



CONSTRUCTION **SUPER**CONFERENCE **2021**

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The More The Merrier

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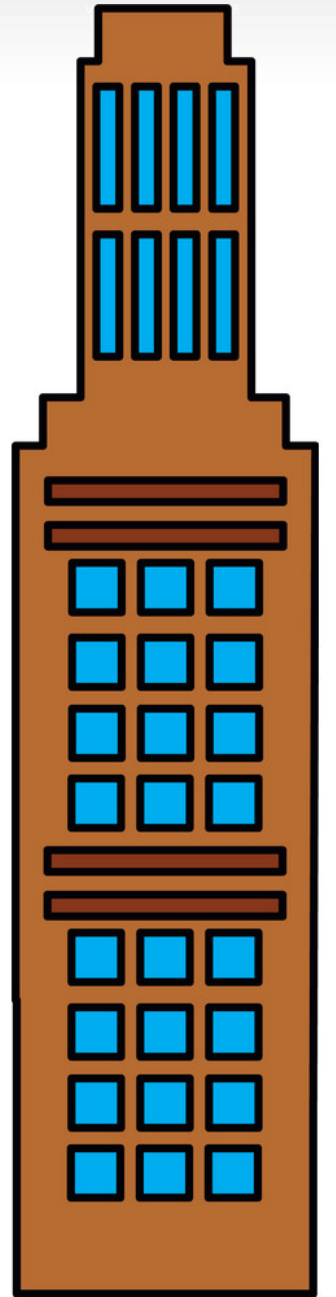
JAMS

Agenda

- Introduction of Panelists and Program
- Issues Involving Multi-Plaintiff Actions
- Multiple Defendants
- Impact of the Pandemic
- Discovery, Scheduling and Case Management
- Trial Preparation Considerations and Pretrial and Resolution Conferences

THE MORE THE MERRIER - HYPOTHETICAL PART 1

- Multiple parties have become embroiled in disputes arising from the design, construction and transition of a large high-end high rise multi-unit mixed commercial and residential use condominium project
 - Units entirely sold out before construction was completed
- The Association which is now controlled by unit owners
- Individual unit owners have claimed damages associated with construction defects
 - Affecting the structural and systems components of the building
 - Resulting in damage to the common elements, individual units and a collapse of the portico over the front entrance
- Transition experts have opined that there are significant workmanship and code issues with the design and construction



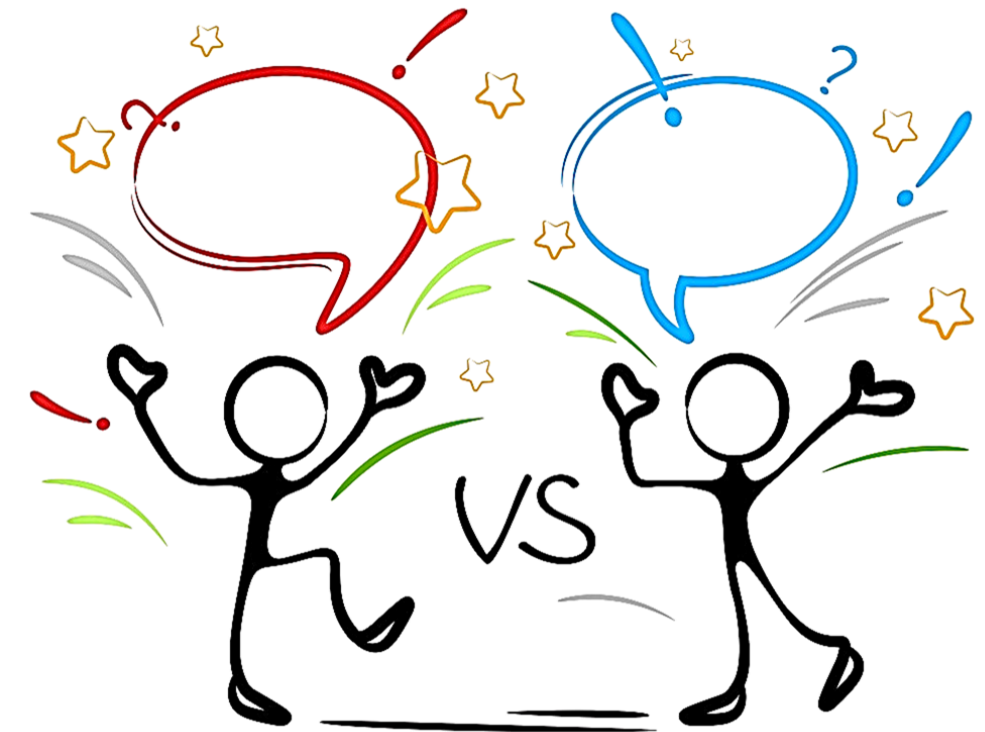
THE MORE THE MERRIER - HYPOTHETICAL PART 2

