2019 Construction Conference
September 25-27, 2019
San Diego, CA

Insurers Heal Thyself:
Proactive, Innovative and Creative Solutions for Construction Claims

I. The "Old Way" of Handling Construction Claims

Pre-Suit: Wait for the Lawsuit or Proof of Coverage

Typically, an insurer would receive notice from an insured of a construction claim and simply ask the insured, in writing or telephonically, for copies of relevant claim documents. Those documents would form the basis for a broad ("kitchen sink") reservation of rights letter composed by the claim handler as well as some relatively passive "investigation," which primarily relied upon the insured to provide impetus for further claim handling decisions. Risk transfer questions, including indemnity, additional insured status and time on risk issues, typically are not addressed at this stage. Copies of other potentially applicable indemnity contracts and CGL and WRAP policies are generally not reviewed or evaluated at this stage.

Post-Suit: Wait for Defense / Coverage Analysis and Future Mediation

A lawsuit most often triggers a cavalcade of activity whereby an insurer earnestly attempts work with counsel to understand the liability, damages and coverage issues. Insurers often wait until suit is filed to hire defense counsel who eventually identifies the need for any expert testimony, which is intended primarily for presentation at trial. At this point, many insurers find themselves in disputes with the insured, additional insureds and/or other insurers regarding the scope of coverage, indemnity and defense. For example, in states like South Carolina and Florida, where contribution is not allowed among insurers, some insurers will refuse to defend (or contribute) when other insurers have agreed to step up. Insurers sometimes attempt to file declaratory judgment actions to address coverage issues, even when a continuing duty to defend is obviously owed. The general assumption in these scenarios is that the case will resolve at some mediation, whether that may be the first or the fifth mediation.

Mediation: Hope the Right Parties Show Up, Do it Again and Again

Mediation is often the first time the parties have addressed actual liability, damages, time on the risk and insurance coverage issues. While position papers may be anonymously submitted to the mediator by plaintiff and defense counsel, very little pre-mediation work is done to ferret out the real sticking points at mediation. Consequently, mediations often fail before they begin.

II. Effective Pre-Suit Methodology

Partner with The Insured

From the point of very first notice, a claim professional should proactively interact with the insured, both in writing but more often telephonically, to attempt to fully grasp the nature, details and idiosyncrasies of the claim. Effort must be given to document the file as completely as possible so that, if at all possible, claim resolution strategies can be applied at the earliest possible date. This requires that the insurer work with the insured not simply to understand the basic facts of the claim but to get details regarding the personalities involved, the people (witnesses and otherwise) involved, the contracts, the other insurance and the specific time-line of all relevant events. An emphasis should be given to effectively "partner" with the insured and a verbal explanation should be provided as to the potential for any coverage issues.

Consider Pre-Suit Counsel

While the concept may be inimical to the way some insurers approach claims, pre-suit defense and coverage counsel can sometimes make all of the difference in whether a case resolves early or not until the second or third post-suit mediation. For example, retaining coverage counsel pre-suit to prepare a coverage position letter specific to the details of the claim or retaining defense counsel to assist with negotiating a settlement and/or preparing a release.

Often defense counsel in a particular jurisdiction is familiar with many of the players or potential players as well as the project itself which may prove invaluable not only for potential early resolution but to streamline the handling of the matter (or parts of it) if proceeds to/through suit.

Consider Pre-Suit Experts/Consultants

An insurer should consider retaining experts who can assist with a complete "work up" of the case. Such expert should produce nothing written or discoverable at this stage, and all opinion should be provided telephonically or in person. The expert can opine on or even obtain outside contractor repair bids such that a more precise idea of the resolution can be formed. Also, pre-suit experts can be used to review damage reports and evidence to isolate the covered damage from uncovered damage. The more the claims adjuster speaks with the expert the better they will not only understand the allegations but also be able to articulate the insured's defenses to same.

An insurer may also consider another approach to utilizing experts/consultants during the pre-suit stage. Engage the consultants to work proactively with the claimant, general contractor, subcontractor(s) and the insurer(s) to develop a comprehensive cause and origin investigation

for the purpose of locating the source of the defective condition and conducting the repairs. This approach works best when the issues are reported timely and the parties are willing to work together in an effort to resolve the claim. It is a strategy that insurers are utilizing on a more frequent basis in an effort to retain the business of their policyholders.

