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ATTORNEYS AT LAW

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When a Win is a Loss

You sit at counsel table with your intrepid attorney waiting for the judge and jury to enter the courtroom for the start of the trial that will finally resolve your company's most important construction claim in its history. You lean over to your counsel and whisper, "Whaddaya think?" He will, of course, misunderstand your question. If he is a seasoned, longtime litigator, his focus will be on the combatant's ritual that is about to unfold. He is primed for battle and excited to engage in the game only battle-tested litigators love.

What you really want to know is, win or lose, how is this all going to affect my company? Were it ethical and prudent to inject your attorney with truth serum at this moment (it's not), it would not be a surprise if this frothing warrior acknowledges that, win or lose, "you've already lost." This conclusion is invariably true for all litigants that go through the entire process to jury verdict or arbitration award. Someone will lose less than someone else but everyone loses. The losses include time, focus, energy, productivity, relationships, and, of course, money.

While some cases must be tried, the vast majority of cases that go to verdict/award do not resolve earlier because of poor decisions that are based upon bad information and/or bad advice. While the list set forth below is not intended to be exhaustive, it is a list of the "usual suspects" that lead to bad decisions resulting in cases that go to trial that should have been resolved and weren't.

Bad News Does Not Travel North

Three basic construction facts are: (1) concrete cracks, (2) water flows downhill, and (3) bad news does not travel north. Each of these truisms is beyond debate.

Jobs are built by superintendents and managed by project managers. Neither are usually the ultimate decision makers as to whether a case gets resolved. However, the information known only to your project manager and superintendent is critical.

As the project proceeds and progress lags with mounting budgetary "busts," you begin to investigate the causes. As with most skilled and diligent project managers and superintendents, they will explain to you in detail the various project issues ranging from owner interference, unforeseen conditions, lack of design information and/or design mistakes. Based upon this information, you begin to tie the causes with the effects that are resulting in increased costs.

Experience tells us that, when claims are developed, there is invariably a strong basis for recovery. However, what must be kept in mind at this stage, and at every stage along the way, is that there are no perfect jobs. The project manager and superintendent can be among the most loyal and capable employees in your organization. This does not change the fact that your project manager and superintendent will be reluctant to volunteer information regarding problems that are the responsibility of the contractor as well as mistakes that they have made that have, if not created, at least exacerbated the problems resulting in your claim.

To expect a free flow of unvarnished information from the field in order to evaluate the relative strengths of the claim is at best unrealistic. How you get the real "skinny" on the causes of the claim takes digging and a wary eye. Review of objective project data such as cost reports and schedule updates is a good start. Direct and straightforward communication with the owner and design professional is another. Sometimes it is not until a mediation session that

you hear, for the first time, that your company has had some hand in making the project a mess that it has become.

However you close the information gap, you must recognize that it exists. You must approach all claims with skepticism and a critical eye. Your project manager and superintendent are good men and loyal employees. They are also human.

Don’t Book It (… actually don’t book all of it)

As your claim originates, you will begin to wrestle with an evaluation of its worth. At some point in the first year of the process, your accountant will inquire as to the reasonable and expected value of the claim. A portion of your claim that is booked by your accountant will have a direct impact on your line of credit and bonding line.

The larger the amount of your claim that you book, the larger your credit line and bonding capacity will be. As a result, you will be tempted to be overly optimistic regarding the claim’s value. Given that the claim is not fully developed, the risk of overstating the claim’s value is real. Making matters worse, may be counsel’s overly enthusiastic approach to the claim that was one of the endearing qualities that caused you to hire him in the first place.

Once a claim’s value is booked, and banking and surety commitments are made in reliance on the booked value, it is very difficult to make an accounting adjustment for a claim realization that is less than the previously booked amount. Said differently, an overly optimistic booked claim evaluation hamstrings your ability to reevaluate your claim at a lower amount after you have had an opportunity to allow your claim analysis to mature with more and more realistic information. You may well back yourself into a corner such that you cannot resolve a claim at what turns out to be a fair and reasonable amount. The result may be that you will have no choice but to pass up a reasonable settlement offer and “roll the bones” hoping for an unrealistically better result through litigation.

Conversely, if you and your legal team conservatively and realistically evaluate your claim on the front end for accounting purposes, you will be left with the flexibility to resolve the claim on its own merits best maximizing your company’s return.

Joey’s Not Here Anymore

If there is one constant in the construction business, it is change. This is so, particularly with regard to management. In our business, it is not unusual for project managers and superintendents to change jobs every three to five years.

Most claims that go wire to wire can take three to six years to complete. Accordingly, it is not unusual that by the time that trial commences, your project manager and/or superintendent may no longer be your employees. Even if they leave your employ on good terms, their new employer will be less than enthusiastic in supporting your effort to call their new employee as a witness or to cooperate with your development of the claim. Needless to say, the unavailability of the folks that built the job and know the claim can be a devastating blow. Worse yet, you may be forced to continue to employ a less than satisfactory employee for the sole reason that you need him to support your claim.

The longer you wait to resolve a claim, the more likely it will be that you will need to deal with this situation.

