



WHEN THE WALLS COME TUMBLING DOWN: A CASE STUDY OF FOUR TIMES SQUARE

Presented by

Robert T. Adams

Partner

Wilson, Elser, Moskowitz, Edelman & Dicker

William D. Motherway, Esq.

First Vice President

Tishman Realty & Construction Co., Inc.

Too often the importance of being prepared for the worst gets little attention until it is too late. But when the eyes of the world are upon you, do you really want to be flying by the seat of your pants? In this session, the general contractor for the Times Square project and the primary defense attorney describe the aftermath of the now infamous scaffold collapse and the ensuing litigation. A real life “success story”, attendees will hear how an effective crisis management plan played into the handling of the situation in the hours immediately following the collapse. A must-hear session for agents, brokers, loss control specialists and consultants who want to help their clients avoid “a disaster following a disaster.”

Wednesday, November 15, 1:30–3:00 and 3:30–5:00 p.m.

After all... what could possibly go wrong !

Providing Risk Management Solutions to the Construction Industry

Surety Bonding • Commercial General Liability Insurance •
Workers' Compensation • Life/Health Insurance • Financial Planning •
Comprehensive Claims Programs • Safety Engineering • Professional
and Environmental Liability • OCIPs/CCIPs



THE ALLIED GROUP OF COMPANIES
America's Construction Specialist

390 North Broadway, Jericho New York 11753 • (516) 733-9200

New York • New Jersey • Georgia • Texas • California • Missouri

Robert T. Adams
Partner
Wilson, Elser, Moskowitz, Edelman & Dicker

Mr. Adams is one of the presenters for Workshop K, "When the Walls Come Tumbling Down: A Case Study of Four Times Square," on Wednesday afternoon. He is a partner at Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York City, and is an experienced trial lawyer who currently focuses a great deal of his practice on construction defense. Presently, he is managing the defense of the Times Square scaffold collapse litigation and is also heavily involved with a variety of wrap-up insurance programs. Additionally, he has been working on several cases for the Walt Disney Company for the past year. He has lectured throughout the country on the rather sophisticated insurance wrap-up issues that confront insurers. He earned a bachelor of arts degree in economics from Colgate University, a masters in economics from State University of New York at Stony Brook, and a law degree from Pace University in White Plains, New York. As an advocate, Mr. Adams is one of the nation's most respected college basketball officials, evidenced by his selection in 1998 and 1999 to officiate in the NCAA Division 1 basketball tournament.

William D. Motherway, Esq.
First Vice President
Tishman Realty & Construction Co., Inc.

Mr. Motherway is one of the presenters for Workshop K, "When the Walls Come Tumbling Down: A Case Study of Four Times Square," on Wednesday afternoon. He is responsible for the development of a corporate-wide risk management program including safety, litigation management, and disaster preparedness as well as the administration of the corporate property and casualty programs for Tishman Realty & Construction Co., Inc., located in New York City. He coordinates the marketing and placement of coverages on behalf of clients of the company during construction projects. He reviews all contracts to make sure that the company and client are properly protected. He is responsible for negotiating all claims settlements on behalf of Tishman and its clients. Mr. Motherway was the risk manager for New York City from 1993 to 1994.

Prior to working for New York City, Mr. Motherway was a litigation associate with Akerman Senterfitt & Eidson, P.A., in Miami, from 1991 to 1993. He holds a J.D. from the University of Miami School of Law and a B.S. in biology from Manhattan College. He is a member of the Florida Bar and admitted to the U.S. Southern District of Florida, and belongs to the Dade County Bar Association, the American Bar Association, and the Risk and Insurance Management Society, New York Chapter, Board of Directors.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