Conduct Pre-Suit Meetings

Arrange meeting with the claimant, your experts/consultants, any claimant's and pre-suit defense attorneys to assess exactly what the claimant's claims are, what the actual damages are, and whether there is an obvious mutually agreeable resolution plan For example, having an in-person meeting between the insured, defense counsel and the claims adjuster allows the parties to explain their strategy, for counsel to clarify the insured's position and for the adjuster to speak to the insured (without counsel present) to address any coverage issues. Here the adjuster can plant the seed that the insured may need to consider contributing to the settlement for their uninsured exposure. Experience shows that having this conversation in an amicable in-person setting garners more favorable results for all, as opposed to calling the insured on the eve of a mediation and demanding that they be prepared to offer up settlement funds (see below).

A pre-suit meeting with claimant and their credible expert(s) dovetails into the pre-suit retention of defense counsel. Such meetings may not only narrow issues and provide a roadmap going forward, but it can often lead to early resolution if not of the entire case, then discrete aspects of it.

Carriers need to overcome the institutional reluctance to insist on only global resolution of claims

Effectively Address Pre-Suit Coverage Issues

It is possible to explain coverage issues to an insured, in conversation and in writing, in a way that is consistent with "partnering" with the insured. Coverage limitations do not have to be controversial or a source of dispute, they are a fact of life in the construction arena. "Kitchen sink" reservation of rights letters should be a thing of the past and, in some jurisdictions (e.g., Missouri and South Carolina) are ineffective and dangerous. While it is true, generally speaking, that an effort should be made to reserve rights before retaining defense counsel to act on the insured's behalf, reservation letters should focus on the actual details of the claim and the policy rather than simply block quote policy provisions and suggest that any or all such provisions may apply. An insurer should look upon a reservation of rights letter as an opportunity to explain how a liability policy works, going so far, for example, to explain how a liability policy is not a warranty for the insured's work. There is no need to fill a reservation of rights letter with policy language or legalese, to the contrary the letter should be worded so the insured actually understands what is being said and implied.

III. Effective Post-Suit Methodology

Meeting with Defense Counsel and Insured

After the filing of any legal action against the insured, early on a follow-up meeting (or telephone conference) should be arranged between defense counsel and the insured to discuss how the case will move forward and to allow adjuster again to go over terms of policy (vis-à-vis covered vs non-covered damages) in connection with the allegations of the complaint. This meeting is the ideal opportunity to discuss in a less formal setting any coverage limitations as well as any categories of damage for which the insured may reasonably be expected to pay in settlement or after trial. The parties should develop a resolution strategy at this meeting and all parties should commit to keeping open lines of communication.

Discussions with Plaintiff and Its Counsel

Work telephonically and, if possible, by meeting in person before and outside of the context of formal mediation with the plaintiff directly to determine the contested issues.

Regular communication and interplay among the parties' experts, with the knowledge, consent and guidance of their respective counsel may temper each party's expectations and create an environment that is conducive to early resolution pre-suit or more meaningful and efficient discovery , mediation and even trial.

Use of Experts and Consultants During Litigation

Retain experts early on in the litigation and utilize them as a resource. The relationship between an expert witness and the attorney should be collaborative and the expert should have an understanding of the "big picture" so he/she can focus on the important issues. A good expert will have a knowledge of the legal process and understand strategic issues such as what to put in writing, what to discuss with opposing experts and should also understand the nuances of dispute resolution and their role in the process.

Be Practical and Informative in Stating Coverage Defenses

Everything stated above regarding avoiding "kitchen sink" reservation of rights letters, applies even more with respect to post-litigation coverage position letters. Efforts should be made to narrowly tailor discussion of the factual allegations in the complaint with the relevant policy provisions. Remember that what most people call a reservation of rights letter is not a form letter. Rather, it is an opportunity to fully explain coverage limitations in a way that needs to be understood by the insured (particularly if the insured will be asked to contribute toward settlement).

