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THE LATEST NEWS IN CONSTRUCTION ADR FROM THE WORLD'S LEADING NEUTRALS

Five Strategies for Effective Settlement Negotiations

BY HON. GERALDINE SOAT BROWN (RET.)

Every litigator knows that many more cases settle than go to judgment. At some point in almost every lawsuit, the parties will discuss settlement, either on their own or with a push from the judge. During my 16 years as a United States Magistrate Judge, I conducted more than 100 settlement conferences each year. I witnessed the whole range of lawyer performance. Underprepared lawyers and their clients stumbled into settlement conferences, often resulting in a negotiation that didn't lead to settlement, or they settled on terms they found disappointing. Effective lawyers, on the other hand, approached settlement negotiations strategically and with thoughtful preparation.

Here are five strategies to maximize your clients' chances of a favorable outcome.

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Special Issues in Multi-Party Construction Mediations

BY THOMAS I. ELKIND, ESQ.

Typical construction projects usually involve an owner, an architect, consulting engineers, a general contractor, subcontractors, suppliers, sureties and insurers. These parties may not all have contracts with each other. The owner may have separate contracts with the architect and the general contractor, and each of those may have separate contracts with subcontractors, suppliers and consultants. Often, when a dispute arises, the plaintiff will be forced to bring multiple arbitrations or a complex litigation unless all parties involved agree to participate in one proceeding.

Mediation, and particularly early mediation, is one way to prevent the cost and uncertainty of multiple proceedings and enable all parties to continue working without the dispute

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Also in our Summer 2018 Newsletter:

INSURANCE

Tenth Circuit Predicts New York Law Will Go the Way of *Weedo*

BY HON. NANCY HOLTZ (RET.)

Real estate developers, general contractors and many other commercial policyholders may have a new reason to ♥ New York. In *Black & Veatch Corporation v. Aspen Insurance (UK) Ltd.,* No. 16-3359 (February 13, 2018), the U.S. Court of Appeals for the Tenth Circuit reviewed the operative contract language applying New York law and determined that, were the New York Court of Appeals to decide this case, it would likely join a "clear trend" among state supreme courts holding that damage from faulty subcontractor work can be covered under the current language of the standard commercial general liability (CGL) policy.

If the Tenth Circuit's prediction is correct, New York may well adopt a reading of "occurrence" to find coverage in a contractor's own CGL policy for damage to property caused by the defective work of its subcontractors. If this happens, the New York Court of Appeals would overrule contrary precedent reaching back to 1979, which insurance carriers have relied upon to deny coverage for property damage claims filed by general contractors when the damage was caused by a subcontractor. See, *Weedo v. Stone-E-Brick*, 405 A.2d 788 (N.J. 1979). Notably, the New Jersey Supreme Court has overruled *Weedo* itself. *Cypress Point Condominium Association, Inc. v. Adria Towers, LLC, et al.* No. 076348, 2016 WL 4131662, 2016 N.J. LEXIS 847 (August 4, 2016).

> *"[I]t was no surprise that the court predicted New York would join the growing number of courts in rejecting the legacy of* Weedo*."*

Background

Black & Veatch Corporation (B&V) is a global engineering, consulting and construction company. It enters into engineering, procurement and construction (EPC) contracts to subcontract all or most of the work its projects require. B&V entered into an EPC contract with American Electric Power Service Corporation (AEP) to engineer, procure and construct jet bubbling reactors (JBRs) for coal-fired power plants. After installation of some JBRs, AEP notified B&V of property damage it claimed was caused by the defective work of one of B&V's subcontractors. These defects caused parts of the JBRs to deform, crack and, in some instances, collapse. B&V reached a settlement with AEP for $225 million to repair and replace the defective components.

Coverage

B&V had obtained insurance for this project under several CGL policies. Upon settling with the owner regarding the damage, B&V looked to its insurance carriers for coverage of a portion of this settlement. The primary insurer paid its limits, but the excess carriers balked. In refusing to indemnify, the excess insurers argued that the damages that formed the basis of the settlement were, under the policy, considered B&V's "own work" and thus excluded. That is, even though the internal components of the JBRs were clearly constructed and installed by B&V's subcontractors, this was B&V's own work as defined by the policy and case law such as *Weedo*. As such, the damage to the components did not constitute an "occurrence" under the CGL policy. No occurrence, no coverage.