WHEN THE WALLS COME TUMBLING DOWN: A CASE STUDY OF FOUR TIMES SQUARE

***Robert T. Adams
Wilson, Elser, Moskowitz, Edelman & Dicker***

***William D. Motherway, Esq.
Tishman Realty & Construction Co., Inc.***

I. Crisis Management Planning

A. Pre-Wrap-Up Procedures

1. Establish a crisis management team
 - a. Broker—account executive, loss control personnel and inspections, claims reviews, policy review and amendments, available in-house resources
 - b. Insurer—top construction executive in region, loss control personnel and inspections, use of outside counsel, crisis plan
 - c. Claims administrator—specific team, location, experience, outside counsel, technology, crisis plan
 - d. Counsel—expertise, specific team, location
2. Establish a construction team
 - a. Owner/developer
 - b. Construction manager
 - c. Contractors
 - d. Architect/engineers
3. Establish a rapid response team
 - a. Owner/GC
 - b. Insurer
 - c. Defense counsel
 - i. Investigator
 - ii. Experts
4. Set forth insurer guidelines
5. Identify outside counsel
6. Hold a wrap-up kick-off meeting
 - a. Discuss who's who
 - b. Responsibilities
 - c. Project status
 - d. What investigations are "privileged"
 - e. Potential OSHA issues
7. Be prepared for the inevitable

II. Crisis Case Study—Partial Scaffold Collapse

- A. The “incident”—July 21, 1998
 - 1. 8:30 a.m.: Accident occurs
 - 2. 1:00 p.m.: Deployment of rapid response plan for 4 Times Square after conferring with insurer and insured
 - 3. 3:00 p.m.: Counsel on site
 - 4. 4:00 p.m.: Experts on site
- B. Local emergency response
- C. Immediate construction manager and owner response
 - 1. Contact all key personnel
 - 2. Contact broker, counsel, public relations firm, and insurers
 - 3. Set up crisis center
 - 4. Organize crisis meeting
- D. Immediate insurer response
 - 1. Contact key personnel
 - 2. Set up claims unit
- E. Immediate broker response
 - 1. Mobilize key personnel to attend crisis meeting
 - 2. Mobilize loss control and claims staff
- F. The crisis meeting
 - 1. The attendees
 - 2. The goal
 - 3. The action plan
 - 4. The public relations plan

- G. Governmental agencies involved in 4 Times Square collapse
 - 1. New York City Mayor’s Office
 - 2. New York County District Attorney’s Office
 - 3. U.S. Department of Labor: Occupational Safety & Health Administration
 - 4. New York City Department of Buildings
 - 5. New York City Police Department
 - 6. New York City Department of Transportation

III. 4 Times Square Scaffold Collapse

- A. Legal defense strategies
- B. Potential liability issues
 - 1. Identify bona fide claims
 - 2. Identify questionable claims
- C. Develop damages strategy
 - 1. Early evaluation
 - 2. Meet with claimants
 - 3. Arbitration and other ADR
- D. Counsel responsibilities and objectives at site
 - 1. Facilitate crisis management
 - 2. Coordinate actions with governmental agencies
 - 3. Maintain presence at site and protect insured interests
 - 4. Monitor criminal investigation to minimize impact on future civil litigation
- E. Conclusion

WHEN THE WALLS COME TUMBLING DOWN: A CASE STUDY OF FOUR TIMES SQUARE

LEGAL DEFENSE STRATEGY Minimizing Litigation and Legal Costs

Analyzing the Claims

In the event of an accident which provokes multiple lawsuits, such as the Times Square scaffold collapse, or in the event of an accident that provokes only one or a few lawsuits, it is imperative that both legal and claims personnel be able to identify and evaluate those lawsuits which present bona fide liability allegations and those lawsuits which present questionable, if not baseless, liability allegations.

Ferretting out and resolving promptly those claims that are questionable or baseless from a liability standpoint is the necessary first step in minimizing litigation and legal costs from a damages standpoint, as well as the first step in determining one's overall exposure.

Using the Times Square scaffold collapse as a model, the following is a brief discussion of the liability and damages issues that arise in the context of these accidents.

