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Sinking the Ship
Dealing with Heavyweight Coverage Issues

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Introduction

The mediation process has evolved over the past few decades and has generally been embraced by litigants. Effective mediation strategies have the potential to streamline and resolve complex cases efficiently, but they must constantly be updated and reevaluated for their efficacy. In the realm of construction litigation, insurance coverage is the driving force that can either facilitate or undermine settlement. Failure to recognize the need to address the complex coverage issues that invariably arise in construction defect litigation threaten to undermine the resolution process. Indeed, multi-party construction defect mediations are now notorious for being costly, protracted, and ineffective. Frustrations over delays and costs have caused both practitioners and commentators to call into question the efficacy of mediation as a means to efficient resolution. Lack of information and preparation are the two most significant obstacles to resolution. With this in mind, and utilizing the construction defect case as a means for examining the challenges presented by complex coverage issues in the mediation context, this roundtable proposes strategies for maximizing the potential for resolution and challenging the paradigm of the multi-phase mediation.

The Road to Mediation: Timing

Nothing drives up the cost and promotes frustration more than scheduling the mediation session prematurely before the parties are ready to meaningfully participate. Four considerations are of primary importance in evaluating whether to proceed with mediation. Those considerations are:

1. Have all the necessary parties been brought into the lawsuit?
2. Has there been sufficient discovery to evaluate the defect claims?
3. Have all the insurance carriers on the risk for the alleged damage been notified?
4. Have all coverage determinations and respective positions been communicated?

If the answer to any of these questions is "No" then the parties should resist the urge to schedule a mediation. Rather, the parties should evaluate whether a mediator can help to facilitate the parties' pre-mediation preparation and streamline the exchange of critical information necessary for all parties to meaningfully participate.

The Road to Mediation: Mindset

The mindset of the mediator and the parties sets the tone and expectation for the mediation process. In the last decade standard practice for complex cases is to schedule multiple sessions

before the first mediation occurs. Engaging in this practice creates and fosters an expectation that the parties do not expect to settle at the first session. When multiple sessions are scheduled , the participants rarely come to the first session with the necessary settlement authority for a global settlement. Those who are prepared and have obtained adequate authority leave frustrated. This model for dispute resolution has minimal value to the litigants, promotes lack of preparation by the parties, and ultimately needs to be reevaluated on an industry-wide level. The best chance for changing the paradigm of multi-phase mediation is communication. Parties should effectively communicate early and often that multiple mediation sessions are not necessary and they expect to settle at the first, and only, mediation session.

The Road to Mediation: Streamlining the Process Through Collaboration

The mediation process does not begin the day of the mediation. The process can and should take months. Each of the parties to a complex construction defect mediation requires sufficient time to properly evaluate the claims presented. Insurance coverage is the driving force that can either facilitate or undermine settlement, and insurers need sufficient time to establish the existence of covered defects. It is incumbent on both plaintiffs' counsel and developer counsel to facilitate that process and provide the necessary documentation to establish not only defects but also covered damage within the applicable insurance policy periods. All too often, plaintiffs' counsel takes the position that insurance coverage is irrelevant because the homeowner claims are against a solvent defendant. Such rhetoric is imprudent and merely thrusts the burden of posturing the case for resolution on the developer. The participation of subcontractor insurers presents the best opportunity for resolving the plaintiffs' claims. Rather than "passing the buck" to the developer, the prudent plaintiffs' counsel provides reports with the supporting photographs and documentation necessary to invoke coverage. Although the homeowners incur the cost of generating an expert report prior to mediation, those costs are offset, and in most cases outweighed, by the benefit of prompt receipt of the settlement funds and avoidance of unnecessary mediation costs.

The Road to Mediation: Expert-to-Expert Negotiation to Narrow Areas of Disputes

The parties must identify critical issues of disagreement early on if mediation is to be productive. At a minimum, this means experts for all parties should be provided the opportunity to inspect and report their observations. At that point, counsel should be able to determine whether there are obstacles to resolution that need to be addressed prior to negotiating at mediation. In many cases, an expert meeting between plaintiff and the developer/general contractor experts provides an opportunity to determine whether the case is actually postured for mediation or whether additional investigation is necessary to overcome significant disputed questions of fact. Waiting until the day of mediation to identify and address contentious issues reflects poor planning and invariably consumes the time of the parties' and the mediator.

Recognizing the Roadblocks: Who Is Paying What?