Change in New York Law

The Tenth Circuit disagreed. In analyzing and applying New York law to the facts at hand, the court found that damage caused by a subcontractor's work could be con-

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Weedo

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sidered an occurrence under the general contractor's policy. The Tenth Circuit based its opinion on a number of factors.

The court noted that to read the standard CGL policy as denying coverage for defective workmanship because it is not an "occurrence" would render certain exclusions and exceptions to the exclusions redundant. The Tenth Circuit justices reasoned that the New York Court of Appeals would not countenance a conclusion that would make these exclusions and exceptions superfluous.

The Tenth Circuit also noted the growing number of state supreme courts that have considered this very issue. These courts have reached near unanimity in finding that property damage caused by a subcontractor's defective workmanship is an "occurrence" within the meaning of the standard CGL policy language. It came as no surprise when the New Jersey Supreme Court finally reversed *Weedo*. Similarly, upon reading the careful policy analysis carried out by the Tenth Circuit, it was no surprise that the court predicted New York would join the growing number of courts in rejecting the legacy of *Weedo*.

In *Black & Veatch*, the court carefully analyzed the language of the CGL policy as it has evolved and as it has been clarified by the Insurance Services Office (ISO), a leading source for information on insurance risk. The court went through a historical analysis of the CGL policy, including market factors that shaped the policies over time. The court observed that since its promulgation in 1940, the standard-form CGL policy had undergone revisions. The 1973 version had precluded coverage for property damage to an insured's own completed work, regardless of whether those damages were caused by the contractor or on behalf of the named insured. But by 1976, general contractors had become increasingly reliant on subcontractors' work and wanted an insurance product that would give them the coverage they needed for this work.

> ***"[T]he court found that damage caused by a subcontractor's work could be considered an occurrence under the general contractor's policy."***

The court noted that in response to this market demand, "the 1976 standard-form CGL policy eliminated the phrase 'or on behalf of' from the 'Your Work' exclusion. The policy thus broadened coverage by no longer excluding damages arising from faulty subcontractor work. Contractors could pay a higher premium to add additional coverage for property damage arising from completed work that had been performed by subcontractors." *Black & Veatch* at 12. This new optional coverage provision was called the Broad Form Property Damage Endorsement. But unlike the earlier versions of the CGL policy, it provided that the policy only excluded property damage to completed work performed by the named insured. Thus, under this new policy language, there was now coverage available by way of an exception to the "Your Work" exclusion when the defective work was done by the subcontractor. This was a small but significant change that provided much-needed coverage for general contractors. However, the courts did not catch up to this change.

Citing *Bruner and O'Connor on Construction Law*, the Tenth Circuit observed that "[u]nfortunately, the courts [have failed to] recognize the importance of this language." *Black* at 13. The Tenth Circuit agreed with Bruner and O'Connor that in 1986 the ISO "attempted to clear up this confusion by expressly stating in the standard-form CGL policy that the 'Your Work' exclusion does not apply if the damaged work…was performed…by a subcontractor." *Id.* But the confusion has continued, and it is only in decisions such as this one that the courts are recognizing the subcontractor exception to the "Your Work" exclusion.

Significance

Although *Black & Veatch* is not a binding decision in New York, it appears to be a well-reasoned prediction as to what the New York Court of Appeals might do. This is significant because New York law is frequently applied to construction coverage disputes. The jurisdiction named in policies based in the London market is frequently New York. Larger construction projects also frequently specify New York law as governing in the contract.

This possibility of coverage for the defective work of subcontractors is sure to be good news for general contractors and other commercial policyholders who have been plagued by coverage denials based on the "Your Work" exclusion.

Hon. Nancy Holtz (Ret.), *a JAMS Boston neutral, has more than 30 years of experience as a judge, attorney and ADR practitioner resolving multi-million-dollar business and construction disputes, as well as employment, wrongful death and other personal injury matters. She can be reached at* ***nholtz@jamsadr.com****.*

*The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. Learn more at **www.jamsadr.com/construction**.*

RECENT MATTERS

Zela "Zee" Claiborne, Esq. recently settled a matter involving the Port Authority of New York and New Jersey arising out of a construction dispute at Newark Liberty International Airport.

Hon. Curtis E. von Kann (Ret.) is serving as sole arbitrator in a case in which the unit owners' association and multiple individual unit owners contend that the developers of a luxury condominium in Alexandria, VA, concealed from unit purchasers numerous serious defects in common areas and in every apartment.

