SECURING AND ENHANCING INSURANCE COMPANY INVOLVEMENT IN THE MEDIATION OF CONSTRUCTION CLAIMS

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INTRODUCTION

Without question, active and engaged involvement by relevant insurance carriers is critical to the mediation of almost any construction claim. Unanswered questions as to whether insurance funds are, or ultimately will be, available to help meet settlement terms tend to impede any meaningful progress toward a resolution short of trial. Even if coverage is disputed or in doubt, not having the details of the coverage issues open and understood creates a cloud of uncertainty that makes settlement virtually impossible. The reason for this is obvious. More often than not, the usual parties to a construction dispute; general contractors, subcontractors, designers, testing organizations, etc. will not have the independent financial wherewithal necessary to provide what takes to settle a typical construction claim. Even those who do have resources to fund a settlement, are unwilling to make that commitment if there is any chance the matter is covered by their insurance policies. In practical terms, mediating major construction disputes without the relevant carriers in attendance, and actively participating in the process is a waste of time. As my colleague John Bickerman, once said, "The mediation of a construction claim is all about the insurance coverage".

Despite their critical role in settling construction claims, we are seeing more and more insurance carriers taking a "stand off" position when the time comes to mediate construction disputes. In today's world, it seems as though coverage defenses are raised in an almost knee-jerk fashion, and reservation-of-rights letters are usually the first thing found in a carrier's construction claim file. There has been an increased focus by insurance carriers on advancing exclusions and limitations in their policies. This pressure has resulted in a rapidly growing body of construction insurance coverage case law that often serves to do little more than present conflicting views on the meaning of the same policy terms. (Who can define an, "occurrence" for purposes of a covered construction claim with any degree of certainty?) When carriers with coverage issues agree to attend a mediation, they often send representatives with inadequate or insufficient authority to settle anything. (Show me an out of state insurance company represented in a mediation by a local independent claims adjuster and I will show you an authority problem).

The purpose of this article is to focus on this problem and suggest ways counsel and the mediator can work together to secure and enhance insurance company involvement in the mediation of construction claims. For purposes of this discussion, we will focus on a "typical" construction dispute involving reasonably substantial claims among multiple parties (Owner, Designer, General Contractor and one or more Subcontractors) with normal insurance policies in effect (Professional E&O; CGL; Builder's Risk etc). We will also assume suit has been filed, or is imminent.

PRE-MEDIATION ORGANIZATION AND PLANNING IS THE KEY

No matter how skilled the construction lawyer, no matter how experienced the construction mediator, nothing can be done to resolve an insurance carrier's non-participation in the settlement process once a mediation is convened and underway. Virtually insurmountable obstacles to settlement arise with a carrier who, (a) isn't physically present at the mediation or, (b) only available by telephone or, (b) represented at the mediation by someone with no authority. Even insurance carriers who appear at the mediation but do nothing more than voice their coverage issues can present insurmountable problems if focus on their position first occurs when the mediation is convened. The key to getting these carriers to appear and meaningfully participate in the mediation is *to get to them well before the mediation starts*.

Identifying the Insurance Players and the Insurance Problems; A Three Step Process

Step One: Getting the "Basic" Insurance Information

Immediately after the mediator is selected, and well before the mediation date is set, the mediator and counsel for the lead party in the suit or perhaps, counsel for a subset of the principal parties in the suit[1], or both, should meet to plan and organize the mediation session. At that meeting one principal agenda item should be to draw up an organizational chart listing each party to the lawsuit, their asserted position in the dispute, *and basic information concerning their respective insurance coverage.* Minimally, this would include the identity of the carrier, the type of policy or coverage, and the policy number. To the extent any such "basic" insurance information is not known, it should be discovered – formally or informally.

Ferreting out the basic insurance information may not be as simple as it sounds. For reasons that are not entirely clear, parties embroiled in a construction dispute (or, for that matter, *any* major lawsuit), are initially reluctant to reveal the identity of their carriers or the terms of their coverage. This information, however, is essential to a successful settlement program, and no mediation planning should begin without this data in hand. There are several ways to get basic insurance information before the mediation is convened;

a) If there is time before the mediation session is scheduled to be convened, conventional discovery can be exchanged among all parties calling for disclosure of all possible insurance coverage available.

b) If there is no time to use conventional discovery, the mediator might be encouraged to start pre-mediation contacts with each of the parties and their carriers. In large cases, a "Pre-Mediation Participant's Information Sheet" might be employed by the mediator to collect a wide range of data – including insurance coverage. (*See, Exhibit "A")*

[1] Often in large multiparty construction claims, it is helpful to create an "Organizing Committee" consisting of representatives of the Owner, Design Professionals, Prime Contractor or Construction Manager and the Subcontractors to plan the mediation.

c) In jurisdictions where mediations can be the subject of a court mandate, efforts might be made to induce the Court to include a provision in its Mediation Order requiring each party to identify its insurance information.