- The Unit Owners and Association have brought a lawsuit against the Developer, General Contractor and Project Architect for damages and to compel corrective work
- The Developer has asserted claims for contribution and indemnification against:
 - General Contractor
 - Project Architect
 - Trade Subcontractors 1-25
 - Suppliers 1-25
- General Contractor has brought similar claims against the same and Project Architect has done likewise and brought similar claims against its Consultant engineers
- All suppliers and subcontractors have cross-claimed



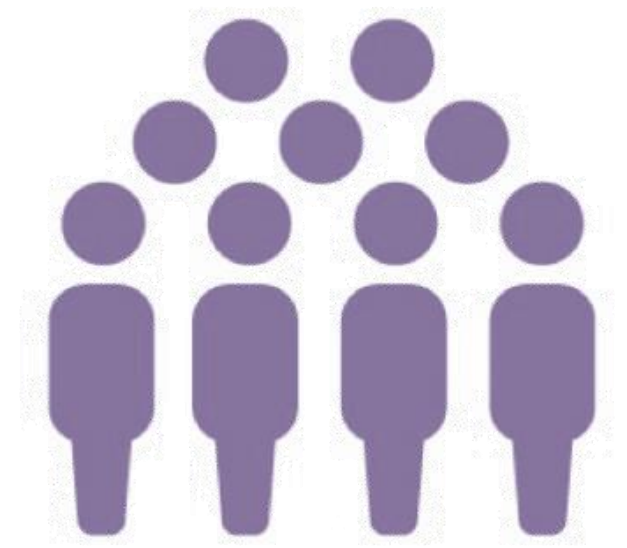
THE MORE THE MERRIER - HYPOTHETICAL PART 3

- There continues a long running dispute involving the Developer, General Contractor, Project Architect and a number of the same subcontractors and suppliers
 - Payment Claims
 - Backcharge Claims
 - Claims for Change Orders
 - Delay Claims
 - Workmanship Claims
- These disputes are being consolidated with the Association and Unit Owner claims



Agenda

- I. Introduction of Program and Panelists
- II. **Issues Involving Multi-Plaintiff Actions**
- III. Multiple Defendants
- IV. Impact of the Pandemic
- V. Discovery, Scheduling and Case Management
- VI. Trial Preparation Considerations and Pretrial and Resolution Conferences





II. Issues Involving Multi-Plaintiff Actions

Multiple Plaintiffs

- Class Action requirements
- The perils of representing multiple Plaintiffs



II. Issues Involving Multi-Plaintiff Actions *Suit vs. Developer for Defects in Common Elements*

- “Common Elements”
- “Limited Common Elements”
- “Unit”



II. Issues Involving Multi-Plaintiff Actions *Standing To Sue*

- Association's Claims for Damages to common elements and limited common elements
- Unit Owners: Claims for Unit Damages
- Unit Owners can assign claims to Association
 - Contract of Sale may preclude assignment