LIABILITY

Recovery of Purely Economic Damage

Many of the lawsuits that were filed as a result of the Times Square scaffold collapse were brought by parties who suffered no actual injury or property damage, but who nevertheless brought claims seeking recovery for economic losses sustained when their businesses were shut down or because they were otherwise negatively affected by the collapse.

Majority Rule—The majority of states apply the Economic Loss Doctrine, which states that a party cannot maintain an action for economic damages where there is no attending actual property damages or bodily injury. See *In Re Chicago Flood Litigation* decision annexed hereto.

Minority Rule—A minority of states apply a foreseeability test to determine whether a party may recover for economic damages where there are no attending actual damages. See *People Express Airlines* decision, annexed hereto.

BEWARE, although some states may observe the Majority Rule, it is not uncommon for some courts to carve out exceptions to rule, in order to allow recovery in certain situations, or under certain theories of tort liability. Because claims for economic losses or damages are sought through various theories of tort liability, it is important to know how the courts in your jurisdiction have addressed the issue of pure economic damages under each of these theories of tort liability.

DAMAGES

Once the meritorious claims have been differentiated from those claims which present more questionable liability allegations, the next step is to develop a resolution strategy which is the most cost-efficient.

In the Times Square matter, we have coordinated with the respective insurers to develop a creative strategy which permits evaluation and possible resolution of the respective claims, often prior to any formal litigation being commenced.

Additionally, we have met with the claimants and/or their representative in an informal setting in order to determine, from a damages standpoint, whether or not their settlement demands could be substantiated by way of documentation and other proof. It is imperative that experienced investigators/adjusters be utilized to obtain this information.

As to those claims and/or lawsuits which are unable to resolve on an informal basis, we have explored alternative resolution strategies, including, but not limited to, Arbitration and Alternative Dispute Resolution.

In those instances where the foregoing resolution approaches have proven unsuccessful, we have taken an aggressive posture, with the expectation that such a posture will facilitate a swift and reasonable outcome.

Notes

The Construction Industry is one of the riskiest industries in the United States. Every contractor needs to be prepared for the inevitable. They also must be equipped with the skills necessary to portray their company in the best possible light while working under the worst possible circumstances.

Session Goals:

- **Manage your insured to expedite the claims process**
- **Facilitate crises management with the involvement of the Local Government**
- **Save your company's reputation in the event of a casualty**
- **Work with legal defense to minimize litigation and legal costs**
- **Maintain a productive job-site in the event of a casualty**

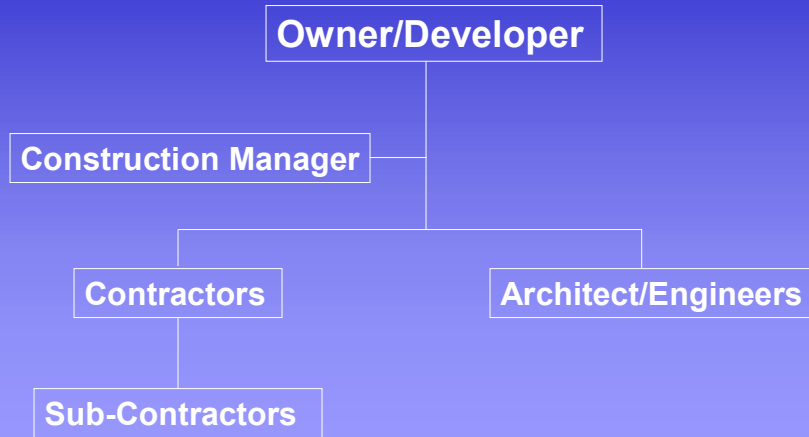
Pre-Wrap-Up Procedures

- ◆ Establish A Crisis Management Team
 - ✓ Broker
 - ✓ Insurer
 - ✓ Claims Administrator
 - ✓ Counsel

Why Do You Need A Crisis Management Team?

