Mediating Catastrophic Construction Claims

Stuart Sobel, Daily Business Review

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Construction has always been a dangerous endeavor. With today's complicated technology, materials, equipment and engineering systems, many argue that it is more dangerous than ever—notwithstanding safety conscious strides in worker protection.

At its heart, construction remains a human endeavor. As such, mistakes are still made. When disaster strikes and a building collapses while under construction, the "normal" difficulties inherent in resolving construction disputes are multiplied by factors not normally brought to bear in the run-of-the-mill dispute involving cost overruns, time overruns, and departures from contractual plans and specifications.

Tragically, a collapsed structure introduces personal injuries, wrongful deaths, economic losses and disappointed expectations on top of the impact to the completion of the project. As such, any formal dispute resolution, whether it be arbitration, litigation or several of both types of proceedings, will involve many parties and claims as well as many issues related to each party and each claim.

Add to this, many parties will have insurance available, but the coverage may be offered in layers, with underlying and surplus policies introducing even more grist for the dispute mill. Insurance policies may have several of the construction participants as additional insureds, and they may also have subrogation waivers and other nuances that must be considered in working toward a just resolution. Additionally, there will also likely be performance bond sureties that will have indemnity rights to bring to the party.

Consider then what the trial or arbitration hearing will look like. How long will it take to select a jury given the number of peremptory challenges? How long will a simple side-bar in a jury trial take? How long do depositions take to conclude, with 20-plus parties each having the opportunity to question important lay and expert witnesses? And, how much will all this cost?

How then best to manage this not so rare occurrence? At the risk of being accused of blasphemy, the answer is to run a mediation track parallel to the formal dispute resolution track.

Statistics tell us that nearly 99 percent of all filed lawsuits are settled. The settlement rate of arbitrations is not quite as high, but we should take some solace in the fact that, in all likelihood, a well-managed mediation process can also resolve our catastrophic construction claim.

So then, what is a well-managed mediation process? It must begin with the recognition that mediation is, itself, a process, not an event. Mediation is most effective when the parties understand the process, which calls for everyone to be brought together with a common goal—settling the claim—even if the goals diverge when each party wants someone else's money to be used. Still, with everyone in the room, the opportunity for cooperative compromise in furtherance of the common goal becomes possible.

Multi-disciplined Requirement

The well-managed process starts with the selection of a mediator. Multi-party mediations require a special talent from a mediator, and each catastrophic claim calls for a unique approach for the mediator.

The mediator must determine how best to approach the global claim: Are there low-hanging fruit that are easy to resolve and would "thin the forest?" Are there natural alliances among some of the parties or discrete claims that should be considered independent of other claims?

Thus, the mediator selected for these types of cases should be very experienced, with a deep understanding of not only construction but also insurance, surety and, if necessary, the personal injury components of medical claims, including lost earnings and other non-economic components of these particular claims.

It is also important to keep in mind that there will be a competition for insurance dollars. The mediator for the construction claims may or may not be the mediator for the personal injury and death claims, but certainly there must be coordination among the various actions and mediations. Moreover, insurance adjustors are active participants in mediations, while they are relegated to being observers in trials and arbitrations.

A Lengthy Process

The timing of the mediation is also important. Typically, mediation of catastrophic construction claims is not concluded in one session. Often they stretch over months or years while the parties exchange information, obtain expert opinions and prepare to present their cases.

As the cases mature, views are more fully developed, strengths and weaknesses become recognized, and interim rulings are issued. It is, therefore, important that the court or the panel of arbitrators be aware of the mediation progress, so that the court or arbitrators can facilitate through their rulings a continual re-evaluation of each of the parties' positions.

This progress down the path parallel to mediation fosters movement of the parties off of otherwise entrenched settlement. It is this movement that lies at the heart of settlement. Through movement and the re-thinking demands and offers, the parties come toward a common ground.

When successful, mediation also allows for creative solutions that may not be available through formal dispute resolution. Correction of work, rather than the payment of money, may prove an attractive piece of a settlement. Resolutions may be kept confidential and private, while a jury verdict is never confidential.

Plan for a Successful Mediation

Successful mediation requires a clear vision of what success will look like on paper. With so many parties, claims and issues, documenting a settlement reached in principle presents its own challenges.

Will all the insurers join in the settlement, disclosing their contributions and submitting to the jurisdiction of the court for the purpose of enforcement? If not, what default mechanism will work best to ensure that all of the parties pay, so that the plaintiff is not left with some paying, some not, and questions about collectability? Consider bringing a draft settlement agreement, leaving numbers blank, to the mediation so that it too can be negotiated, rather than leaving that task, with its own hazards, for the days or weeks after the dollar settlement is achieved.

Mediation provides parties the opportunity to see how their presentation of their case is received by others, and also to see their opponent's case articulated in a manner that allows for more objective consideration. The process enables principals to sit across from each other with the ability to control the outcome of the dispute—as opposed to placing their fate in the hands of a judge, a jury or a panel of arbitrators. That control is appealing, and it has led the construction industry to embrace mediation as an important tool for the resolution of disputes involving construction catastrophes.

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