



The Lucky Daze Casino Construction Dispute

*Planning & Executing The
Mediation of Multi-Party, Multi-
Issue Construction Disputes*

SLICKDEAL DEVELOPMENT, INC (Owner)

CGL
Policy

Property
Insurance
Policy

NORONG BLDRS. INC.
(Prime)

SLIPPERY MUTUAL
(Surety Bond)

ALLAH MOSTRIGHT AIA
(Architect)

DIRTDAUB, INC.
(Site Work)

YOMAMA STEEL, INC.
(Structural Steel)

BARELY SIVEL PE
(Civil Engineer)

GLAZEDOVER GLASS CO.
(Glazer)

E & O
Policy

TRUSSME STRUCTURES
(Structural Engineer)

SLICK WILLIE LLC
(Sealants)

EZ OFF EIFS CO.
(Cladding)

CGL
Policy

MITEFLY MECHANICAL
(Mechanical Engineer)

WHEEZE 'N FLOW
(HVAC)

BLOKEN MUD MASONS
(Masonry)

CGL
Policy

The Claims & Issues



- Owner vs. Prime (Liability)
 - Overall Delay
 - Water Intrusion – Mold
 - Bad HVAC system
 - Cladding Failure
 - Balconies Windows & Doors Leak
- Owner vs. Prime (Damages)
 - Cost to fix
 - Loss of Use
 - Liquidated Damages

The Claims & Issues



- Prime vs. Owner (Liability)
 - Owner Interference
 - Bad Design
 - Bad Specifications
- Prime vs. Owner (Damages)
 - Enhancement
 - Unreasonable Cost to Fix
 - Damages Not Foreseeable

The Claims & Issues



- Prime vs. Sub(s)
 - Indemnity
 - Additional Insured
 - Pass through Claims
 - Construction Negligence
 - Breach of Subcontract(s)
- Sub(s) vs. Prime
 - Mismanagement
 - Co-contractor interference

The Claims & Issues

- Prime vs. Designer
 - Constructability of Plans and Specifications
 - Tortious Interference
 - Breach of Fiduciary Duty
 - Contribution
 - Indemnity



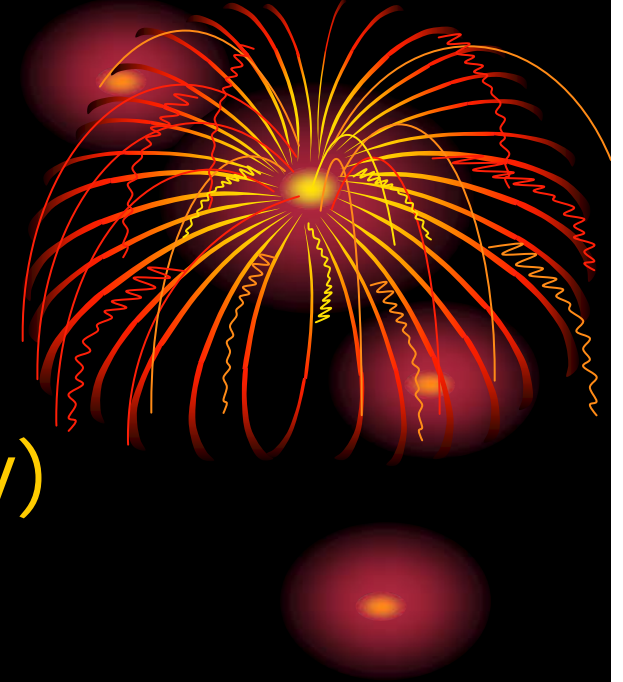
The Claims & Issues



- Insurance Carriers
 - CGL (Subs and Prime) Coverage Issues
 - "No Occurrence"
 - "Insured's own Product"
 - "No Property Damage"
 - "Contractual Liability"
 - E&O (Designers) Coverage Issues
 - "Intentional Tort"
 - "Policy Limits Exhausted"
 - "Late Notice"

Claims & Issues

- Slippery Mutual (Surety)
 - "Cardinal Change"
 - "Late Notice"
 - "I own the Sub Claims and their Carriers"



Getting Started – *Initiating* *the Mediation Process*



- Case Management Leadership
- Steering Committee Members
- Party Communications
- Selecting the ADR Process
- Selecting the Mediator
- Securing Court Involvement

