



2019 CLM Construction Conference  
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## **Dealing with High Exposure Multi-Party Litigation concerning Catastrophic Events or Mega Projects**

### **I. Discussion on types of Catastrophic Events or Mega Project**

#### **A. Catastrophic Events**

##### **1. Catastrophic Failure**

A catastrophic failure is a sudden and total failure from which recovery is impossible. Catastrophic failures often lead to cascading systems failure. This term is most commonly used for structural failures but has often been extended to many other disciplines in which total and irrecoverable loss occurs.

##### **2. Vertical or Horizontal Collapse**

Collapse of any vertical or horizontal structure, regardless of size that partially or totally collapses destroying property. Most of these events normally include substantial loss of life.

##### **3. Death, extreme traumas, physical or non-physical injury**

Most catastrophic events include loss of life, or major physical injury. In addition, catastrophic events normally also include emotional issues from first responders and viewers of the event.

#### **B. Mega Project**

##### **1. High Value Vertical or Horizontal Project**

Megaprojects are vertical or horizontal construction projects with a construction cost in excess of US\$1 billion. Mega projects also tend to attract significant public attention because of their substantial impact on communities, the environment, and budgets. Projects can also be "initiatives that are physical, very expensive, and public".

## **2. Examples of Large High Value Projects**

- i. Airports
- ii. Tunnels
- iii. Large Infrastructural Projects
- iv. Bridges

## **II. How to deal with declining limit policies while the exposure exceeds the policy limits.**

### **A. Eroding Limits Policy - is there enough to pay everyone**

Insurance policies include a limit of liability, or limit of insurance. A policy in which defense costs come out of the limit of liability is called an "eroding limits" policy. An eroding limits policy is a policy where defense costs is considered part of the loss and reduce the available limits available to pay damages or settlement costs.

Most if not all Professional liability, policies are eroding limit policies. On the other hand, General Liability policies are not eroding limits policies and defense costs are covered under the policy outside the limits of liability leaving the policy limits available to settle claims. The majority of the professionals which have eroding limit polices include Architects and Engineers.

### **B. Exposure exceeds the Policy Limits**

Damages and defense costs arising out of catastrophic events can easily can be in the millions. Design professionals, depending on the size of the company and the type of work produced typically carry limits ranging from \$1 million to \$15 million with a deductible between \$10,000 and \$250,000. Larger firms carry primary and excess policies allowing for higher limits.

### **C. Every Plaintiff wants to be paid**

Normally in large exposure cases there are a few defendants that have the largest exposure for example death and quadriplegic. In addition, there can be many parties with physical or emotional issues who also want to be paid. Many times settling with the minor players is the most difficult particularly if you do not have sufficient monies left in reserve. A common strategy is to consider a global settlement or a tender of all limits in exchange for a full release for all defendants.

### **III. Who and when is a mediator selected and how does that affect settlement**

#### **A. Mediator Selection how early is too early**

The Court selects the mediator in most catastrophic event litigation. Most catastrophic event litigations have more than 10 plaintiffs and 20 defendants. The reason the Court makes the mediator selection is because it is extremely difficult if not impossible for all the parties to agree on the mediator.

Many times, Courts order a mediation before depositions have occurred. The early mediation is not normally fruitful but provides a good mechanism to bring the parties together to discuss facts, damages, and defenses between them.

#### **B. Local Mediator or Not Local Mediator**

Local mediators have the advantage of knowing the community and many times are familiar with the plaintiff and defense counsel involved in the litigation. However, when a plaintiff or defendant has hometown advantage, or when the catastrophic event occurs in a small town that does not have a mediator with sufficient experience, a non-local mediator should be used.

#### **C. Mediator with construction experience versus large case experience**

Mediators that were former contractors or construction litigators are invaluable in assisting in the settlement process. Construction cases have their specific set of problems and nomenclature.

Large party litigation has its own set of issues dealing with large number of parties. Organization of large party mediation is complex, and a very difficult task. In addition, the interconnection between the parties as they

increase is normally more difficult, such as additional insured endorsements.

Obviously, the best mediator would be an individual with construction background and experience with multiple party litigation.

**1. Claims Administrator**

Claims Administrator means a person, firm, or company, which has agreed to provide technical or administrative services and advice in connection with litigation and is normally assisting the mediator.

**2. Purpose of Claims Administrator in catastrophic event litigations.**

Due to the number of Plaintiffs and the lack of insurance monies to pay the claims, the Claims Administrator is responsible for deciding the distribution of the insurance funds to the Plaintiff.

**3. Can Class Actions assist in settlement?**

Class action is a legal action undertaken by one or more plaintiffs on behalf of themselves and all other persons having an identical interest.

