Settlement Construction

By Anne M. Lawlor Goyette

Construction defect cases typically involve large numbers of parties, attorneys, insurance companies and experts. Each player has its own goals. The property owner wants maximum funds to repair defects and cover losses. The builder disputes both plaintiff's repair scope and associated costs and seeks to pass plaintiff's claims onto subcontractors. The subcontractors concentrate on minimizing alleged damages and shifting responsibility. The design professionals distinguish between construction errors and design issues. Attorneys challenge pleadings, decipher contracts, pursue claims, and assert defenses. Insurers highlight policy language to define covered losses and involve other carriers to share the risk. Experts bring technical insight to all aspects of the discussion. Discovery and litigation costs soar. It is no wonder that the resolution of construction defect cases has been compared to herding cats.

These independent players can be steered towards efficient case resolution. First, it is important to bring the participants together at the onset of the case to articulate their goals and tailor a case schedule that addresses such goals. Second, the parties should use the productions of insurance, scope of work and project documents to identify and address potential impediments to settlement. Finally, the parties should develop an overall settlement plan and a negotiation strategy *before* the settlement conference. While these preparations may not remove all obstacles, they will guide the parties toward meaningful settlement negotiations and, ultimately, efficient case resolution.

From the inception of the case, the parties should discuss with the case neutral the overall case schedule and duration, including triggers for conducting a settlement conference, lifting the discovery stay and requesting a trial date. Importantly, the parties should agree on the total number of anticipated settlement conferences. The parties also should use their best efforts to

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articulate all claims and involve all potentially responsible parties and their carriers early in the litigation; failure to do so most likely will impact the parties' ability to achieve their case goals.

As an example, the parties may craft a case management schedule that anticipates a trial date within two years of case filing. The neutral may calendar teleconferences, site inspections, expert meetings, homeowner board meeting and/or defense meeting. Once these tasks are completed, the parties may agree to participate in the first of a target maximum of three settlement conferences with trial counsel, insurance representatives and principals with settlement authority personally in attendance.

The case management plan ideally should be implemented in a series of customized pre-trial orders. With the exception of scheduling a trial date, each order should establish deadlines over roughly a 90 day period and notice teleconferences between the neutral and all counsel after the completion of specific tasks. This approach allows the parties and the neutral promptly to address any missed deadlines and minimize any resultant delay. It also avoids the perception of "fake deadlines," particularly by decision makers who grow weary of last minute scheduling changes that directly impact their calendars.

The first pre-trial order in a construction defect case typically delineates a process for producing basic information - insurance, scope of work and project documents. Rather than treating these productions as part of a rote process, the parties should use the productions to identify and resolve potential settlement problems.

For example, is there an insurance issue that may impede settlement discussions? If so, who are the decision makers and what information do they need to address the issue? Is additional carrier participation needed? Have the carriers reached a time on risk agreement? Are there any outstanding Additional Insured issues? Many times, insurance-related issues can be resolved through a conference call between the case neutral and carrier representatives; at a

minimum, these calls identify decision makers and facilitate carrier analyses *before* the settlement conference.

The preparation of the scope of work statement is an opportunity for counsel to confirm an accurate picture of his client's work. If a contract exists, does it accurately reflect the client's work at the project? Did the client perform additional work? If the client is uncertain, will a site inspection refresh his memory? If there is a disagreement regarding the work a party performed at the project, the parties may use the statement as a springboard for an informal discussion between principals, an expert exchange at a defense allocation meeting or service of narrowly tailored formal discovery. This approach may be especially helpful for small parties who wish to exit the case early. Even if a scope of work issue is not conclusively resolved, addressing the matter early allows the parties to incorporate the issue into their case evaluations.

In producing project documents, counsel should review his client's contract and note if there is any attorney fee, duty to defend, indemnity or limitation of liability provision. ***No*** attorney should attend a settlement conference without first reading his client's contract. Counsel should bring a copy of the contract, and any revisions, to all settlement conferences. Counsel also should educate himself regarding the overall project by visiting the document depository prior to any settlement conference.

The initial document production is also a time to assess whether all potentially responsible parties are in the case. A delay in involving a party and its carriers can have a significant impact on the case schedule and duration.

It is important to develop an overall settlement strategy as far in advance of a settlement conference as possible. The discussion should address the potential structure of the parties' settlement, the use of expert information and the timing of settlement demands.

As far as structure, will plaintiff only consider a global settlement? Will the lead parties allow peripheral party settlements? Can players with additional insured endorsements settle

early? Will the lead parties consider settling around an unprepared or "problem" player? Who will attend the settlement conference with authority to finalize any settlement agreement?

The use of expert information plays a significant role in preparing an overall settlement plan. The experts generally focus on plaintiff's biggest ticket item: the cost of future repairs. Alternatively, if the project is an income producing property, such as an apartment building, hotel or professional business, the experts may concentrate on repair scopes that minimize move out or business interruptions. Expert discussions throughout site inspections, testing, joint expert meetings and the preparation of a defense response assist the parties in defining potential problems and developing repair proposals and pricing. In developing a case settlement strategy, the parties should determine how they will use the expert evaluations.

One option is the preparation of a joint scope of repair. The parties' experts negotiate a compromise repair scope for the project, and a cost estimator bids the cost of implementing the scope; the estimator also bids areas of disagreement. Having quantified the difference between each side's view of a reasonable repair, the joint scope allows the parties to evaluate a reasonable settlement range for the case. It also enables the parties to articulate solutions that may be unavailable at trial. Another option may be to price out the other side's repair scope with the party's own cost estimator. Regardless of how the parties decide to utilize the expert information, they should address the issue in advance of the settlement conference.

Service of timely settlement demands is another factor to be considered in a settlement plan. Sufficient time is needed after service of the demands to allow counsel to complete their evaluations and submit reports to principals and carriers. At least four weeks before the conference, plaintiff should serve its settlement demand with a breakdown of its claims (e.g. future repair costs, move out expenses, out-of-pocket expenditures, *Stearman* costs, attorneys fees.) At least three weeks before the conference, lead defense should serve settlement allocations on cross-defendants and, at the same time, circulate a draft settlement agreement,

with key financial terms omitted, for all parties' review and comment before the conference. During down time at the conference, the parties can negotiate settlement language; if the parties reach a settlement, they can execute the agreement at the conference and prepare to close their files.

In addition to a settlement plan, the participants privately should discuss and define the outcome that they hope to achieve through settlement before the conference. Based on an evaluation of a realistic cost of repair, *Stearman* fees, contract obligations, factual and legal issues, what is a reasonable opening number? What are the risks and costs associated with proceeding to trial? If successful at trial, will the party be able to collect on any judgment or recoup any costs from a viable party? What is the client's tentative bottom line? At what level does trial become a better alternative to a negotiated agreement? With this information in mind, the participants should give some thought as to how they will move from offer to offer or demand to demand prior to the start of the settlement conference.

Moving players towards settlement in a complex construction defect case is not easy. The process involves multiple players with variable and changing goals. Factual disputes, conflicting legal theories, late claims, missing parties and recalcitrant carriers create additional challenges. The early identification of case goals and settlement roadblocks and the creation of a general settlement plan and basic negotiation strategy may not remove all of these obstacles. Nonetheless, these preparations will open the door to meaningful settlement negotiations, and, ultimately, steer the participants to efficient case resolution.

Anne M. Lawlor Goyette is a special master and mediator with Griffiths, Castle, Goyette & Dekker in Burlingame, California. As a full-time neutral since 1998, she has resolved hundreds of construction defect cases.