Kenneth C. Gibbs, Esq. has been engaged to serve on a dispute review board involving Denver's light rail system and has been hired as the mediator of a dispute regarding the construction of major facility on a college campus in Connecticut.

ON THE MOVE

Deborah S. Ballati, Esq. joined JAMS in San Francisco.

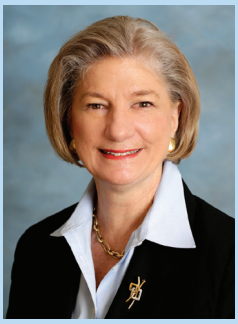
Douglas S. Oles, Esq. was sworn in as the President of the American College of Construction Lawyers at that organization's 29th Annual Meeting in Dana Point, California.

HONORS AND SPEAKING ENGAGEMENTS

Katherine Hope Gurun, Esq. spoke about dispute resolution from the perspective of a former corporate counsel and ADR practitioner at the 2018 Builder's Risk & Construction Symposium on May 3, 2018, in New York.

Patricia H. Thompson, Esq. spoke at the 11th Annual Arbitration Training Institute on "The All-Important Preliminary Conference" May 17-18 in Miami, FL (presented by the American Bar Association and cosponsored by JAMS and the ABA Forum on Construction Law).

Hon. Carol Park-Conroy (Ret.) participated in a conference with China's Supreme People's Court's administrative tribunal and Guanghua Law School, Zhejiang University, on public-private partnerships and government contracts in Hangzhou, China, and related discussions in Beijing with academics, judges and government officials in June 2018. The conference was sponsored by the **Paul Tsai China Center**, Yale Law School. In addition, Judge Park-Conroy will moderate a panel on key court decisions for the annual educational program sponsored by the **Boards of Contract Appeals Bar Association** in October 2018.



Deborah S. Ballati, Esq. joined other former ABA Forum on Construction Law leaders in speaking at the Forum's 2018 Annual Meeting and Diversity Luncheon in New Orleans on April 13, 2018. "The Forum has always had diversity as a priority," said Ballati, "and we have made substantial progress in achieving greater diversity over the years. Like all important things, however, more can be done, and continuing to push forward to promote diversity should remain a priority for the Forum and the construction industry." ***Read more about JAMS' commitment to diversity in ADR here***.

Philip L. Bruner, Esq., **Douglas S. Oles, Esq.** and **John W. Hinchey, Esq.** will speak at the **8th International Society of Construction Law Conference** in Chicago, September 26-28, 2018.

Stacy L. La Scala, Esq. and **Hon. Nancy Wieben Stock (Ret.)** will speak at the CLM Business and Insurance Construction Conference in Chicago, Illinois, September 26–28, 2018. Mr. La Scala's panel—"It's the End of the World As We Know It"—will explore the myriad of claims and coverage issues implicated where a traditional construction defect action is impacted by a catastrophic event. Judge Stock will speak about strategies for success in achieving diversity and inclusion benchmarks in "Building the Pipeline and Bridging the Gap." ***Register here*.**

John W. Hinchey, Esq. will speak at the fall 2018 meeting of the ABA Forum on Construction Law, October 3–5 in Montreal, QC, Canada. Mr. Hinchey has also co-authored an article on international arbitration agreements for the June 2018 issue of the *ACC Docket* (American Corporate Counsel).

CHAMBERS USA 2018 RANKINGS

Robert B. Davidson, Esq. is recognized on the International Arbitration: Arbitrators list.

Hon. William Cahill (Ret.), **Barbara Reeves, Esq.** and **Michael Young, Esq.** are ranked as Nationwide Mediators.

George D. Calkins II, Esq. and **Kenneth C. Gibbs, Esq.** are ranked as California Construction Mediators.

Special Issues

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affecting the project schedule. If all parties agree to mediation, the legal issues of liability, damages and agency can all be resolved in one proceeding. A voluntary, non-binding and confidential process, mediation offers quick and cost-effective resolution. If that fails, parties can revert to arbitration or litigation having lost only a small amount of time and money.

