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## No Success in Successive Suits

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More than 200 years after the original Tea Party, the English common law principle of res judicata and the related rule against splitting causes of action can produce unanticipated results in Florida lawsuits. The danger of filing multiple suits relating to a single contract or transaction, or even a series of related contracts or transactions, is illustrated by the First District Court of Appeals' ("First District") opinion in *AMEC Civil, LLC v. Florida Department of Transportation*, 41 So. 3d 235 (1st DCA 2010), where the court held that AMEC Civil, LLC's ("AMEC") second suit against the Florida Department of Transportation ("DOT") was barred by res judicata and the rule against splitting causes of action. As discussed below, the decision is somewhat controversial because the causes of action alleged in AMEC's second suit had not accrued when it filed its first suit. The First District found that AMEC should have amended its pleadings to assert its additional claims against DOT rather than filing a separate suit. In light of this decision, parties to an existing suit must diligently analyze and assert any interrelated claims or counterclaims between such parties that accrue or may have accrued during the course of the suit.

A brief recital of the facts and procedural history of AMEC and DOT's disputes is necessary to understand the First District's decision. AMEC entered into a contract with DOT to perform certain road construction work in Jacksonville, Florida (the "Project"). The contract established a Disputes Review Board ("DRB") comprised of three construction professionals to help the parties resolve contract disputes, but the DRB's decisions were not binding upon the parties. The contract further provided that "no circuit court or arbitration proceedings on any claim, or a part thereof, may be filed until after final acceptance . . . of all the Contract work by [DOT] or denial [by the DRB] hereunder, whichever occurs last."

In 2001, shortly after AMEC started construction, it submitted a claim to the DRB based upon DOT's failure to obtain permits to allow it to work at night (because of the City's noise ordinances). The parties did not accept the DRB's proposed resolution of the claim, and in August of 2003, AMEC filed a state court action against DOT for breach of contract (the "Night Work Lawsuit"). While the Night Work Lawsuit was pending, AMEC continued to work on the Project until May of 2006, when DOT issued its Final Acceptance of the Project. After Final Acceptance, AMEC submitted a number of additional contract claims to the DRB and DOT. DOT asserted that AMEC should litigate all of its contract claims in the Night Work Lawsuit. The trial court did not require AMEC to assert its additional claims in the Night Work Lawsuit, but the Court did warn AMEC that a subsequent court may not permit AMEC to pursue its additional claims in a separate action.

In October of 2007, the Night Work Lawsuit was tried and AMEC obtained a judgment against DOT for \$8,500,000. When the trial court entered the judgment, the DRB had not made recommendations regarding all of AMEC's pending contract claims. Nonetheless, after the entry of the judgment, DOT refused to participate in further DRB proceedings because it claimed its liability under the contract was fully adjudicated by the Night Work Lawsuit.

In February of 2008, AMEC filed a second state court action seeking a declaratory judgment regarding DOT's obligation to participate in the DRB's review of its contract claims and for damages for various breaches of the parties' contract. Both parties filed summary judgment motions, and the trial court entered summary judgment in favor of DOT based upon its findings that: (1) AMEC's second suit was barred by res judicata, and (2) the suit violated the rule against splitting causes of action. AMEC appealed to the First District for review of the trial court's summary judgment rulings. On appeal, AMEC argued that DOT breached the contract multiple times and that a suit for one breach does not bar suit for subsequent breaches of the same contract. The First District quoted the Florida Supreme Court's statement in *Kimbrall v. Paige* that res judicata bars "every matter which was offered and received to sustain or defeat a claim," **and** "every other matter which might with propriety have been litigated and determined" in such action. 448 So. 2d 1009, 1012 (Fla. 1984). The First District determined that the AMEC-DOT contract was a single, indivisible agreement, relying in part on the contract provision whereby the parties agreed not to commence circuit court or arbitration proceedings on any claim until after final acceptance or denial of a claim by the DRB, whichever occurred last. The court also found that AMEC had ample procedural means, including discovery and the right to seek to amend its pleadings, to incorporate all of its contract claims against DOT into the Night Work Lawsuit. AMEC also unsuccessfully attempted to avoid the application of res judicata by arguing that its second suit sought declaratory relief in addition to its breach of contract claims (and therefore, it asserted that the causes of action in its two suits were not identical). In a two to one opinion, the First District affirmed the trial court's rulings on both summary judgment motions.

The AMEC decision is a cautionary tale for parties currently involved in litigation or who may become involved in litigation in the future. Litigants must remain vigilant to analyze and at least attempt to assert any claims or counterclaims between parties to an existing suit that are discovered or that accrue during the course of litigation. It is also important to note that the AMEC holding equally applies to plaintiffs and defendants. The court's rationale suggests that a defendant should assert any counterclaims against a plaintiff that accrue after the defendant files its initial responsive pleading, if such claims arguably relate to the contract or transaction that is the basis for the parties' existing suit.

Moreover, it seems that parties involved in multiple, concurrent suits relating to the same contract or transaction, or even arguably related contracts or transactions, should consider consolidating such cases. If consolidation is inappropriate for practical or strategic reasons, one should explore whether the parties to the suit would stipulate not to assert res judicata and related defenses in the existing (or even future) suits. Alternatively, one could request that the various courts presiding over such cases enter an omnibus order addressing each case's effect on the related cases.

The First District noted the trial court's warning to AMEC in the Night Court Lawsuit that its additional claims could be barred in a subsequent action. It seems that the First District would have reversed the trial court's summary judgment rulings in the second suit if AMEC had timely sought to amend its pleadings in the Night Work Lawsuit to include its additional claims against DOT, especially if DOT argued that AMEC had not satisfied the condition precedent of DRB review. Thus, it seems prudent for litigants to conduct discovery regarding additional claims which may exist between parties to an existing suit, and to attempt to amend the pleadings to assert any newly discovered claims within a reasonable period of time. If a trial court denies a motion to amend pleadings to assert additional claims, it seems the appellate court must factor such motion into its analysis of res judicata and the rule against claim splitting in a subsequent action.

It is not uncommon for parties to be involved in concurrent or successive suits relating to the same, similar, or related events, contracts, or transactions. At times, and for a variety of reasons, a party cannot avoid such additional suits. A party involved in such actions should regularly evaluate whether interrelated claims or counterclaims have been discovered or have accrued during the course of the suit, as well as the potential for subsequent litigation between the parties to such actions. If potential future claims exist, a party can likely avoid claim preclusion resulting from res judicata and the rule against splitting causes of action by attempting to incorporate such claims into the existing litigation, or by reaching an agreement with the other parties regarding how the existing litigation will impact any future claims between the parties. Although AMEC is a two to one opinion from one of Florida's five District Courts of Appeal, the decision highlights the potential pitfall of not adequately evaluating additional claims and causes of action between parties to an existing suit, even if such claims or causes of action are discovered or accrue during the course of the existing suit.