II. Issues Involving Multi-Plaintiff Actions

Three Critical Documents

- Master Deed
- Offering Plan
- Unit Purchase Agreement



II. Issues Involving Multi-Plaintiff Actions

Timing of Claims

- Percentage of units owned reaches a certain level per state statute
- Unit Owners control Board of Directors
- Usually 75%
- “Turnover”
- Retain Engineer to prepare Transition Report



II. Issues Involving Multi-Plaintiff Actions

Statute of Limitations

- Depends on law of your state
- Some states have a re-set when Unit Owners control Board
 - Ex.: Six years from Date of Turnover
- Other Approach: Statute starts to run upon discovery of defects
- Developer's knowledge of defects imputed to Association under Unit Owner control
- Difficult to apply
- File ASAP
- Building Permit date is always a safe starting point



II. Issues Involving Multi-Plaintiff Actions

Statute of Repose

- Additional protection for Developers, Contractors and Subcontractors
- Usually ten years from date of last work
- Exception: abnormally dangerous conditions



II. Issues Involving Multi-Plaintiff Actions

Claims Against Developers

- Defects
 - Patent
 - Latent
- Economic
 - Budget in Offering Plan Understated
 - Capital Reserve Study
- Statutory
 - Consumer Fraud
 - Disclosure Issues
 - Offering Plan Omissions
- Reformation of Governing Documents – Developer Income Streams for Common Element Amenities
 - Ex.: Parking, Storage, etc.
- Breach of Fiduciary Duty vs. Developer Board Members
- Breach of Implied or Express Warranty
- Punitive Damages



II. Issues Involving Multi-Plaintiff Actions *Claims Against Contractors*

- Issue of Privity
- Economic Loss Doctrine
- Timing of Claims under Statute of Limitations/Repose
- Third-Party Beneficiary Claim
- Contract with Developer may preclude direct suit



II. Issues Involving Multi-Plaintiff Actions *Claims Against Design Professionals*

- Condo Association is not the client of the Design Professional
- No ability to claim Professional Negligence
- Third-Party Beneficiary Claim
- Subject to exception in Developer/Design Professional Agreement



II. Issues Involving Multi-Plaintiff Actions

ADR Issues

- Association's right in Master Deed and Offering Plan
 - May require Unit Owner vote to sue
- Unit Owners rights in Purchase Agreement may have ADR for all claims
- Assignment of claims to Condominium Association will not work

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III. Multiple Defendants *Potential Defendant Groups*

- Developer Group
- Design Group
- Construction Group



III. Multiple Defendants *Developer Group*

- Developer – potentially responsible to unit owners and association for non-disclosed defects, misrepresentations etc.
- Developer's Construction Advisor/Administrator – third party under contract to developer to “watch” the design and construction teams to avoid defects – theoretically could be liable in negligence
- PROBLEMS:
 - Liability likely limited in the Condo documents
 - Potential lack of direct privity between the potential plaintiffs and the Developer and its advisor
 - Potential lack of duty to potential plaintiffs



III. Multiple Defendants *Design Group*

- Architect – usually overall control of the detailed design under contract to the Developer
- Sub-consultants – usually under contract to the Architect
 - Soils/geology
 - Structural engineer
 - Electrical engineer
 - HVAC engineer
- Contractual duties run to contract party (no privity for others)
- Some jurisdictions extend contract duties to foreseeable users
- Statutory duties (usually safety related) run to everyone intended to benefit from the statute
- Be aware of potential design responsibility outside of the normal group
 - specialty subcontractors and suppliers



III. Multiple Defendants

Contractor Group – Multiple Scenarios

- General Contractor/Construction Manager – one entity in charge of all work (most physical work performed by subcontractors)
 - Contract duties run to contract parties
 - Contract duties owed by the contractor can be passed to association
 - Subcontract contract duties usually end at contractor/CM
- Multiple Prime contractors – Developer could use different contractors for different aspects
 - Excavation/paving
 - Site utilities
 - General construction of individual units
 - Contract duties run to contract parties



