



The Florida Bar Committee

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INSURANCE & SURETY COMMITTEE**

**Mediation is Not a Punchlist Item –
A Look Behind The Curtain**

Presented by:
Bruce G. Alexander

Ciklin Lubitz

ATTORNEYS AT LAW

Start At The Start

- ▶ Get all contract documents and insurance policies available from Developer at time of Association Turnover
- ▶ Educate your experts and assist in formulating the wording getting any expert reports relating to resulting damages

The Guiding Principles

- ▶ View mediation session as the “Victory Lap”, not the day to begin negotiations.
- ▶ Available insurance coverage must be fully evaluated by every construction defect lawyer from DAY ONE - well in advance of mediation session
- ▶ This program features critical keys to executing a construction defect mediation involving insurance coverage issues
- ▶ Our GOAL, to re-focus the role of the Attorney so as to allow insurance to aid in achieving a successful Mediation session
- ▶ Success at mediation is fully developing and defining the reconciliation and adjudication options for resolving the dispute – establish a solid basis for decision

Formulating the Claim and Defenses; The Pleadings, the Claims, the Coverage

- ▶ Always best to start at the beginning
 - ▶ Initial evaluation of the claim, preparing operative pleadings and understanding insurance resources go hand in hand.
 - ▶ Coverage and a Duty to Defend generally measured by the “Four Corners Rule” - Nationwide Mutual Fire Ins. Co. v. Advanced Cooling & Heating, Inc., Fla. 4th DCA, October 2013 ; Core Construction Services Southeast v. Crum & Forster Specialty Ins. Co., 2015 U.S. Dist. LEXIS 163695 (S.D. Fla. Dec. 7, 2015).
 - ▶ But, see Evanston Ins. Co. v. Dimucci Devt. Corp., (M.D. Fla. Sept. 13, 2016, wherein the carrier was found to have no duty to defend a GC, within a condominium defect multi-party action.
 - ▶ Avoid pleading your client OUT of available coverage (e.g. intentional torts).
 - ▶ §558 Dilemma

The Project Insurance Program

- ▶ From day ONE, acquire all available insurance policies
 - ▶ Which carrier(s) have “time on file”?
 - ▶ Which have “risk on file”?
 - ▶ What type of Policies are in play?
 - ▶ CGL
 - ▶ PL
 - ▶ OCIP
 - ▶ CCIP
 - ▶ Surety
 - ▶ Excess

Trigger Dates & Scope of Coverage

- ▶ Is policy “Claims Made” or “Occurrence” based? Difference?
- ▶ Are there one or more “occurrences”?
 - ▶ Coreslab Structures (Miami), Inc. v. United States Fire Insurance Company, (No. 14-008893-CA-01) (Fla. 11th Cir. Ct. April 22, 2015)
- ▶ Are multiple policy periods implicated?
- ▶ What is the TRIGGER date for coverage?
- ▶ Is the “Trigger” related to an occurrence or event giving rise to potential coverage?
 - ▶ “Manifestation” or “injury in fact”? Axis Surplus Ins. Co. v. Contravest Construction Co., 2012 WL 2048303 (M.D. Fla. 2012)
- ▶ Is the policy a declining balance policy? What must be done to ensure funds remain available to reach mediated settlement?

The Role of the Adjuster

- ▶ **CRITICAL** – Adjusters are most often lawyers.
- ▶ They evaluate or **CLASSIFY** a claim file based upon:
 - ▶ Reported evaluations.
 - ▶ Time and risk on file.
 - ▶ Are multiple periods Implicated?
 - ▶ Are there other carriers to share in the risk?
 - ▶ Is coverage primary or excess?
 - ▶ What are the risks of the loss based upon the evidence?
 - ▶ Exclusions and risk limitations

The Question of Additional Insured - ("AI")Coverage

- ▶ Additional Insured vs. Additional Named Insured coverage
- ▶ Has "Additional Insured" coverage been evaluated and developed PRE Mediation?
- ▶ AI establishes potential rights for indemnity coverage and reimbursement of attorneys fees and costs to one NOT a primary insured under the policy.
- ▶ AI Evaluation:
 - ▶ Is there a CONTRACTUAL indemnity clause?
 - ▶ Do NOT rely upon the "ACORD" or Certificate of Insurance FORM – likely NOT binding on the insurer since issued by a local agent.

