



2017 CLM & Business Insurance Construction Conference
October 9-11, 2017
San Diego, CA

Construction Claim Leaders: Emerging Trends in Coverage and Litigation in 2017 and Beyond

Technology and Construction:

Perhaps the fastest evolving issue which is confronting claim professionals nationally is the advent of technology, particularly as it applies to the construction sequence. Technology is changing rapidly, which means the methods and means in which buildings are designed and constructed have evolved and changed in a short time frame. BIM, Drones, three dimensional printing, even smartphones, provide different methods which translate into evidentiary issues which absolutely must be addressed should claims be brought at a later time.

Technological changes are huge, claim professionals are well aware of these changes in their individual practices. From paperless files to how evidence is generated, presented, preserved and the like. Internet searches by jurors can find "hits" on topics wide ranging, from the lawyers, experts, builders and even verdict values despite admonition that to stay away from the internet. How the claim professionals keep abreast of the changes and impact on the claim presentation and resolution is pivotal. Overlaying this entire subject area are issues specific to cyber risks, cyber security and issues involving the data itself.

Lack of Qualified Workforce:

When the economy took a turn in 2008, construction was not immune. Projects which were in the process of being completed sat idle, went into foreclosure and otherwise construction stopped altogether. Hundreds of thousands of individuals who had relied upon a lifetime supply of construction jobs went without employment. During the economic recovery, these individuals found gainful employment, but in areas other than construction. Fact of the matter, there simply were not jobs to be had. At the same time, the new generation found little interest in construction as a career. This led to the perfect storm when the economy, and necessarily construction, rebounded.

National trade organizations including the AGC and others have cited the lack of qualified labor and skilled artisan contractors as one of the top concerns that they share. There are reports of builders poaching other builders' trades during the critical path to meet deadlines. Add to this mix the fact that the labor force is aging, workers are getting older and retiring. This aging workforce is not getting replaced. The outgrowth of the lack of skilled labor means delays in providing completed projects, but much more in the nature of claims.

Consider the fact that the workforce is less skilled. Whether this translates into more claims for defective construction or otherwise provides fodder for an eager plaintiff lawyer remains to be seen. When one pencils out the statute of repose for the various jurisdictions following the collapse of 2008, and the economic rebound, we will soon see the test of whether the qualifications and availability of skilled labor equates to greater exposure and lawsuits. Whether that is the driver is an issue of intense debate.

Product Mix:

Urban infill, lack of lots which can be built, consumer demand and profit motives all come together to generate a substantial trend in and of itself. Stated simply, the products being delivered today in the world of construction are markedly different than yesteryear. While we have always had the simple categories of residential, albeit single family homes, apartments, condominiums, and commercial, we have not had the plethora of mixed use housing. Condo hotels, mixed use and other unique beasts generate and create theories of liability and exposure which are not seen in the residential context. Lost profits and economic impact are areas of tremendous exposure. Stated simply, what is being built today is changing. The era of large tracts of production homes is not providing the inventory for lawyers to chase construction defect claims.

Methods of construction are also changing. Utilization of modular construction whereby entire structures/buildings are built offsite and assembled in lightning speed is becoming more frequent. Construction individual components offsite is another huge trend to save time and money, doing so impacts the critical path in a direct manner. These trends also fuel and dovetail into the theories of liability and exposure the claim professional, risk manager and general counsel must consider.

Challenges in Claims Handling:

The change in the product mix directly correlates into the issues of claims. Coverages are not as straightforward, as the coverage issues complexity mirrors that of the underlying project. Mixed use, high rise, conversions and de-conversions involve complexities in sorting out potentially implicated policies, with greater frequently on policies that are triggered both for the CGL and professional liability aspect. Bearing in mind that this environment comes with facts and projects that present greater exposure, this can present a challenge to the claim professional working on claim navigation. This presents new questions and challenges for the claim professional charged with sifting through the insurance landscape.

Similarly, general counsel and risk managers task of sorting through the coverages and transferring risk is increasing complex in this new generation of construction projects. Policies of today bear little resemblance to those of earlier years, coverages are tightened, new language has been included, and certain provisions remain to be tested. One constant is the higher deductible or self insured retention that seems to be the new norm. This places even greater pressure on the efficient claims management and transfer of the risk early in the claim process. For the claim professional, this can also be a source of distress should there be failure to appropriately direct or manage the case within the retention amounts.