Class actions are used to make sure that all possible plaintiffs are involved in the litigation prior to settlement. Making sure that all potential plaintiffs are in the lawsuit is critical because most defendants will be tendering their entire policy.

**VI. How to deal with the client's fears and emotions**

**A. Clients with experience versus clients that have never been in litigation**

When you are dealing with a clients that have never been involved in litigation you need to do a lot of hand holding. In addition, you must also educate the client as to the litigations process. For example, in catastrophic events the entire policy may need to be tendered in order to achieve settlement although your client's exposure maybe low.

There are clients that have a significant amount of experience in litigation. These experienced clients many times have procedures in place to document the project, which helps in the litigation process.

**B. Large Corporations versus small businesses**

A large corporation is a corporation that had, or whose predecessor had, taxable income of \$1 million or more for any of the 3 tax years immediately preceding the 2019 tax year, or if less, the number of years the corporation has been in existence.

Small businesses are privately owned corporations, partnerships, or sole proprietorships that have fewer employees and/or less annual revenue than a regular-sized business or corporation.

Although both small and large corporations would like to settle within policy limits. If settling within policy limits is not possible both small and large corporations are affected, although differently.

A large verdict above policy limits could cripple a large corporation and close down a small business.

**V. If the exposure is greater than all available limits does the defense strategy change**

**A. When to put up your policy limits**

Normally in catastrophic events that have loss of life, even defendants with low liability will need to pay their entire policy to be released.

**B. Defense strategy and policy limits**

What makes settling a catastrophic event or mega project so difficult is that normally there are not sufficient settlement proceeds to pay all Plaintiffs.

**C. If a party declares bankruptcy what happens then**

When parties declare bankruptcy it either changes the landscape of liability of defendants or sometimes gives other defendants not declaring bankruptcy to become part of the bankruptcy proceedings.

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### **Case Study - Example of Pensacola Jail Explosion Case**

A settlement fund of \$17.5 million is being set up to compensate persons affected by a 2014 explosion and fire in a Pensacola, Fla. jail.

Persons on the scene during that event, including inmates, employees and first responders, may qualify to submit claims.

This settlement resolves claims related to a fire and explosion that happened at the Central Booking and Detention Facility in Pensacola, Fla. on April 30, 2014. Around 668 persons were present in the facility during the fire, **including 98 persons named as plaintiffs** in this class action settlement.

According to the class action lawsuit, the explosion and fire happened during a flood, when gas-powered laundry dryers in the basement of the facility floated on rising flood water and broke from their gas lines, releasing gas that later ignited.

The settlement creates a net settlement fund worth \$17.5 million. Of this fund, \$2.52 million is reserved for payments to jail inmates in connection with their civil rights claims. The remaining \$14.98 million will be used to pay claims of all Class Members, including jail employees and first responders. About 85 named plaintiffs will ask the court to grant them incentive awards of up to \$1,323 each, to be paid from the settlement fund.

Claims must be submitted via mail. Claimants will need to submit a Claim Form with the requested supporting documentation.

The settlement is still waiting on final approval from the court. The settlement could be terminated if the court does not grant final approval or for other reasons. If the settlement is terminated, no payments will be made.

Class Members who prefer to opt out of the settlement or object to its terms must file their written request no later than Sept. 1, 2018.

## **Case Study - Example of FIU Bridge Collapse Case**

A Miami pedestrian bridge that collapsed in March and killed six people had design errors, [federal investigators said Thursday](#).

The National Transportation Safety Board will continue to investigate the collapse of the 174-foot-long section of the Florida

International University bridge that was under construction. The board hasn't ruled on what caused the collapse, and the results could take months.

The errors in the design of the northern edge of the bridge overestimated how much stress the structure could take, according to the two-page board update. Cracking observed in the bridge before the collapse was consistent with the design errors, according to the board, which received help in analyzing the incident from the Federal Highway Administration's Office of Bridges and Structures.

Besides the six fatalities, eight people were injured in the collapse March 15. [Eight vehicles were crushed beneath the bridge](#) that had been under construction above Southwest Eighth Street, and seven were occupied.

The FHA's Turner-Fairbanks Highway Research Center conducted numerous tests and examinations of concrete and steel samples taken from the bridge.

Despite the collapse, the tests found that concrete samples from the bridge deck and canopy met requirements and that the concrete met Florida Department of Transportation specifications.

The \$14.2 million bridge was being built under [a process that allowed for installation of large sections](#), but one that experts said left it vulnerable to collapse until it was completed.

The structure above a seven-lane road was intended to link the university's new dorms with off-campus housing. When completed, the structure would have been 289 feet long and 109 feet tall.

When the 950-ton bridge collapsed, a witness said it sounded "like the world was ending." Rescuers clawed through the rubble to help survivors.