- Provides flexibility to adapt quickly to changing conditions
- Provides additional personnel where tasks are too large for one individual
- Since each person usually has expertise in only a few areas, the team members will complement one another

Construction Team



Rapid Response Team

- Owner/GC
- Carrier
- Defense Counsel
 - ✓ Investigator
 - ✓ Experts

Insurer Guidelines

- Who will be the top construction executive on the account?
- Who are the loss control personnel?
- How often are safety inspections performed?
- Insurer's position on use of outside counsel
- Crisis plan

Claims Administrator

- Construction and Wrap-up Experience
- Specific Team Members
- Physical Location of Claims Staff
- Use of Outside Counsel
- Crisis Plan

Outside Counsel

- Construction and Wrap-up Expertise
- Specific Team
 - ✓ Team Leader
- Physical Location
- Litigation Philosophy

During Construction

- Conduct Periodic Review of Wrap-up
- Performance Plan
 - ✓ Owner and Construction Manager
 - ✓ Broker
- Conduct Periodic Review of Wrap-up Team Performance

Wrap-Up Kick-Off Meeting

- Attendees should include:
 - ✓ Carrier
 - ✓ Owner or Owner's Representative
 - ✓ Construction Manager or G.C.
 - ✓ Broker
 - ✓ Claims Administrator
 - ✓ Defense Counsel

Kick-Off Meeting Agenda

- | | |
|--|---|
| <ul style="list-style-type: none">■ Who's Who<ul style="list-style-type: none">✓ Distribute Project Contact List■ Responsibilities<ul style="list-style-type: none">✓ Reporting Claims✓ Enrollment Follow-Up✓ Loss Control✓ Emergency Preparedness | <ul style="list-style-type: none">■ Project Status<ul style="list-style-type: none">✓ Timing<ul style="list-style-type: none">✓ Unique Procedures or Construction■ Performance Plan<ul style="list-style-type: none">✓ To be in writing and distributed to all parties |
|--|---|

Crisis Case Study:

**Four Time Square
Partial Scaffold Collapse
July 21, 1998 - 8:30 a.m.**

It was a day like every other day on this project - full of challenges and frustrations and not enough time to take care of them all. Then it happened . . . The way a crisis situation is handled says as much about a company as the incident itself.

The “Incident”

July 21, 1998

- ✓ 8:20 a.m. - passenger hoist operator reports feeling “strange vibrations”
- ✓ Operator lets passengers off elevator and radios to street to clear area
- ✓ Workers on street below clear cars and pedestrians
- ✓ 8:25 a.m. - Upper section of hoist separates from scaffold
- ✓ Partial scaffold collapse

Local Emergency Response

- New York City Fire
 - ✓ Fire Personnel
 - ✓ Emergency Medical Services
 - ✓ Rescue
- New York City Police
 - ✓ Police Personnel
 - ✓ Emergency Services Unit
- Mayor’s Office
 - ✓ Office of Emergency Management
- Department of Buildings
- Department of Transportation
- Red Cross and other Human Services

Construction Manager and Owner Response

- Contact all key personnel
- Contact broker, insurer, counsel, public relations firm
- Set up in-house crisis center at Construction Manager's office
- Schedule and arrange initial crisis response meeting

Insurer Response

- Mobilize key personnel to attend crisis meeting
- Mobilize claims unit to attend to displaced residents

Broker Response

- Mobilize key personnel to attend crisis meeting
- Mobilize loss control staff
- Mobilize claims staff

The Crisis Meeting

- The Attendees:
 - ✓ Owner, CM, Broker, Insurer, Counsel, Public Relations
- The Goal
 - ✓ Develop strategy to address immediate needs of affected residents and businesses
 - ✓ Assign responsibilities

The Initial Plan

- Issue Press Release (Owner and Insurer)
- Set up Emergency Claims Office
 - ✓ 7 days a week
 - ✓ Arrange for check cashing services
- Inform Local Government of Action Plan
- Designate Site Contact for Investigation
- Expedite Required Work at Site

Public Relations Team

- Owner/Developer and its Public Relations Firm
- Construction Manager and its Public Relations Firm
- Insurer's Public Relations Representative
- Counsel

