



**2022 CLM Construction Conference**

Sept 21<sup>st</sup> – 23<sup>rd</sup> 2022

San Diego, CA

**The Changing Face of Construction Litigation in a Post Covid World**

**Discussion of the changing face of actual construction**

This course will assist the claims professional in understanding how the changes brought on by covid affect a series of issues and events inherent in every CD project and claim. First the session will discuss how the General Contractor and Sub Contractors have been affected by Covid in real life terms and the issues that are generating claims based upon those affects and will advise and educate the claims professional on these affects. The session will also discuss how covid has altered the litigation landscape such that in person, dealings are rare and the influence and methodology of old are no longer applicable in litigation as it relates to discovery mediation and trial and will educate the claims professional on how to deal with this challenge. Lastly, the session will discuss how claims has changed given the remote working situation and how to address the changes.

- Discussion concerning delays caused by lack of work force and lack of materials

COVID-19 has had profound economic consequences on the construction industries, and some of usual vendors and subcontractors did not survive or became much smaller not allowing them to fulfil their contracts. This has caused contractors to overpay for normal workforce personal and work with sub-contractors that they have never worked with before. In addition, overseas and domestic supplies have caused delays on the project. For many contractors it is an extraordinary challenge to obtain visibility into and manage the behaviors of their disparate supply chains at site level.

All over America, lack of material shortage is affecting construction projects. In addition, contractors are finding it extremely difficult to fill the void of workers needed. As a result, the construction industry is hiking up costs to complete projects in an efficient manner. Raw material shortage is one of them. The consequences of such disturbances may be realized through high lead-time, high production cost, low reliability of product, wastage of time, materials etc. On large construction, projects that take many years to complete claims are now being felt relating to delay or work stoppage because contractors cannot complete the project for the previous agreed upon price. Design professionals have had to value engineer many projects to reduce

cost and that has caused claims due to condominium owners expecting a higher standard of product. This has affected both GL and PL claims.

Lately there have been an uptick in lawsuits concerning delay as well as closing out project. The lack of materials and workforce has extended critical path items at all facets of construction making the new delay claims much larger as most sub-contractors are now involved in litigation as opposed to lawsuit concerning specific delay items. The presenters will provide specific examples of how litigation has changed.

- Discussion concerning Force majeure provisions in contracts and the need for them

Most contractors have been impacted by claims due to Covid and post Covid. Covid-19 caused claims based on government shutdowns, owner shutdowns, changes in law, labor unavailability and supply chain failures. It is important to review the force majeure clause of the contract paying special attention to pandemics and government shutdowns. When preparing a contract or a new insurance policy you must address a potential resurgence of Covid-19 or a similar pandemic.

Due to Covid and the remote work environment of contractors and design professionals' professional liability policies and general liability policies are including a cyber component or are being bundled with a separate cyber policy.

The panel will provide additional information and recommendation on how to modify the contract provisions.

- Discussion concerning the changing needs during contract negotiations and the shift in leverage from GC to sub.

Due to Covid and the new Covid environment it is more important then ever to review the contract between the General contractor and sub-contractors to make sure that the new risk involving a post Covid environment are being shifted. For example, as a General contractor you may need a have a paid when paid clause to make sure that any delay or lack of payment by owner will shift the cost to all sub-contractors affected. Also, need to make sure that the vendors that you are using are stable enough to withstand another government closure due to pandemic to be able to finish the project on time and within budget to prevent a potential claim.

### **Discussion of the changing face of litigation**

- Discussion concerning delay in discovery and depositions due to fear of travel, in person contact

As every attorney and claims representative is aware, COVID-19 has caused a seismic shift in the manner of taking depositions as well as discovery. Federal Rule of Civil Procedure 30(b)(4) provides that “parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.” In line with this provision most states civil courts adopted similar rules allowing remote depositions. Although Zoom and other remote access has helped the legal industry conduct depositions, there are certainly disadvantages to the format. Courts have noted that remote depositions “preclude in-person confrontation and the assessment of the deponent’s demeanor, affect, non-verbal responses, and facial expressions.” *Huddleston v. Bowling Green Inn of Pensacola*, 333 F.R.D. 581, 586 (N.D. Fla. 2019). Moreover, “[a] remote deposition offers no guarantees or safeguards against improper conduct by the witness such as crib notes or signaled answers.” *Kean v. Bd. of Tres. of the Three Rivers Reg’l Libr. Sys.*, 321 F.R.D. 448, 453 (S.D. Ga. 2017).

No matter how much we would like to go back to in person deposition and discovery it does not appear to be coming back anytime soon. Parties and non-parties are not available like they use to be, many due to being worried about being sick and the interaction with others. For example

The way attorneys prepare for depositions has totally changed as with remote deposition a lot more preparations are needed such as making sure you have access to all possible exhibits, having exhibits available for other parties to use your marked depositions, and more importantly making sure that the deponent will be able to testify as to all the exhibits. Although many of us are no longer traveling for deposition and discovery, delays in taking depositions and discovery are almost impossible to get around. The presenters will provide potential tools to overcome some of the new challenges we have in deposition and discovery.