AI Coverage (Continued)

- ▶ Look at the ENTIRE Certified Policies.
- ▶ AI Status typically addressed by endorsement or rider to the policy.
- ▶ AI Endorsements – Two Principal FORMS:
 - ▶ ONLY ONGOING OPERATIONS
 - ▶ COMPLETED OPERATIONS
- ▶ The TYPE of endorsement is CRITICAL
 - ▶ Relates to the time on file, risk on file and “TRIGGER” date
 - ▶ May implicate more than one carrier and/or more than one policy period depending upon the facts and nature of claims

AI Coverage (Continued)

- ▶ To help evaluate which policy may or may not provide AI rights (if applicable) look at §558 demand to assist in the trigger date(s) and which policies/carriers may have to respond to an AI demand.
- ▶ Procedurally, Additional Insureds want to make demand to ALL potential carriers for BOTH indemnity coverage and reimbursement of payment of attorneys fees and costs.
- ▶ The obligation to pay for, or reimburse attorneys fees and costs incurred by one with AI status is typically measured from the date of the TENDER.

AI Coverage (Continued)

- ▶ The potential obligation to pay attorneys fees and costs of an AI is INDEPENDENT from the duty to indemnity.
- ▶ Fees and cost reimbursement obligations:
 - ▶ Are NOT related to any ultimate finding or existence of underlying indemnity.
 - ▶ Begin (typically) from the date of the tender.
 - ▶ Are NOT a function of “apportionable fault” by and amongst other parties or their carriers.
 - ▶ IS JOINTLY AND SEVERALLY owed by all carriers obligated to the AI.

AI Coverage (Continued)

- ▶ Selective enforcement of the AI rights can be a powerful strategic tool in mediated settlement negotiations
- ▶ An AI obligation is joint and several amongst all insurers - an election can thus be made to settle and discharge AI rights with some parties and their insurers, and retain or “target” AI rights against others.
- ▶ This tactic could maximize settlement value for indemnity and AI rights among remaining insurers.

CRITICAL COMPONENTS OF AI STATUS

- ▶ Evaluate what carrier(s) owe AI obligations
- ▶ Make demands/tenders **AS SOON AS POSSIBLE** and, in any event, well in advance of mediation session.

CGL Coverage

- ▶ Overview –
 - ▶ An Insured's OWN defective work not covered.
 - ▶ Coverage is for damage to property OTHER than to the work of the insured
 - ▶ Consequential
 - ▶ Ensuing
 - ▶ Resulting Loss
 - ▶ Compare ALSO whether a PRE or Post J.S.U.B policy or policies are at issue.

Pre vs. Post J.S.U.B

- ▶ For PRE J.S.U.B policies, at the GC level, there is POTENTIAL coverage for damages caused by the faulty work of one sub to the work or materials of ANOTHER sub or subs.
- ▶ POST J.S.U.B. - the “work” of the GC will typically incorporate all work of all subs to exclude coverage for claims against GC for damage caused by and between subs.
- ▶ Whether PRE or POST J.S.U.B. - damage to property other than to the work performed by the GC and all subs may be covered.

CGL and Mediation Strategy

- ▶ Evaluate whether Pre or Post J.S.U.B. based upon §558 notices, facts and potential trigger dates, there may be both pre and post J.S.U.B policies at issue.
- ▶ Clarify nature and extent of damages caused by one sub to the work of other subs (for pre J.S.U.B. policies) and in any event, be PRECISE regarding nature and extent of damages to all property (including “loss of use” damages) other than to the work of the GC and ALL SUBS.
- ▶ Distinguish this damage component EARLY and provide clear notice to all Defendants / Third Party Defendants.

CGL and Mediation Strategy

- ▶ Evaluate Whether “Rip and Tear” damages MAY be covered.
- ▶ Split of Authority in Florida.
 - ▶ Current trend suggests coverage under TL policies.
 - ▶ Arguably, balance of authority DOES provide potential coverage for Rip and Tear.