Step Two: Discovering the Insurance Relationships

Once the parties and their carriers are identified, the mediator, or the mediator in combination with the principal mediation organizers, should privately visit with counsel for each party to secure as much information as possible about the present relationship between each party and their respective insurance carrier. That information might include:

a) Has the carrier been put on notice?

b) Has an adjuster or claims manager been assigned to the claim? What are the levels of claim management? Home office manager? Field adjuster? (Secure the names and full contact information for everyone).

c) The exact position the carrier has taken, if any, with respect to coverage,

d) The level of support and involvement the carrier is currently showing in the case.

e) What is the tone of the present relationship between the carrier and the insured regarding this case? Are there open communications? Are there mumblings about "bad faith"?

f) Has the carrier retained coverage counsel? If so, who?

The first of these questions seems rather basic – making sure the carrier has been notified of the claim. Experience has shown, however, that parties to a dispute often fail to take this fundamental step – particularly in situations involving pre-suit mediations. If the carrier has been put on notice and has responded in one fashion or another, getting information from counsel for the parties as to that carriers' involvement in the case can be instructive. Find out if, in fact, a carrier is "standing off" from supporting the insured; determine what coverage positions have been advanced, how strenuously they have been argued, whether coverage counsel has been hired, whether there is friction between the carrier and the insured. In short, generate a clear understanding of exactly where the carriers stand on the claim.

If there seems to be a smooth working relationship with the carrier and its participation in the upcoming mediation is assured, that fact might be confirmed in one fashion or another, and no further steps would be required. Even if no specific problems exist, however, it never hurts for the mediator to take some additional steps to see to it that even the cooperative carrier is affirmatively brought into the mediation planning process. Simple things like making sure the session is on the adjuster's calendar, directly stressing the carrier's importance to the process, confirming authority requirements, and making sure the carrier's agenda is otherwise being met, will all go a long way toward preventing a carrier from showing up for a mediation unprepared and uninformed.

If, on the other hand, it is discovered that there are problems with the party's insurance coverage, that some friction exists between the party and its carrier, or that the party is uncertain as to the carrier's role in the case, direct contact with the carrier becomes essential.

Step Three: Defining and Dealing with the Insurance Problems

If problems with the carrier are discovered that threaten its active participation in the mediation process, the next step would be for the mediator to establish direct contact with appropriate representatives of the relevant carriers to more specifically verify and identify those problems. Many times what the insured's lawyer assumes to be the carrier's problem is not what is actually causing the carrier to stand off the case. Direct contact with the carriers by a "neutral" mediator - not positional debate voiced by the insured's lawyers – is the only way to get accurate information on where the carriers actually stand. More often than not, the carriers are willing, if not eager, to share that information if asked. Interestingly, insurance carriers frequently report, "lack of information", or "awaiting further information" as a principal reason for their apparent disinterest in the claim. Other times what the insured perceives to be a major problem with its carrier's position on the claim turns out to be nothing more than an overworked adjuster who simply hasn't had the time to focus on the file.

Once a problem is specifically identified, be it coverage issues, late notice, lack of information, contractual policy issues or whatever, it should be forthrightly addressed with the carrier and other options for dealing with the problem should be developed – preferably options that contemplate the carrier's full involvement in the planned mediation process.

If there is a coverage problem, for example, a determination might be made as to whether that issue can be folded into the mediation of the main claim in an effort to get everything settled at once. This might contemplate bringing coverage counsel to the mediation and shaping the data to be exchanged at the mediation to deal with the coverage issues. The carrier's final role in the settlement of the main claim might be tempered by the uncertainties presented by the coverage issues, but the at least the carrier is part of the resolution process and, more importantly, the carrier's position does not become an unknown factor blocking settlement.

Alternatively, an agreement might be reached to deal with the coverage issues between the insurer and the insured in an earlier mediation convened to establish an agreed set of ground rules or even an allocation plan for resolving the main claim. Another approach might be to agree to "freeze" the coverage issues and have the insured and insurer work together – while fully preserving all coverage positions - to define the settlement option with the claimant first. In many respects, it is impossible to appropriately assess the significance of an insurance coverage dispute without knowing what is at stake, i.e., the value of the disputed claim. Once the settlement value of the claim has been defined, and the exact amount of money being sought from the insured is established, coverage issues come into much better perspective. There is much to be said for a plan that defines the settlement option first, then deals with the coverage issues.

The objective here is to not let coverage issues serve to diminish or preclude the carrier's interest in the resolution of the main claim. Absent very extreme cases, i.e., "no insurance policy was ever issued", coverage problems should not be allowed to preclude a carrier's involvement in mediated settlement programs.

