

Building settlements in construction-defect cases

Passing the buck is the usual defense strategy, and a special master may be needed to steer these cases towards settlement

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Construction-defect cases typically involve large numbers of parties, attorneys, insurance companies and experts. Each player has its own goals. The property owner wants maximum funds to repair defects and cover losses. The builder disputes both plaintiff's repair scope and associated costs and seeks to pass plaintiff's claims onto subcontractors. The subcontractors concentrate on minimizing alleged damages and shifting responsibility. The design professionals distinguish between construction errors and design issues. Attorneys challenge pleadings, decipher contracts, pursue claims and assert defenses. Insurers highlight policy language to define covered losses and involve other carriers to share the risk. Experts bring technical insight to all aspects of the discussion.

Special master/mediator

A special master/mediator can steer these players towards resolution by designing and implementing strategies that allow for meaningful settlement discussions in advance of mediation.

First, discuss with the participants the necessary parties and their roles at the project. If a contract exists, does it accurately reflect the client's work? Did the client perform additional work? If the client is uncertain, will a site inspection or meeting with other defense parties refresh his memory? Also, determine whether the contract includes any attorney fee, duty to defend, indemnity or limitation of liability provision.

Second, assist the parties in sorting through any coverage issues. If there is an insurance issue that may impede settlement discussions, who are the decision makers and what information do they need to address the issue? Is additional carrier participation needed? Have the carriers reached a time on risk agreement? Are there additional insured issues? Many times, insurance-related issues can be resolved through a conference call between the neutral and carrier representatives; at a minimum, these calls identify decision makers and facilitate carrier analyses before mediation.

Third, work with the parties' experts to define potential problems, develop repair proposals and explore creative solutions. Expert information plays a significant role in preparing a complex case and defense. How will the parties use this information in settlement discussions? Will experts explain areas of agreement and disagreement? Will they share possible solutions?



Finally, encourage the participants to develop a settlement strategy. Will plaintiff only consider a global settlement? Will the lead parties allow peripheral party settlements? Can players with additional insured endorsements settle early? Will the parties consider settling around a "problem" player? Who will attend the settlement conference with authority to finalize any settlement agreement? When will lead parties serve settlement demands? In addition to a settlement plan, the participants privately should define the outcome that they hope to achieve and plan how they will move from offer to offer or demand to demand before the mediation.

Moving players towards settlement in a construction-defect case is not easy. The process involves multiple players with variable and changing goals. Factual disputes, conflicting legal theories, late claims, missing parties and recalcitrant carriers create additional challenges. Nonetheless, a special master/mediator can steer these players towards resolution by implementing strategies that prepare parties for meaningful settlement negotiations.



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