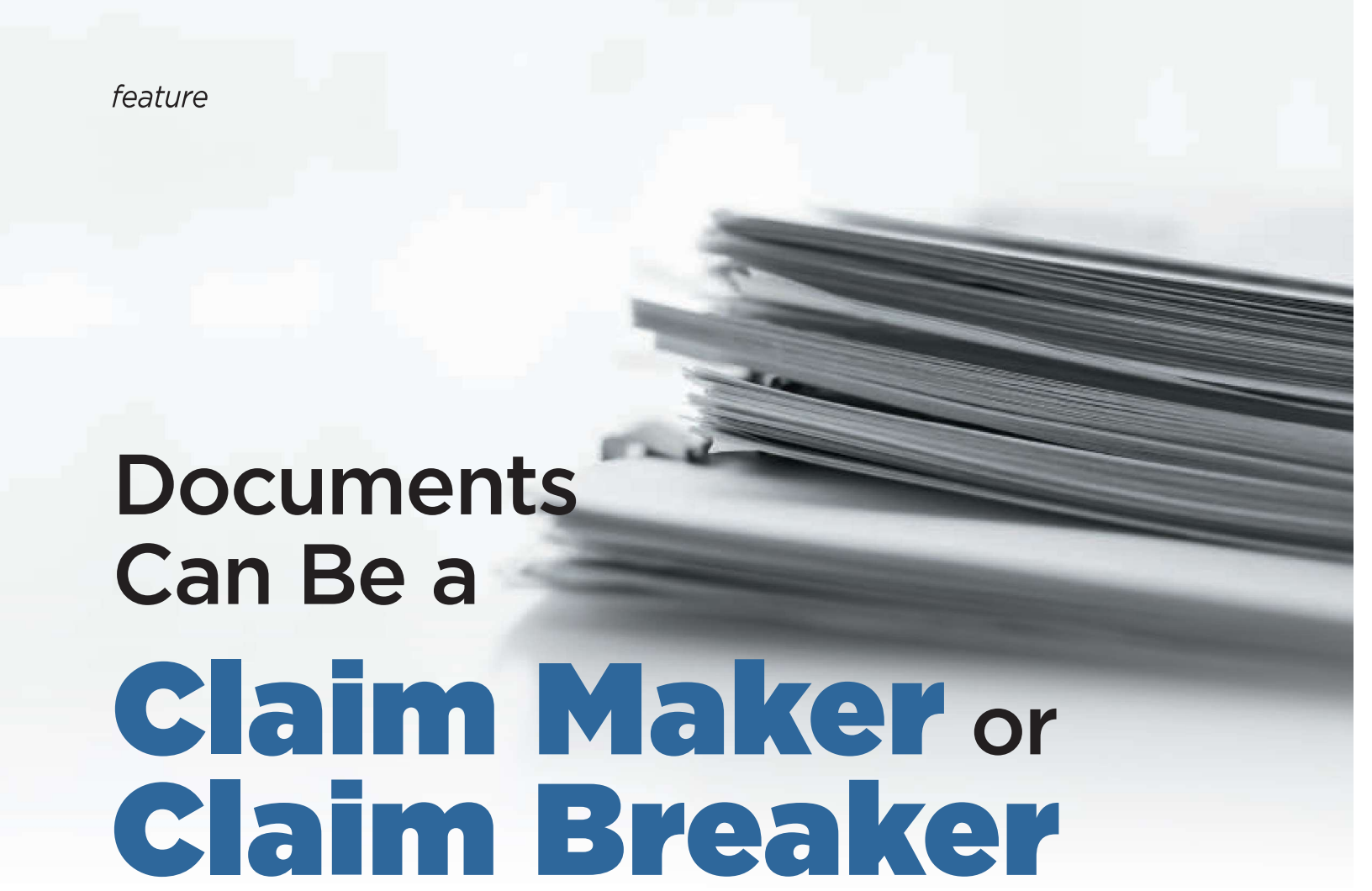

Documents Can Be a Claim Maker or Claim Breaker

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– *Bradley*

The way one handles documentation can make or break claims and defenses. Good documentation may increase your chances of prevailing in disputes that could arise down the road and may help avoid embarrassing landmines in general. When a party files a lawsuit or arbitration demand, parties may use rules of procedure to request documentation from parties in the dispute, and from entities outside the dispute that they otherwise may not be able to obtain. The purpose of discovery rules is to permit a party to obtain evidence to understand the dispute, generate arguments, and to ultimately help the decision-maker rule on the issues.

Let's back up. First of all, what is a document? A "document" may be extremely broad, which can include emails, texts, letters, memoranda, logs, journals, daily reports, financial records, cost reports, schedules, plans, notes, employee personnel files, etc. To be clear, parties are generally required to produce a very broad array of documents under the rules of discovery. The general standard for whether a party must produce a document is whether the information is relevant or is likely to lead to the discovery of relevant information. That can be a broad standard.

Here are a few examples. We have seen instances where the issue of whether a contractor complied with contractual notice requirements for change orders was influenced by documents in a project manager's internal personnel file. The personnel file included notes from a superior that this project manager should be terminated because he failed to provide timely notice of hundreds of thousands of dollars' worth of change orders in the relevant project. To the contrary, the company's position in the dispute was that notice was provided through the course and conduct of the parties.

As a current example, Fox News recently settled a lawsuit with Dominion over election fraud theories during the 2020 election. As part of that litigation, Dominion subpoenaed text messages and emails from prominent figures at Fox News, including Tucker Carlson. As a result of that subpoena, Carlson purportedly produced a personal text message that allegedly called an unnamed Fox News executive a four-letter word. There is speculation that this may be a reason that Carlson no longer works for Fox News. This is an example of how broad the rules of discovery can be. You don't even have to be a party to

a lawsuit to be required to produce personal information pursuant to a subpoena. We see examples like this all the time in construction disputes where the rules of discovery can turn up interesting information that you may never think will see the light of day.

Practical Tips

Document Dos:

- Do have internal discussions about issues in person or on the phone.
- Document important discussions with other parties by promptly sending an email confirming what was discussed. If you aren't sure about sending correspondence, run it by in-house or outside counsel, which may help protect disclosing drafts or internal discussions in the future under applicable privileges.
- Think twice before sending a document internally or externally.
- Be factual. Take as much care when sending a text to a colleague or friend as you do when emailing a superior.
- Take good photos, which can be worth a thousand words down the road. Keep in mind the ultimate decision-maker, such as a judge or arbitrator, may never see the actual project at issue or the work might get covered up later. So, pictures can be more than helpful.

Document Don'ts:

- Don't have informal, internal email exchanges about core issues.
- Don't change documents after the fact. Not only is it unethical, but others may see how it was changed through the use of technology, which can detect metadata.
- Don't delete documents that can result in monetary sanctions against you, bar your claim, or be viewed as proof against you.
- Don't write contradictory statements, self-criticism, or opinions that may later limit your rights or be used against you.
- Don't speculate.
- Don't get middled, meaning don't say one thing to the owner and something completely contradictory to a downstream subcontractor.
- Don't be snide, which can hurt your credibility.

In summary, every document you generate, from the bid to project completion, could be an exhibit at trial or the arbitration hearing. Be warned that every document you generate could potentially be read back to you on the witness stand. So, before you draft a document or hit send on an email or text, ask yourself if this will help or hurt you down the road.

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