The Court's Role



- Mediation Referral Order
 - Empower Steering Committee
 - Identify and Empower Mediator
 - Set Organizational Meetings
 - Set Mediation Session Timetable
 - Order Attendance & Authority
 - Control Discovery/Motion Practice
 - Set Monitoring Process

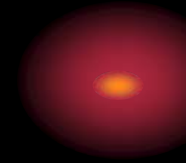
Pre-Mediation Organizational Meetings



- Attendees
 - Counsel & Client Representatives
 - Insurance Adjusters
- Meeting Options
 - Plaintiff's Group Meetings
 - Defendant's Group Meetings
 - Combined Meetings
 - Steering Committee Meetings

Pre-Mediation Organizational Meetings



- Purpose & Goals
 - Preliminary Issue Refinement
 - Set Mediation Agenda/Format
 - Resolve Shape of the Table Issues
 - Attendance & Authority Issues
 - Create Mediation Participation List
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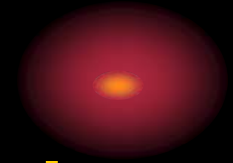
Pre-Mediation Organizational Meetings



- Purpose & Goals
 - Everyone Buys Into the Process
 - Agreed Process Confirmed with Case Management Order
 - Court Involvement (Again)
 - Mandate Agreed Process
 - Provide Process Dispute Resolution(?)
 - Reconfirm Attendance & Authority

Pre-Mediation Organizational Meetings



- Purpose & Goals
 - *DEVELOP A GAME PLAN* – A path for the negotiation process
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The Game Plan - Overall



- “Top Down” Settlement Path
 - Close with Owner then
 - Close with Subs
- “Bottom Up” Settlement Path
 - Define Owner’s Range
 - Define Sub’s Ranges
 - Close with Any or All
- “Trade Issue” Settlement Paths
 - Settle Out Separate Trades

The Game Plan (Sample)



- *DAY ONE* - Opening Presentations
 - Owner vs. Prime, Subs (Carriers)
 - Prime vs. Owner
 - Common Defenses to Owner's Claim
 - Design Contribution
 - Coverage Issues
 - Design vs. Owner/Prime, Subs.
 - Rebuttals
 - OWNER/DESIGNER RETIRE

The Game Plan (Sample)



- *DAY ONE* - Opening Presentations (cont.) *Owner/Designer Absent*
 - Prime vs. Subs & Carrier Issues
 - Subs vs. Prime Issues
 - Defendant's Collective Evaluation of Owner's Claim
 - Establish Appropriate Opening Bid

The Game Plan (Sample)



- *DAY TWO* - First Caucus Sessions
 - Prime vs. Subs (Demands & Offers)
 - Prime vs. Designer
 - Owner vs. Designer (Optional)

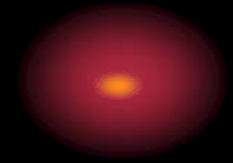
The Game Plan (Sample)



- Prime Contractor's "War Room"
 - Concurrent Negotiations with each Sub
 - Demands and Offers to Build Global Pool
 - "Ford" or "Cadillac" Deals
 - Insurance Coverage
 - Co-Mediators (?)
 - Timing Critical

The Game Plan (Sample)



- *DAY THREE* – Second Caucus Sessions
 - Prime vs. Owner
 - Prime/Owner vs. Designer
 - Prime vs. Subs (Revisit)
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The Game Plan (Sample)



- *DAY THREE* – Closure
 - Seal the Deal
 - Separate Agreements
Owner/Subs/Designers
 - Bullet Point Accords

The Game Plan (Sample)



- *DAY THREE* – Downstream Programs
 - Define Why Case Won't Settle
 - Define What Additional Information Will Help Change Positions
 - Define How to Cooperatively Get Information Needed
 - Adjourn, Develop Data and Reconvene

The Game Plan (Sample)



- *DAY THREE – Downstream Programs*
 - Cooperative, Focused Discovery
 - Joint Investigations/Audits
 - Stipulated Motion Practice
 - Get the Court Involved
 - Case Management/Discovery Orders
 - Special Hearings

Conclusion



- *Don't let big mediations simply "happen".*
- *Planning and Preparation is the key.*
- *Give settlement a chance to happen.*