The P.R. Plan

- Choose one spokesperson
 - ✓ The only person to address the media
 - ✓ Should have a pre-existing relationship with media
 - ✓ Ability to handle high levels of stress
 - ✓ Thinks on his/her feet
 - ✓ Ability to neutralize situation and maximize opportunities
 - ✓ Appear calm in any situation

The P.R. Plan (cont'd)

- Formulate the statement
 - ✓ Portray the company in the most favorable light, whatever the situation
 - ✓ Be truthful
 - ✓ Present a consistent and timely account of company policies and activities
 - ✓ Be responsive to legitimate requests for information on company policy and practices
 - ✓ Work with local government and emergency personnel
 - ✓ Work with counsel and insurer

Counsel Response to Incident (July 21, 1998)

- 8:25 a.m. - Incident Occurs
- 1:00 p.m. - Deployment of Rapid Response Plan for 4 Times Square after conferring with insured and insurer

(Counsel Response cont'd)

- 3:00 p.m. - Counsel on site
- 4:00 p.m. - Experts on site

Crisis Meeting

- ✓ Meeting with Safety Personnel
- ✓ Determination of key personnel - re: Investigation
- ✓ Hoist/Scaffold Expert
- ✓ Daily Contact with Insurer!!

Governmental Agencies

- New York City Mayor's Office
- Mayor's Office of Emergency Management
- New York County District Attorney's Office
- New York City Corporation Counsel
- U.S. Dept. of Labor: OSHA
- New York City Dept. of Buildings
- New York City Police
- New York City Fire
- New York City Dept. of Transportation

Counsel Responsibilities and Objectives at Site

- Facilitate Crisis Management
- Coordinate actions with government agencies
- Maintain presence at site and protect insured's interests
- Monitor criminal investigation to minimize impact on future civil litigation

OSHA Investigations

- Top two reasons for an investigation
 - ✓ Imminent danger - a situation where workers face an immediate risk of death or serious physical harm
 - ✓ Any fatality or catastrophe - an accident that requires hospitalization of three or more workers
 - Employers must report fatalities and catastrophes to OSHA within 8 hours
- If any of these situations arise, you need to contact outside counsel immediately

Worker Involvement in OSHA Inspections

- According to OSHA Act a representative of all workers' unions may accompany the OSHA inspector during the inspection
- The representative is chosen by the union and never the employer
- Workers have a right to talk privately to the inspector on a confidential basis and are encouraged to point out hazards

Effect of OSHA Violations

- An OSHA violation cannot serve as the basis of a Labor Law 241(6) claim
- However, OSHA violation may be considered as evidence of common-law negligence
- Generally, owners and general contractors do not have a duty to monitor compliance of subcontractors with OSHA regulations

Whether Initial Crisis Investigations Are Privileged?

- In order to raise a valid claim of privilege, the party seeking to withhold the information must show that it was a “confidential communication” made between the attorney and the client in the context of legal advice.
- So long as the communication is primarily of a legal character, the privilege is not lost merely by reason of the fact that it also refers to a certain non-legal matter.
- Not privileged if investigation is part of the company’s regular course of business

Legal Defense Strategies

Minimizing Litigation and
Legal Costs

4TS Liability Issues

- Recovery of pure economic damages
 - ✓ Majority rule - attending actual property damage or bodily injury required *Chicago Flood Investigation*
 - ✓ Minority rule - foreseeability rule *People's Express*

Analyzing The Claims

- Identify claims with bona-fide liability allegations - No issue - Physical Damage - *Aggressive*
- Identify questionable liability claims

4TS Damages Strategy

- Need to develop a cost efficient strategy
 - ✓ Work with insurers to permit early evaluation and disposition of claims
 - i.e. - Philosophy of Insurer
- Work towards informal meetings with claimants to get a handle on damages
 - ✓ Experts - substantiation of claims
- Use Arbitration and other ADR
- If all else fails: *Be Aggressive!*