



2016 CLM Annual Conference  
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Orlando, FL

**PROS AND CONS OF MEDIATING, ARTIBRATING AND LITIGATING  
CONSTRUCTION CLAIMS”**

**CASE STUDY**

Colonial College is a liberal arts school located in a rural setting near the Mexican border. The college essentially drives the local economy, which otherwise has few municipal services.

Colonial is selected as the site for a debate on immigration policy to be hosted by Colonial’s venerable Dean Wormer. One of the more incendiary participants, Rush Trumpet, has a history of making *ad hominen* attacks on Wormer, who has been an advocate for educating the children of illegal immigrants.

Neither Colonial’s security force nor the available paid detail officers from the town are well-equipped to handle an angry crowd fueled by TV cameras. The security director hires an outside service, Tactical Temps, to provide the pre-event advice and a security team of twenty.

Colonial’s procurement officer sends Tactical Temps its standard terms and conditions for doing business with the college. The document states that all vendors are deemed to abide by the terms, which include (1) a defense and indemnity clause in Colonial’s favor for losses arising out of the vendor’s services and (2) an insuring obligation requiring the vendor to designate Colonial as an additional insured on a “primary and non-contributory” basis. Colonial’s T & C provides a signature line for the vendor to confirm its agreement to all content. The document further states that the vendor is deemed to consent to all terms, even without a signature, upon coming on campus with the purpose of rendering services.

Tactical sends over an agreement to Colonial’s security director having its own risk transfer provisions. It imposes no insuring obligations on clients such as Colonial. It does, however, contain a provision that the parties will indemnify each other “to the extent” of their respective roles in causing a loss.

Neither Colonial nor Tactical Temps formally sign the other’s contract. Colonial’s security director does sign the timecard for Tactical Temps’ consultant, who comes on campus to go over logistics and to make suggestions the week before the debate. The reverse side of the timecard states that the client (Colonial here) “agrees to be bound by the Tactical Temps Service Agreement.”

The debate proceeds and Trumpet resumes his personal attacks on Dean Wormer, leading audience members to throw things on the stage, jostling with Trumpet supporters and ultimately leading to fist fights and chaos, causing the debate to be abruptly terminated. The team of Colonial and Tactical Temps personnel cannot control the crowd, which causes property damage to the amphitheater, TV camera equipment and guest vehicles in an amount over \$1 million. There are several personal injuries to audience members, both those involved in fighting and innocent bystanders alike. Trumpet sustains a severe hair injury while being rushed out of the amphitheater by combination of Colonial and Tactical Temps security officers. A Tactical Temps employee is killed in the process when accidentally clubbed by a Colonial security officer. The projection of exposure for the personal injuries and death is over \$3 million.

The college is protected by a \$20,000 non-profit cap on damages. Its employees are not protected by the cap and can be sued individually in excess of the cap. The school's CGL makes them insureds.

### **DISCUSSION POINTS**

1. Categories of claims arising from fact pattern and grouping for analysis for defense or ADR.
2. What information is needed before making determination
3. Role of contractual risk transfer & coverage consequences on ADR or defense determination
  - For Colonial and its insurers (GLC of \$2million occurrence/aggregate)
  - For Tactical Temps and its insurers ( GLC \$1 million occurrence/aggregate)
4. Range of target outcomes on stated facts
5. Means to resolution.