Count The Cost

In evaluating whether to settle a claim, you will obviously need to understand and quantify legal fees and expert fees. If you have never litigated a claim through verdict, the amount of these costs can be surprising. Don’t be afraid to demand budgets from your professionals. However, remember that, while budgets can be helpful, they are subject to change as litigation variables are encountered.

With budgets in hand, you will begin to understand the wisdom of trying versus settling the case. In this way, you can begin to evaluate the “net.” Assume that you have submitted a delay claim in the amount of $600,000. You engage counsel and a scheduling expert. Your counsel provides a budget of $125,000, and a scheduling expert submits a budget of $100,000. In the development of your claim, you have incurred $20,000 in attorneys’ fees and $10,000 in expert fees for a preliminary CPM analysis. Your counsel confirms that the $600,000 is your “homerun,” and he believes that you have a 75 percent chance of recovery. In response to the claim, the owner suggests mediation. At the mediation session, the owner makes a last and final offer of $350,000. This is a tough one to accept given that it represents approximately a 50 percent recovery of your claim. However, if you go to trial, you will need to get an award/verdict of at least $575,000 in order to net $350,000. Essentially, you will need to recover 96 percent of your claim. Your attorney has only predicted a 75 percent chance of recovery. You must work from the “net” to properly evaluate a settlement proposal.

Count The Costs – All The Costs

While most contractors are familiar with and aware of the costs relating to attorneys and experts, a surprising number of contractors fail to even consider the human cost exacted on a company, its employees and owners by litigation.

I can say with absolute certainty that you did not get into this business to sit in a room full of attorneys and consultants hour after hour, day after day. You signed on for this business to build things and provide for your families. You are doing neither when you are spending your valuable time prosecuting your claim. During this time, you and your employees are, at best, distracted from the business of securing and building projects.

Did You Follow The Contract?

Virtually every contract has technical written claim notification requirements both in terms of timeliness and specificity. These requirements are rarely a contractor’s friend for several reasons.

First, “paperwork” is rarely a contractor’s strength. With focus on schedule, coordination of subcontractors and resolving daily challenges at the site, properly documenting the commencement of a claim event is far down a superintendent’s list of priorities.

Second, it is only with hindsight that the commencement of a claim event can be pinpointed. When a claim event occurs, it usually takes an extended period of time before it becomes clear that a claim will result.

Third, when a claim event occurs on the front end of a job, a prudent contractor is reluctant to immediately begin “saber rattling.” It is usually hoped that the issues can be quickly resolved with little or no impact to the project.

I raise this issue because contractors rarely recognize the lack of technical claim notification as a substantial “Achilles heel.” In most jurisdictions, the failure to provide technical claim notification is overlooked by courts and arbitrators when the owner knew or should have been aware of the circumstances giving rise to the claim, and the owner is not prejudiced as a result of not receiving the technical notification. However, you should be aware that there are some jurisdictions, such as Ohio, that enforce technical contractual notification provisions even in the face of evidence that the owner was aware of the circumstances giving rise to the claim and was not prejudiced in any way as the result of not receiving the technical claim notification. You need to be aware of how the claim was “papered” and the attitude that the controlling jurisdiction has toward these requirements.

The World Spins Forward

The settlement process is a “game” and has specific rules that in many respects are inalterable. One of the important rules is that the world spins forward. For example, a contractor makes a demand of $300,000 to resolve a claim so long as the offer is accepted by Friday at 5:00 p.m. The deadline passes with no acceptance by the owner of the contractor’s demand. Subsequently, the parties engage in mediation. The contractor makes a demand to resolve its

claim of $450,000. Quite correctly, the contractor notes that it is entitled to increase its demand because its prior demand of $300,000 was conditional upon timely acceptance.

While the contractor is technically correct that it was entitled to withdraw its demand and make a higher demand at a later date, this case will not settle. The owner knows that at one time the contractor would take $300,000 to settle its claim. Thus, the owner will not offer to pay a penny more than the lowest demand made by the contractor. As a result, be careful not to back yourself into a corner with an insufficient demand.

Reasonable Unhappiness

During the course of all claim prosecutions, the contractor marches through an inevitable progression of realities. Initially, the contractor will have uneasy concerns about a project that just doesn't seem to progress in a positive way. Deadlines are missed, budgets are exceeded and good will with the owner doesn't materialize. Next, the contractor becomes educated regarding the specifics of its claim and begins to understand and quantify its claim. Soon thereafter, most contractors begin to "fall in love" with their claim. The project team begins to "cheerlead" the contractor's entitlement to relief. Any contractor that has reached this very dangerous stage must force itself to take at least one more crucial step. For purposes of making the best possible business decision, a contractor must take a step back from its claim and consider factors other than the claim itself. Did you break even or even make money on the project? What could we have done better? What do we need as a company to live to fight another day? Can a client relationship be preserved if we resolve this case now? Ultimately, if you can resolve a matter in a fashion that leaves you reasonably unhappy, it is a result you can live with.

Do You Really Want To Lose?

The items listed above are certainly not intended to be an exhaustive list of causes of claims. Whatever the reasons, more claims should resolve than do. That said, it takes two to settle. If the party sitting across the table refuses to engage in reasonable negotiations, it's probably time to strap it on and have at it. However, serious thought should be given to a timely, prudent and reasonable settlement.

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