If a coverage question is raised and specifically identified, every effort should thereafter be made to organize the mediation session to focus on, and deal with, that issue. For example, if a specific coverage question is raised by the carrier, the mediation might be planned to insure that there will be a flow of information that includes the key facts underlying the coverage dispute. In any event, the plaintiff's opening presentation, and the defendant's response, should never be couched in terms that plead the case completely out of insurance coverage – particularly when an alternative, but equally accurate, description of the claim might afford insurance coverage.[2]

As noted earlier, many times a carrier's reluctance to become actively involved in the mediation of a construction claim is caused by a simple lack of information or, perhaps more accurately, a lack of information relevant to the coverage provided by the policy. Simply asking the insurance claims manager, "What information is important to you? What information do you need to have during this mediation in order to make the decision you need to make on this claim?" will do wonders toward getting the carrier involved and focused on the planned mediation. Again, the mediation session should be planned and organized in a manner to insure that the information the carrier requires is presented.

Even if a carrier has a substantial basis for standing off a claim against its insured, there is a logic that supports its active involvement in working with the insured in a mediated settlement proceeding. First, there is no question that a well planned and organized mediation provides all participants with a wealth of information concerning the claim – information that would take a substantial amount of time and money to develop through normal litigated discovery. By the same process, a properly organized mediation session can also provide the parties to the coverage issues with a wealth of information pertaining to those issues as well. It cannot hurt any carrier to attend, listen, and learn about the claim. Secondly, regardless of the certainty the carrier may feel in its position with respect to any legal obligation to participate in the insured's settlement, *there is a definite value in working with the insured to define whatever option is available for settling the main claim.* Whether the carrier has a coverage defense, policy defense, or contractual defense to the claim, there will be a process cost incurred, and some risk associated with, the effort to seek legal validation of that position. It may well be that a concerted effort by the insured and the insurer to negotiate an acceptable resolution of the main claim could result in the decision that the coverage battle simply isn't worth the cost of the fight.

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[2] Classic examples of this problem might be seen in the tendency of overzealous plaintiff's counsel seeking to attribute every act of an insured construction dispute defendant as an "intentional" tort aimed at "defrauding my client" and warranting a claim of "punitive damages" at trial. While this sort of posturing may be impressive sounding to some, the effect is to send the insurance carrier straight out the door. If those assertions were true, there would be no coverage under most general liability policies. The same acts, however, if couched in terms of simple negligence, would have a far better chance of triggering coverage. Another more subtle blunder by construction claimants' lawyers in presenting cases in mediation sessions is the failure to characterize the damages claimed to fit the policy coverage.

CONCLUSION

If the parties to a construction dispute have taken the precaution to purchase liability insurance to protect themselves and the people with whom they work, those policies and their issuing carriers should be an integral part of any efforts to settle their disputes. Insurance coverage is a critical factor in settling construction claims and there is no reason to initiate any settlement process, including mediation, without first securing active involvement from the relevant carriers. Cooperative efforts between construction litigation counsel and the mediator should be initiated early to plan and structure the mediation in a manner that encourages and enhances the role of the carrier in the mediation of construction disputes.

(CASE NAME)
Case No :

Mediation Participant Information Sheet

(DATE)

Please type or print clearly:

1) Party/Corporate/Business Name _____

   Principal Business Address _____

   _____

2) Relationship to project: _____

3) Scope of project work _____

   _____

   _____

4) Principal Party Representative _____

   Title/Role _____

   Address _____

   _____

   Telephone number _____

   E-mail address _____

   Fax number _____

5) Lead Trial Counsel _____

   Firm _____

   Address _____

   _____

   Telephone number _____

   E-mail address _____

   Fax number _____

6) Surety Carrier (if any) _____

Claims Representative(s) _____

Address _____

_____

Telephone number _____

E-mail address _____

Fax number _____

7) CGL Carrier _____

Claims Representative _____

Address _____

_____

Telephone number _____

E-mail address _____

Fax number _____

8) Professional Liability Ins. Carrier _____

Claims Rep _____

Address _____

_____

E-mail address _____

Fax number _____

9) Total number of representatives anticipated to attend any mediation session scheduled for this case

_____

_____

10) Substance of claims against you as of this date (if known).
(By who, for how much and why.)

_____

_____

11) Substance of claims by you as of this date.
(Against who, for how much and why.)

_____

_____

12) Are there any restrictions whatsoever on the authority of the above named party representatives to negotiate and conclude a settlement agreement in this case? _____ If "yes", please explain.

_____

_____

_____

NOTE: COUNSEL, PLEASE PROVIDE CONFIDENTIAL INFORMATION REQUESTED IN PARAGRAPHS 13 - 15 BELOW

CONFIDENTIAL TO MEDIATOR ONLY

13) Synopsis of any negotiations conducted to date with any other party,

(please include identity of parties involved) _____

_____

_____.

a) Last demand received from _____ was: $_____

b) Last offer made to _____ was: $_____

c) Your impression of probable settlement range
(if different than described in (a) and (b) above) is:

$_____ to $_____

d) Principal obstacle to settlement (briefly stated please):

_____

_____

_____

14) If claims have been asserted against you have been turned over to your Insurance carriers, have coverage issues been raised by those carriers? (Please briefly state substance of those issues and status of any negotiations.)

_____

_____

_____

15) What do you see as the primary impediment to reaching a settlement to your role in this case?

_____

_____

_____

_____