

Comprehensive Construction Defect Claims
& Coverage SuperConference

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Important Negotiation Strategies

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The Parties

- Should all the parties of the underlying case be present?
- Should the policyholder have independent coverage counsel?
- Who should be at the table from the insurance carrier?
- Should the additional insured carriers be present?



Selection of the Mediator

- Can spend time before, during and after the mediation session
- Knows coverage issues
- Is not a mere “number passer”
- Good time management
- Working with 2 mediators: Do you have one for coverage and one for the underlying case?
- What characteristics should you look for in a mediator?



Preparing for Mediation

- When is the case ready for mediation?
- What meetings should take place before the mediation?
- Should mediation position statements be exchanged and/or submitted to the mediator?
- What documents should be given to the mediator?
- What documents should be present at the mediation?
- What is the best physical layout of the mediation site?



The Legal Issues

- Which policies apply?
- Which legal issues should be addressed first?
- How do you begin an allocation discussion?
- Should the carrier enter into temporary funding agreements?



What Every Policyholder Wants to Know

- Policies
- Identity of all coverage counsel
- Availability of other coverage
- Exhaustion and aggregate information
- Additional insured information
- Indemnification Agreements
- Carrier requested information
- Coverage positions of each insurer



What Every Carrier Wants to Know

- Other coverage available to insured
 - Position of those carriers, Notice? Coordination?
- Indemnity claims
- Exhaustion or aggregate information
- Additional Insured information
- Status/evaluation of underlying case
- Insured contribution



Can You Mediate Too Soon?

- While underlying case is ongoing?
- While underlying case is itself in its infancy?
- Without a coverage suit pending?
- Before depositions?
- Before exchanges of second wave of documents?



Mediating Coverage with Underlying Case in the Background

- Effects on underlying case
- Declaratory judgment actions
- Allocation issues – temporary and permanent
- Role of players in underlying case
 - What if coverage turns on liability fact issues?
 - Risk of carrier learning facts learned in mediation case to determine coverage



Mediating the Underlying Case with Coverage in the Background

- Role of coverage counsel when the underlying case is being mediated
 - Should they attend? Court ordered attendance?
 - Whose room?
- Multiple carriers with allocation disputes or differing views on liability
- Whose money? Mediating under an ROR
- Policy limit demands



Tips

- Preparation – know the law, facts and venue
- Choose an appropriate mediator/arbitrator
- Define your objectives and execute on them
- Get something for every concession
- Understand your adversary's motives
- Work with the mediator



Tips (Continued)

- Be patient
- Know your style and use it to your advantage (i.e. principal to principal negotiations, schmoozing, good cop/bad cop)
- The Settlement Agreement drafting process – memorialize critical terms immediately after settlement is reached and have all parties sign
- Take control of the drafting process