IV. Mediations

Picking the Right Mediator Is Crucial

The right mediator can make all of the difference and insurers should endeavor to develop institutional knowledge of mediators who (1) can effectively and efficiently address construction issues, (2) command the respect of the majority of the necessary parties and their insurers, and (3) account for, address and respect the subtleties presented by the coverage limitations. Carriers should create a shared database where adjusters can input their opinions and recommendations as to specific mediators. For example, some are better then others with regard to comprehending coverage and time-on-risk issues.

Focus on Pre-Mediation Activities

Successful mediations start long before the actual mediation day and the perhaps the biggest single reasons mediations fail is that many parties wait until opening statements or even private caucus (at 1:00 pm) to raise massive, disputed issues. By the time of mediation, all sides should fully understand both the liability damages arguments as well as the specific impact of insurance coverage limitations. If applicable, participating co-carriers should have time-on-risk issues resolved well before the first mediation. If there are recalcitrant cocarriers that have not taken a formal coverage position, or cocarriers that have taken a seemingly improper coverage position, then the participating carriers (and/or their coverage counsel) should already have issued rebuttals to improper declination of coverage letters.

Attendance at Mediation

Non-attendance at mediation of critical parties should not be a reason that mediations fail, but it is one of the most frequent in the construction area. Many insurers in large multi-party cases decide not to send claims professionals or even surrogates in the hope that their contribution may be minimized. Very simply, mediations should not go forward without the full commitment of all necessary parties. The mediator has a very big role in this concept, and efforts must be made to involve the mediator in attendance issues long before the date of mediation. Where mediation is by court order, the judge should be involved in ensuring attendance. Regardless, all of these matters need to be addressed at least 90 days in advance of the mediation.

Coverage Issues at Mediation

Too often coverage issues are ignored until later in the afternoon in the first day of mediation. When the plaintiff finally realizes how limited the insurers' contributions will be, mediations can collapse on this news alone. This should never happen. As indicated, all parties (or at least their counsel) should have a basic understanding of the coverage limitations prior to mediation, and the opening session of mediation should almost always involve discussion of serious coverage limitations. An advantage to the carrier to have their adjusters attend the mediation is that this gives the adjuster an opportunity to take the initiative and meet alone with the mediator (apart from defense counsel) at the beginning of the day to articulate their coverage issues.

V. Carrier Disputes and Addressing Recalcitrant Insurers

Address Risk Transfer Issues First!

Unfortunately, disputes among carriers have become disruptive to the resolution of construction claims. More often than not, these disputes can be avoided or minimized by proactive claim handling that allows all potentially triggered insurers and their respective insureds and additional insureds an opportunity early on to fully understand potential exposure and expected contributions. Proactive claim handling begins pre-suit, and every effort should be made by the claim handler to collect all potentially triggered policies, identify and tender any additional insured claims, and analyze the impact of indemnity contracts. Coverage counsel can help shepherd this process. Defense or pre-suit counsel also can assist with notifying other carriers and coordinating with the insured regarding the impact of AI coverage and indemnity contracts.

Organize Conference Calls with Co-Insurers

Potentially triggered insurers are more likely to take a claim seriously if they are personally involved and forced to state their position on a conference call, even if that call is conducted pre-suit. Pre-suit or defense counsel with the involvement of the insured can help coordinate these calls such that the other carriers understand that this is a collective effort to communicate with and involve all relevant insurers. Carriers should almost always conduct conference calls prior to mediation, and any disputes can potentially be addressed in a separate day of mediation or even a separate mediation altogether.

Enlist the Insured or Its Counsel to Assist with Disputes

Too often insurers engage in coverage disputes regarding defense or indemnity, primary or excess exposures without thinking to involve the insured (unless, perhaps, if the insured has retained independent coverage counsel). This is a missed opportunity if not a mistake. Rather than endless letter writing between the insurers, an effort should be made to explain and involve the insured in the dispute. Sometimes this will motivate the insured to obtain separate counsel to assist with maximizing the insured's coverage, and this is not always a negative development from the perspective of the proactive insurer. A well worded letter from an insured has a completely different impact on many recalcitrant insurers than a letter from a co-carrier.