What keeps the claim managers up at night, the issues which give them pause, emanate from this new world of increasing complexity of the nature of the projects which includes higher exposures and increasing difficult coverage issues. Juxtaposed against this backdrop is another harsh reality of 2017 and beyond, the aging of the claims workforce. Similar to the construction industry, fewer individuals are pursuing careers in claims management or insurance in general. Companies which are focused on bottom line results are devoting fewer resources to internal training or mentor ship programs which is leaving a vast talent gap. With people aging out of the work force, fewer experienced individuals remain to tackle these difficult issues. What remains, however, are heightened expectations about the quality, timeliness and handling of the claim remains with increasing metrics applied to the handling and outcomes.

Emerging Trends:

Today's panel discussion will focus on the emerging trends from the perspectives of individuals charged with the handling of complex construction matters throughout the nation. From this unique vantage point, they will be sharing impressions of developing trends which they see in the earliest stage which are growing with frequency or severity throughout either the nation or individual jurisdictions. Bearing this in mind, historical perspective is important to keep in mind when discussing these trends.

Going back to 2008, the economic crash meant almost a complete halt to new construction. The insurance market was extremely soft, claims increased with frequency but not severity. Insurance carriers cognizant to fiscal health responded by writing more manuscript forms and endorsements for the market which did exist. As time wore on, lessons from the aftermath of 2008 resulted in new language, higher retentions and other carefully thought out changes from the carrier side.

Fast forward, these policy changes are what drives the complexity in the coverage issues and provides fodder for challenges in trial courts, potentially providing a new body of law. From the risk manager, general counsel, claim professional charged with the claim resolution, this adds a layer of uncertainty and costs. In the continuing soft market, the ability of the general contractors and Homebuilders to secure "good" additional insured endorsements is squarely an issue. With more carriers going into runoff, there is an impact potential where the active and runoff carriers share the risk creating potential conflict in claim direction and objectives.

One trend which will be discussed is whether construction defect is dying claim. Fewer suits are being filed, pundits are torn whether this is the hangover effect of 2008 and lack of new construction juxtaposed with the statute of repose or the impact of successful right to repair laws on the books throughout the nation. Global warming may actually be at play in this issue, years of drought have not given the torrential rains to test the weather resistance of homes in places like the arid Southwestern United States.

Increased construction site accidents, fatalities in some jurisdictions, will also be discussed and whether this is an outgrowth of the lack of skilled labor force or otherwise. This panel will share insight on what States are concerned problem children and other States where construction issues are reality easy from a claims standpoint.

Construction Trials:

There is no question more construction cases are getting tried to verdict. This panel will discuss where these trials are taking place and special challenges specific to the venues. Given the multiple parties, complex coverage issues and pure length of the case, trial is generally not viewed as a good result. However, facts and demands often leave the general counsel and claim professional little choice.

Trials of today, however, have three different components which are giving pause to the claim managers. First, we see a change in the demographic of the trier of fact. Specifically, our jury pool is getting younger and younger, which means having the dreaded millennial juror making a decision is more likely than not. No longer will the defense trial lawyer be able to strike the millennial based on age ago, ethics aside.

Why do we care about the millennial? In general, they are thought to be more pro-plaintiff, more anti-big business (and the developer/general contractor need not be that big). They like to "send messages" in the form of larger verdicts and are thought to have a higher propensity for doing independent research about verdict values, witnesses, defendants and the like despite judicial admonition otherwise. They have grown up in a generation that is technologically savvy and has shorter attention spans.

Whether this is fact or fiction, one thing remains true. Trial presentation is changing markedly, how cases are presented, evidence delivered, trial themes communicated. With the demographic of the juror changing, this means we are by necessity making real time changes in the trials being presented.

Second, we are seeing the rise of the reptile in the trials of today. Combating the "reptile theory" is something that must be considered early on in the life of the case and means that defense counsel and the defense team are setting up the case correctly to deflate any attempt by the plaintiff to go down this path.

Finally, exposure issues with the increasing complex trials is a factor that cannot be ignored. Particularly with the commercial project and damage claims, different levels of insurance are exposed.