For mediation to be productive, it is imperative that issues regarding the availability of insurance proceeds are addressed well in advance. Have tenders been sent to all the appropriate carriers - primary, excess, and/or additional insured? Are there coverage issues between the insurer and the insured that need to be addressed? Is the insured going to be asked to contribute? Are there coverage issues between the carriers that need to be addressed (who/what is insured, timing of damages, priority of coverage, compromised aggregates, proper exhaustion, horizontal vs.

vertical exhaustion)? Are all the necessary carriers meaningfully participating (Primary, Excess, Pollution, Professional Liability)? Have the carriers addressed any time on risk issues? Have any necessary SIR's been satisfied to trigger coverage? Is the project insured under an OCIP or CCIP and has any necessary coverage outside the policy been addressed? Is there enough insurance available?

No one likes surprises. Sending out demands well in advance of a mediation is imperative to secure the necessary participation and meaningful settlement contributions. Every carrier is different in terms of the time it may take to secure settlement authority. It may not be possible to secure adequate settlement authority without having the answers to at least a majority of the questions raised above.

Recognizing the Roadblocks: Who Is Getting What?

Allocation of recovery proceeds can be another sticking point. Addressing affirmative claims with the insured, reimbursement of SIR's, and allocation of additional insured proceeds between multiple carriers are often a necessary component to settling a construction defect case at mediation.

Recognizing the Roadblocks: Disarm the Lawyers

Third party administrators (TPAs) should maintain control in the case throughout the mediation process. More often than not, attorneys believe it is their role to take control of the claim. In doing so, lawyers may fail to adequately report case-related information to third party administrators so as to keep them apprised of the proceedings. Furthermore, it can also be said that attorneys do not have the same incentive to promptly resolve a case. TPAs should take an active role in the process to ensure their interests are adequately considered and there is aggressive mediation preparation by outside counsel to maximize the opportunity for resolution. In some cases, TPAs bring valuable insight to a claim because they have been involved from the onset of the investigation. TPAs may also have access to pertinent information regarding the case that the attorneys did not have or could not easily obtain. More importantly, TPAs ultimately decide whether to settle a claim. As such, TPAs should be involved in the process of deciding whether to enter mediation, actively follow or participate in the preparation for mediation, and attend the mediation.

Recognizing the Roadblocks: Work Away From Uncooperative People

Mediation offers an informal, flexible and cost-effective alternative to litigation. However, mediation is a voluntary process and no party can be forced into settlement. For mediation to be successful, both parties must have a genuine commitment to the process and act in good faith to reach a mutually beneficial resolution. A strong backdrop of candid communications about the strengths and weaknesses of each parties' case provides the best foundation for productive negotiation at mediation. Where parties are expected to be disruptive to the steady progress toward resolution, such concerns should be addressed directly with the party in a professional and straightforward manner prior to mediation.

Mediation Checklist: Are You Ready for Mediation?

1. Are you familiar with the reputation and modus operandi of all parties involved?
2. Do you understand the institutional pressures upon the parties and their principals?

3. Have all the necessary parties been brought into the lawsuit?
4. Has the insured's scope of work been confirmed?
5. Have all insurance carriers on the risk been identified and notified of the lawsuit?
6. Have all additional insured tenders been sent to carriers?
7. Have all insurers been provided with sufficient information to determine coverage and evaluate exposure?
8. Have all coverage determinations been fleshed out and identified?
9. Have all the indemnity claims against the insured been evaluated?
10. Has the insured been notified of covered and uncovered damages?
11. Have the contractual indemnity claims between the insured and other parties been determined and communicated?
12. Have the additional insured claims between the insured and a/I carriers been determined and communicated?
13. Have the homeowners inspected the project, provided expert reports establishing causation, cost to repair and allocation of damages to the defendants?
14. Have the defendants inspected the project, provided causation, cost to repair and allocation of damages to implicated third party defendants?
15. Are all carriers on the risk participating in the defense of the insured? Have the participating carriers reached an agreed to time on the risk and an agreement as to allocation of indemnity payments?
16. Has the insured and its carriers reached an agreement regarding payment of SIRs and deductibles?
17. Have the parties reached an agreement on the allocation of any potential recovery money?
18. Have the homeowners submitted a settlement demand?
19. Have the developer and general contractor provided timely demands for both indemnity and defense/additional insured obligations to the defendants and their insurers?
20. Have you prepared a term sheet for settlement?
21. Have you secured settlement authority and/or are your dealmaker/s actively participating?
22. Have you managed your client's expectations?
23. Based on the above, are you ready to mediate?

Good Luck!