III. Multiple Defendants

Third Party Practice – Contract Case

- In Court, a party sued in contract can seek indemnity or contribution from other parties liable over to that party – based primarily on contract duties
 - Developer can sue third party designer for design defects, GC/CM/Separate Primes for construction defects, and/or Construction Advisor
 - Architect can third party sub-consultants responsible for particular sections of the design
 - GC/CM/Separate Prime can third party subcontractor that actually performed the work
 - And so on down the line to sub-sub-consultants, sub-sub contractors, etc.



III. Multiple Defendants

Third Party Practice – Tort Case

- In Court, parties suing in tort may be able sue any person who owed that party a duty created by state/common law (most jurisdictions severely limit such rights when purely “economic loss” is involved)
- A party sued in tort contract can seek defense, indemnity or contribution from other parties liable to that party – based either on contract duties or duties created by state/common law



III. Multiple Defendants

Third Party Practice – In Arbitration

- Right to arbitrate is purely contractual
- Generally a party who has not signed an agreement to do so can not be required to arbitrate with someone else
- Flow-down provisions in arbitration clauses can create multi-party arbitrations
- In the absence of specific agreements, arbitration organizations can create combined arbitrations, e.g., Developer v. GC combined with GC v. Subcontractor (may or may not be separate panels)
- Arbitration award v. one person is not enforceable against anyone else (except may form basis for determination of rights in flow-down clause or liquidating agreement)
- Limited arbitration rights may force parties to seek contribution/indemnity in court actions (with potential for inconsistent results and extra costs)



III. Multiple Defendants

Arbitration – Third Party Issues

- Statutes and caselaw strongly favor arbitration
- Based on such policy considerations, other actions and legal proceedings may be stayed if necessary to fully implement the agreement
- However, related cases may not be stayed – especially if they involve issues not in the arbitration (like payment issues)
- Very real possibility of inconsistent positions having to be taken and inconsistent results
- SOLUTION: REALLY TIGHTLY DRAFTED DISPUTE FLOWDOWN PROVISIONS



III. Multiple Defendants *Insurance Carrier Involvement*

- Designers' Errors and Omissions (usually claims made, declining coverage)
- Contractors' and subcontractors' CGL policies (usually occurrence based, fixed coverage amount) (may or may not exclude damage to the work itself)
 - Classically requires an "occurrence" causing "property damage" or personal injury (lots of litigation as to what these terms mean)
- Construction advisors – could have E & O or CGL
- Developer would normally have a CGL

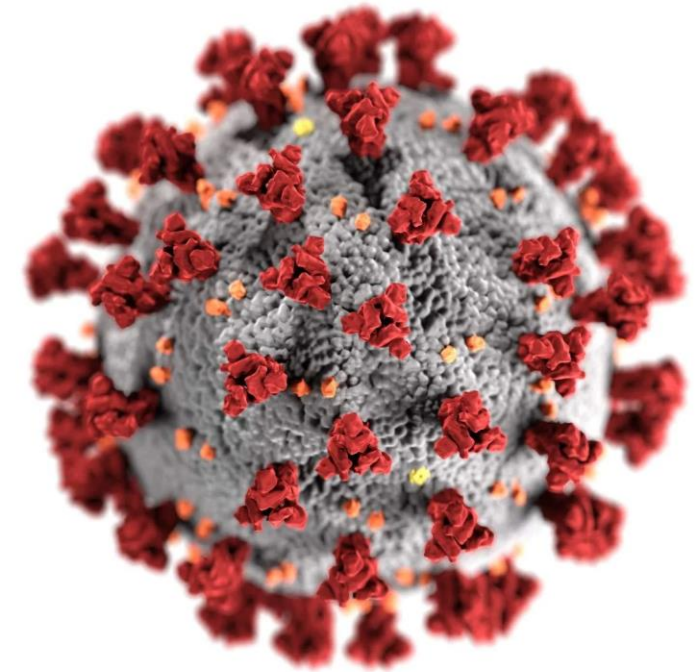


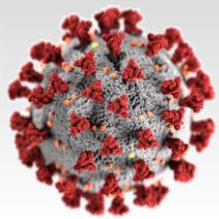
III. Multiple Defendants *Insurance Carrier Involvement*

