

Developers Strive To Resolve Differences Before Litigation

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Developers and their partners are avoiding stiff litigation costs by finding ways to resolve disputes out of court in South Florida's post-recession construction boom.

At the bottom of the market, developers entered shotgun marriages with unfamiliar partners to survive in a struggling economy.

The trick has been to find ways to negotiate immediate solutions for these strange bedfellows before construction-site snafus turn into expensive and lengthy litigation, said Steven B. Lesser, a Becker & Poliakoff shareholder and chair of the firm's construction law and litigation practice group.

Lesser, a certified circuit court civil mediator, is the new chair of the American Bar Association's forum on construction law. For the next year, the forum will focus on teaching construction lawyers how



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Steve Lesser

to advise clients navigating these emerging issues.

It's an important mission, especially since the drop in litigation means limited new case law to guide contracts for future development, Lesser said.

The article has been edited for length and clarity.

How has the litigation and mediation landscape changed in the post-recession era?

In this new age of construction, people have learned some important lessons. Litigation is a zero-sum game. The disputes go on for many, many years and deplete resources. Today, people are looking for solutions—and they're looking for solutions during the project.

At the start, there are good vibes between the partners, and they're not thinking about disputes. They often make a pledge to each other.

'We're going to work everything out.' I've heard it a million times. But what happens on these projects is money will make you stupid. When they get in problems, they start to focus on the dollars without thinking of how much will be spent on litigation.

But as these claims arise, the last thing you want is to have people stop working on the project. That costs everybody money. You could have pollutants in the ground, hazardous waste, soil problems—and these are just some of the issues that have to be resolved right then and there.

Senior management has to meet to discuss the dispute and come up with a resolution. If they can't resolve it, then they step it up to a mutually agreed-upon third party and try to find a solution.

Most of these construction cases are not tried and are resolved with some kind of private mediation. So there are fewer case decisions and nothing to appeal. There's not a lot of case law to guide people. It's good that these cases are being resolved, but from an academic standpoint we learn from the lessons in case law. People align contracts by guidelines in case law.

What's guiding contracts now?

There are seminars to educate lawyers on how to advise clients. Education is important. You have

to go to the leading providers of legal education in the country to get out into the public those things that were buried in arbitration.

The American Bar Association's construction forum has a reputation based on providing cutting-edge information. We have four national programs each year. The fall 2014 program is called Bulldozers, Cranes and Claims. It focuses on the challenges of rebuilding the construction industry and the new challenges in this rebuilding cycle.

The annual meeting will take place in Boca on April 15 to 16. The programs address dispute avoidance, project performance, workforce management. There's also a construction lawyer bucket list that will deal with pre-bid assessments, risk assessment and other issues that impact outside counsel and construction lawyers.

How might these issues play out going forward?

We're expecting more controversies as we go forward. In this new age, owners are getting smarter. Instead of hiring contractors who then hire subcontractors and charge a markup, owners are eliminating the middleman. Owners now hire several professionals instead of the contractor hiring and managing subcontractors. But new issues could result. In the past, a delay would have been the contractor's

fault. But now, since owners are dealing directly with several service providers, the owner might be responsible for delays on the construction site. So the pro is owners are getting smarter, but the other side is that this could create new difficulties. It's good for the owner if they can control the project, but the downside is that they could be in dispute with 10 different people as opposed to a one-stop shop.

You've suggested that recession-weary clients now have an almost obsessive focus on the bottom line.

Yes, there's an effort to exert more control over projects. People are more reluctant. If they're going to remain in business, they're a lot more conservative. A lot of projects have investor money, but the investors don't trust anyone so you're seeing more projects with real-time cameras on the job. People are under the microscope a little bit more. In the past, you'd have an investor in South America who wouldn't ever come to see the project. Now investors are more hesitant and savvy, and this can cause issues between investors and developers.

But you're seeing a lot more collaboration to the design-build phase than you did before. You're seeing a lot of trends along the way. People are trying some different things."

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