- Discussion concerning appearance by zoom, teams, face time and web-based appearance

Appearing remotely via Zoom, Teams, face time and other web-based appearance was already happening within most insurance companies before the pandemic; however, it was not mainstream for most of us. Today all insurance companies and law firms have remote appearances daily. The presenters will expand on how this remote interaction has affected litigation as well as claim handling.

- Discussion concerning changes in mediation, trial and arbitration through satellite appearance and influence

Covid and remote requirements for trial challenges for counsel, particularly as it concerns the jury. With and through video participation, counsel’s ability to read the

jury is limited, that is, gauge jurors' reactions to arguments, expert witnesses, or other testimonies. Video removes the nonverbal cues that litigators look for to see how their message resonates with jurors. The jury, of course, may only see the person speaking on video rather than everyone in the courtroom, which also limits their ability to gauge the demeanor of other participants and their reactions to testimony. The same can be said for remote arbitration as it relates to arguments, expert testimony, and fact testimony by not being able to read the reaction of the arbitration during the presentation.

These restrictions also have a significant impact on the voir dire process of vetting jurors, making it more difficult to evaluate the mindset of jurors, whose experience with Covid may affect how they approach jury service or how they react to corporate defendants. Some jurors may still be highly concerned about Covid and have had experiences with corporate entities during the pandemic, making them more skeptical of defense testimony from any corporate client.

More arbitrations are taking place because many jurisdictions still have trials partially or have them completely on hold. Holding remote or partial remote arbitrations and trials are a reality. Many arbitrations and trials are now being held where the parties and their counsel are present, but most fact and expert witnesses are remote. The panel will expand on how this remote or partial remote arbitrations and trials are influencing outcome of verdicts.

- Discuss how the non-binding arbitration is being used to reduce case load.

Before the pandemic, the conventional wisdom had been that offices were critical to productivity. Law Firms and Insurance Companies competed intensely for prime office space in major cities to be a key player, since Covid that has changed. Most law firms now have many attorneys partial or full time remote. Insurance companies also have shifted to hoteling, and remote work. Many of the new upgrades in the latest remote technologies have made remote working as affective as working firm an office. However, there has been consequences as it relates to management and settlement of claims.

For example, when mediations are done remote less mediations are settling. The major cause is that the parties are remote working on other files an opposed to being vested in the outcome of the mediation. For example, there is no more "this is my final best offer as I am getting on a plane in one hour." This is one of many scenarios that has affected mediation.

Due to substantial backlog of cases because of the Pandemic, Courts are finding alterative ways to reduce the back log. One of the ways many Courts are trying to reduce the backlog is by requiring non-binding arbitration in additional to or replacing mediation. Non-binding arbitration does save cost and time then a normal trial. The non-binding arbitration are conducted informally with presentation of testimony and evidence to be kept to a minimum, and matters are presented to the Arbitrator(s) primarily through the statements and argument of counsel.

The parties may choose to have a single Arbitrator or in complex or high exposure cases have three arbitrators. There is also a potential to have the non-binding arbitration remote, which could reduce traveling cost as well as potential expert fees. The Courts require the claims representative and client to fully attend the arbitration, which makes vested in the outcome of the non-binding arbitration. The time involved in non-binding arbitration is normally only a fraction of the time that would be needed for trial. For example, a two-week trial will normally only take two days in a non-binding arbitration platform.

Another advantage of utilizing the court-ordered, non-binding arbitration process is that the arbitration must be completed within 30 days of the first arbitration hearing, unless extended by court order, on motion by the chief arbitrator or a party. No extension of time shall be for a period exceeding 60 days from the date of the first arbitration hearing. Rule 1.820(g), Florida Rules of Civil Procedure.

Upon completion of the arbitration hearing, the arbitrator(s) must render a written decision within 10 days of the final adjournment of the arbitration hearing. The arbitration decision may set forth the issues in controversy and the Arbitrator's conclusions and findings of fact and law.

Any party who disagrees with an arbitration decision, may file a motion for trial de novo. If a motion for trial de novo is not filed within 20 days of service of the decision on the parties, the decision shall be referred to the presiding Judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided in Section 44.103(5), Florida Statutes.

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### **Discussion of the changing face of Claims**

- How satellite work has affected round table of claims and management of claims

As in most instances, there are pros and cons to every aspect there is no difference here. Cons obviously include, work life balance, higher productivity, timeliness, decreased turnover, cost savings and flexibility. However, over one of the best advantages insurance companies are seeing is that they can higher more experienced individuals within their field regardless of geographical area. Adding the additional highly skilled individuals into the mix has provided a large boost in efficiency and experience. However, one of the biggest concerns insurance companies are having is training new recruits that have limited experience and no longer have the day-to-day interaction. Both situations will be discussed by the panel.

- How satellite work has affected standards on settling claims

Even before the epidemic, insurance companies had already adopted some digital solutions although not to the extent they are forced to do now. While insurance companies managed to adapt their operations when it comes to sales, they are aware that customer satisfaction depends on the rapid processing of damage claims and the resulting pay-outs. But how do you remotely assess some construction claims if the insurance company themselves ban travel, or the claims handler is worried about traveling. Of course, claims handlers rely on their attorneys and clients for a lot of information, but to understand some claims the claims handler needs to see the damage firsthand. The panel will discuss tools being used by the insurance companies to overcome these obstacles.