- Carriers usually have a duty to defend if any allegation in the pleading could be subject to coverage
- Carrier can undertake defense under a reservation of rights – arguing that there is no coverage, but they will defend anyway (defense can be withdrawn)
- Coverage issues that are not settled are usually resolved in an action seeking declaratory judgment (Dec action)
- Dec action can be commenced by insured or insurer
- Dec action proceeds independently of underlying action (consider whether seeking a stay of the underlying action until conclusion of the Dec action is advantageous)

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IV. Impact of the Pandemic

- Substantive impact on delay claims and claims for additional costs
- Impact on the Dispute Resolution Processes
 - ADR
 - Trials – State by State determinations
 - Resumed in person
 - Resumed in person– allowing remote trial by consent
 - Resumed in person – subject to protocols
 - Local call
 - Remote - only
- Impact on moving the Docket

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V. Discovery, Scheduling and Case Management

- Expediting and simplifying the Process
 - Consolidate or Bifurcate Discovery
 - Multiple/Parallel Track Discovery
 - Issue Based Discovery and Scheduling
 - Depositions – Primary vs Secondary Witnesses
 - Compelling Expert Reports and Identification of Damages
 - Early Dispositive Motions



V. Discovery, Scheduling and Case Management

- Effective Use of a Case Management Conference
 - Have a plan
 - Propose a schedule
 - Have a pre-conference discussion
 - Identify logical points to engage or resume ADR
 - Identify primary issues that require discovery
 - Use of the Corporate Representative deposition
 - Press the issues/witnesses that can be addressed to reduce parties and issues



V. Discovery, Scheduling and Case Management *Mediation of Complex Construction Disputes*

- Too big and complicated for typical mediation processes
- Alternatives:
 - Guided choice approach
 - Evaluative mediation
 - Multiple mediators



V. Discovery, Scheduling and Case Management *Arbitration of Complex Construction Disputes*

- Properly managed, there are significant benefits to the resolution of complex construction disputes by arbitration over litigation
 - Greater party autonomy over dispute resolution process and decisions
 - Skilled, knowledgeable construction arbitrators
 - By agreement, absolute right of appeal to skilled, knowledgeable construction appellate arbitrators
 - Flexibility, economy, expedience of pre-hearing proceedings
 - Hearings can be greatly improved over trial proceedings
 - Site visits are beneficial to the understanding of the claims and evidence and easily done in arbitration



V. Discovery, Scheduling and Case Management

Joinder, Consolidation & Bifurcation of Claims & Parties In Arbitration

- Trying to resolve all of the claims outlined in this hypothetical in one proceeding is nuts
- Arbitration allows the parties to bifurcate and resolve individual claims in an order and in venues in a process that make sense, is fair and saves money and time
 - By agreement
 - By operation of law or court order



V. Discovery, Scheduling and Case Management

Scheduling Conference, Case Management & Discovery In Arbitration

- Focus of Preliminary conference is to enable the parties, as soon as possible, to be able to summarize for the Arbitrator their actual claims, the underlying facts and evidence, including expert evidence, the importance and significance of those claims on the claims of other related parties
 - This understanding allows for an informed agenda of allowing limited discovery
 - It allows the parties to reach agreement with the Arbitrator as to order of proof and hearing bifurcation
 - Affects discovery and prehearing motion practice