The “Pre-Judgment Interest” Factor

- ▶ If damages claimed have ALREADY been incurred/spent – typically pre-judgment is calculated annually at the legal rate for all years which apply since the time and funds were actually spent.
- ▶ COMPARE recent Circuit Court opinions HOLDING pre-judgment interest available EVEN WHERE funds have not been spent to a Condo Association or HOA, measured as of the date of TURNOVER to the Condo or HOA.
 - ▶ Arguably requires expert testimony of damages as of the date of Turnover.

SRI and Deductibles

- ▶ Critical to evaluating potential for mediated settlement .
- ▶ Have SRI's or Deductibles been met? Are defense costs included?
- ▶ Who owes FIRST dollars – potentially carrier will not get involved (and may not even have a say in what is or is not offered) until SRI or deductible has been paid / satisfied.
- ▶ For Professional Liability Policies, not only is the SRI /Deductible a critical component, BUT the insured typically must consent to the P.L. carrier to offer any settlement contributions and overall settlement.
- ▶ The consent of insured can be a major IMPEDIMENT to settlement option

The “DJ Action” and Subrogation Factors

- ▶ Have actions for Declaratory Judgment regarding coverage been filed or threatened?
- ▶ Have demands for subrogation been made?
- ▶ Are there contractual waivers of subrogation clauses?
 - ▶ Are there contractual waiver of consequential damages clauses?
- ▶ Each of these can serve to delay or impede the ability to settle at mediation.
- ▶ The impact and consequences of these issues must be made clear to clients well in advance of mediation session.

The Surety Demand for Indemnification and Settlement Rights

- ▶ The Sureties' role in mediated settlement negotiations ride on underlying indemnity and guaranty rights from the Principal.
 - ▶ Good security – “hands off” settlement negotiations
 - ▶ Bad security – “hands on” settlement negotiations
- ▶ Mediation can be significantly impacted by the actions of the Surety:
 - ▶ Will the Surety “settle” despite protests from its Principal?
 - ▶ Will Surety insist on indemnity for attorneys fees and costs in a global mediated settlement?
- ▶ Clients MUST be educated regarding the potential role of the Surety and the consequences of Surety rights and claims (where Suretyship is at issue) well in ADVANCE of mediation session.

Primary vs. Excess Coverage

- ▶ Every party to a Mediation must have a clear understanding of “which carrier(s) are there for which parties” and whether some carriers ONLY have excess exposure vs. primary exposure.
- ▶ Typically the “excess lines” carrier will NOT participate toward a global mediated settlement until or unless all primary carrier funds have been exhausted.
- ▶ There are exceptions to this general rule, depending upon the level of exposure involved and relationship between the carriers.
- ▶ Inquire whether any premium discounts may be available in the event of an early mediated settlement.

What Time is Needed for the Insurer?

- ▶ The earlier the insurer receives comprehensive reporting on a file, the better.
- ▶ Demands not communicated in writing until mediation session are a MAJOR problem and impediment to mediated settlement negotiations.
- ▶ Range of authority established well in advance of mediation session, based upon reporting and committee review.
- ▶ Authority CAN be increased beyond original evaluation by the Insurer during mediation session but typically NOT a major increase of available funds.

The Importance of Allocation

- ▶ Parties to multi-party claims should receive REASONED allocations within TOTAL demand claim well in ADVANCE of mediation session
- ▶ Allocations should not be duplicated or overlapping in the total demand claim.
- ▶ Allocations amounts can vary to allow for potential “carve outs” to assist in structuring a successful settlement option .
- ▶ Consider coordinating allocations between Plaintiff and General Contractor.
- ▶ PERCENTAGES ARE THE KEY: Evaluate scope of work, % of buildings or Project worked on by participant, compare as a percentage of total damages asserted by experts for that scope of work - excellent tool to predict behavioral analysis by adjuster and defense counsel, and therefore a basis to mathematically predict potential settlement values or anticipated authorized contributions

The Question of Policy Limits

- ▶ Evaluate CAREFULLY what limits of coverage (single and aggregate) apply under EVERY applicable policy of insurance.
- ▶ Determine the benefit of making a Demand (or allocated demand) WITHIN policy limits.
- ▶ BAD FAITH exposure only created when an Insurer has the opportunity to protect its Insured by settling within policy limits but does NOT.
- ▶ This consideration is OFTEN ignored by a Plaintiff and even less often understood by the CLIENT or INSURED.