V. Discovery, Scheduling and Case Management

Scheduling Conference, Case Management & Discovery In Arbitration

- Claim or party dispositive motions involving pure issues of law can be requested, and with the Arbitrator's permission, scheduled, if they will reduce number of claims/parties
- Use of Redfern schedules for document production disputes
- Use of witness statements to reduce number or length of depositions
- Possible coordination of information exchange with the needs of on-going mediation, especially guided choice type mediation

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VI. Trial Preparation/Pre-Trial and Settlement

- Dispositive and In Limine Motions
- Severance, Consolidation, and Bifurcation
- Effective Pre-Trial Conferences
- Ethical Considerations—Multi-party Representation and Settlement Agreements



VI. Trial Preparation/Pre-Trial and Settlement *Dispositive/In Limine Motions*

- Summary Judgment/Judgment as a Matter of Law
 - Timing and restrictions on the number of Dispositive Motions
- In Limine Motions
 - Motions to Exclude Experts, Testimony, and Damages
 - Renew motions throughout trial
 - Settlement Offers v. Settlement Agreements
 - Settlement Agreements relevant to establish settlement credit and “one satisfaction” rule



VI. Trial Preparation/Pre-Trial and Settlement *Severance, Consolidation and Bifurcation*

- Joinder and Severance:
 - FRCP Rules 14 & 21
 - Will continued joinder unduly complicate the litigation or prejudice the other parties in any substantial way?
- Consolidation:
 - State Statutes Governing Consolidation of Civil Actions (e.g. Virginia Multiple Claimant Litigation Act of 2000)
- Bifurcation:
 - Bifurcation: Individual Defendants v. Entity Defendants
 - FRCP 42: Expediting Resolution and Judicial Economy



VI. Trial Preparation/Pre-Trial and Settlement *Effective Pre-Trial Conferences*

- Jury Trials:
 - Determine order of *voir dire*
 - Allocate peremptory strikes (e.g. CCP 231(c) “If there are several parties on a side, the court shall divide the challenges among them as nearly equally as possible.”)
- Bench and Jury Trials:
 - Order of presentation
 - Allocation of time (“[D]istrict courts should not adopt this practice [a chess clock] as a ‘matter of course.’” *Raynor v. G4S Secure Sols. (USA), Inc.*, 2020 WL 917060 at *5 (4th Cir. Feb. 26, 2020)(Unpub.)



VI. Trial Preparation/Pre-Trial and Settlement

Ethical Considerations - Multi-party Representation & Settlement Agreements

- Professional Responsibility Rule 1.8(g) prohibits a lawyer representing 1+ clients from participating in an “aggregate settlement” without Court approval, absent written, informed consent
- City of New York Bar Formal Opinion 2020-3:
- Be aware of Rule 1.4 (disclosing major developments) and Rule 1.7 (simultaneous representations)
- Settlement of one lawsuit that may impact another lawsuit handled by that lawyer should not be entered into without informed consent or, for certain aggregate settlements, court approval



THE EVIDENTIARY HEARING IN ARBITRATION

- Flexibility in ordering the presentation of claims
- Flexibility in presenting evidence
- Use of site visit(s)
- Bifurcation of claims and evidence re: same
- Use of virtual testimony
- Multiple venues to obtain testimony



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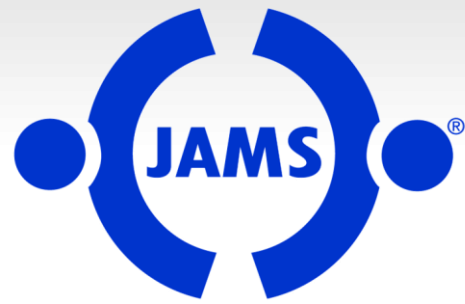


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The background image shows a construction site at sunset. A large crane is visible on the left, and a tall tower structure is on the right. In the foreground, several workers are silhouetted against the bright orange and yellow sky, working on a building's framework. The overall scene is a blend of industrial and construction themes.

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evaluation in the CSC
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