Reservation of Rights (ROR) and Coverage Denials

- ▶ Prepare Claim Insurance MATRIX – identify Insureds, Insurers, limits of coverage (single and aggregate), policy periods, primary vs. excess status, special endorsements, All rights, coverage issues raised in ROR letters or coverage DENIALS, nature of Summary Judgment motions on coverage, Dec Actions filed,
- ▶ Identify coverage counsel retained, insurance executives or adjusters on claim
- ▶ Complete insurance situation summarized and provided to the Mediator
- ▶ Use MATRIX as planning tool for mediation session
 - ▶ Attack the factual coverage issues.
 - ▶ Attack the legal coverage issues .

Educating the Clients and Managing Expectations

- ▶ Absolutely critical.
- ▶ Consider allowing for pre-mediation conference between with Mediator and individual parties in advance of Mediation session to discuss realistic settlement scenarios and mediation goals.
- ▶ Consider structuring Mediation session by issues/trades to maximize efficiency and avoid “down time” by the participating parties.
- ▶ Ensure that everyone understands the insurance resources available and not available

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Pre-Mediation Organization and Mediation Techniques

- ▶ How far out to schedule Mediation?
- ▶ Overall agenda of session – rough time blocks for opening, caucus, resolution
- ▶ Attendees – the authority issues
- ▶ Opening Statements – who presents and how long?
- ▶ Required closing documents – Releases, indemnities, dismissals
- ▶ Highs/Lows
- ▶ Performance vs. Payment
- ▶ When or If to Share offers.
- ▶ Carve outs.
- ▶ Coblenz Agreements.
- ▶ Indemnity Only or AI only Resolutions
- ▶ Establishing KEY Discovery to allow for meaningful result (e.g. "Standard of Care" testimony in place.)

The Cost of Defense Mythology

- ▶ Cost of Defense (COD) can play a ROLE in settlement but typically will not drive a settlement.
- ▶ All carriers have fully evaluated (and received detailed budgets) on COD well in advance of mediation session.
- ▶ Adjusters typically will not settle (or start their contribution level) based on costs of defense
 - ▶ Operational funds vs. loss reserves
 - ▶ Part and Parcel of Insurers Cost of Doing Business.
- ▶ Dangerous to base settlement expectations upon COD.

Final Legal Considerations

- ▶ Likely – no duty to defend during 558 Stage - Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 2015 WL 3539755 (S.D.Fla. 2015)
- ▶ Duty to defend may not be limited to four corners of complaint
- ▶ Remember rip and tear damages may be recoverable - Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240 (11th Cir. 2015); and Pavarini Construction Co. v. ACE American Insurance Company, case no.: 1:14-cv-20524-JLK (Amended Order dated 10-30-15)
- ▶ Never forget to assist in setting up AI contributions
- ▶ AI exposure and obligation to pay fees and costs owed to an Additional Insured independent of whether the AI has any underlying indemnity exposure – Travelers Prop. Cas. Co. of Am. v. Amerisure Ins. Co., 2015 U.S. Dist. LEXIS 132817
- ▶ The overall goal is to assist the contractors and subcontractors to create maximum contribution opportunities at mediation, being mindful of professional liability policies and their “burning candle” nature, as well as what insurance program (eg. wrap or traditional) is in play
- ▶ Amerisure Insurance Company vs. The Auchter Company, (M.D. Fla. Mar. 27, 2018)

Conclusion

- ▶ Evaluate potential coverage “EARLY and OFTEN”
- ▶ Understand the level of information the Insurer must have to establish a potential settlement range.
- ▶ Consider AI Rights as distinct from liability/coverage exposure.
- ▶ Early EDUCATION of the lay Plaintiff as to HOW CARRIERS evaluate files – CRITICAL to Managing Expectations.
- ▶ Give the Mediator the tools to keep dialogue open.
- ▶ Refine, narrow, resolve the dispute – give settlement a chance to happen