One example of a complex construction dispute resolved by mediation was the construction of a 35-story office building in downtown Boston. Structural steel girders were attached with steel bolts that broke during the construction of the steel frame. The structural engineer determined that the bolts used were not strong enough, and issued a directive to change to larger and stronger bolts. The steel fabricator issued a change order for $1 million to change the fabrication of the girders to accommodate the larger bolts, but the change order was denied by the owner. The steel fabricator then sued the owner, architect, structural engineer and general contractor in federal court in Boston to recover its cost of correcting this deficiency. The steel fabricator was from Texas, the owner was from Massachusetts and the rest of the defendants were from other states as far away as Oregon. The judge indicated in the first pretrial conference that he had no intention of ever trying the case, so the parties agreed to mediation, which was successful.

Through that experience and others, I have identified the following special issues that arise in such multi-party cases.

Pre-Mediation Submissions and Conferences

Parties expect significant work to be done before all parties get together in the same room. In a multi-party construction mediation, this pre-mediation work includes sharing detailed position statements in order for everyone to know where each party stands. Otherwise, a significant amount of time will be spent during the mediation just communicating the parties' positions.

The mediator must also determine whether insurers and sureties will attend the mediation, as well as which parties will caucus together at the mediation. Often, these mediations involve multiple issues with different defendants and their insurers. It is important that everyone agree on the process before the mediation starts, including how many rooms will be needed.

Opening Joint Session

Opening sessions are used far less often now because the attorneys want to avoid arousing emotions, which can make it more difficult to resolve a dispute. However, a relatively short, amicable opening joint session can set the stage for a productive negotiation. The key to a positive opening joint session is planning in the pre-mediation phase. The mediator and the parties should determine whether opening statements should be made and, if so, whether by counsel and/or by principals. It is not always necessary for every party to make an opening statement. One statement each by representatives of the plaintiff and the defendants may suffice.

Caucuses

In multi-party cases, it is essential to focus first on reaching agreement on a reasonable verdict range. If all parties can agree that the case has a certain value range, the defendants can then begin to discuss how to share in contributing to the settlement. However, if the defendants as a whole and the plaintiff cannot agree on a reasonable verdict range, the mediation is not likely to be successful. This process does not preclude further negotiation of the actual settlement amount, but it sets the stage for the defendants to have fruitful negotiations among themselves regarding the amount or percentage that each defendant will contribute to the settlement.

Mediator's Proposals

Increasingly, parties ask the mediator to propose a settlement when they have been unable to reach an agreement. This option is used even more often in multi-party cases, especially within defendant groups, to determine the degree to which each defendant will contribute to the settlement. It is also common for the plaintiff to reach separate settlements with one or more of the defendants if all the defendants cannot agree to meet the plaintiff's demand. In these situations, the mediator must try to assist the parties in reaching agreements without appearing to favor one side over the other.

Documenting the Settlement

Once an agreement has been reached, it is especially important in a multi-party case for a detailed written settlement agreement to be produced, preferably before the parties leave the mediation. In addition to the risk that one or more parties may try to alter the terms after the mediation is over, is the risk that in complex settlements parties may not fully understand all of the terms. Thus, even after an agreement appears to have been reached, the parties and the mediator must be willing to invest the additional time necessary to document every agreed-upon term in detail as soon as possible.

Thomas I. Elkind, Esq., *a JAMS Boston neutral and former litigator, has worked throughout his career to resolve construction cases, representing owners, contractors, architects, engineers, sureties and lenders in a wide variety of matters. He can be reached at* ***telkind@jamsadr.com****.*

Five Strategies

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1. Develop a litigation strategy for each individual case.

There is a temptation, especially in high-volume practice areas like personal injury, to view a case just like any other case that has a similar fact pattern. While it's important to apply lessons from previous experiences, you should avoid a boilerplate, "this is what we always do" approach.

Discuss your client's objectives candidly at the start of the litigation and throughout. From a defense point of view, the client usually wants to end the case as inexpensively as possible, but not always. The client may want to demonstrate its willingness to defend cases it views as meritless rather than pay a nuisance settlement.

The client's view on litigation may change over time. For example, I conducted a settlement conference where the plaintiff's case was not very strong, but it received a better settlement than the facts of the case would otherwise suggest. On the day of the settlement conference, the defendant company was in the process of being sold, and the owners wanted to eliminate any contingent liabilities.

2. Identify, gather and produce the most important information early.

Settlement negotiations are most effective at the proverbial sweet spot, when each side has the information it believes it needs to make a judgment about settlement but before discovery expenses allow the sunk costs mentality to take hold.

As early as possible, identify the information that would make the most difference to both your client's and the opposing party's view of the potential risk.

If the information the other side wants most is discoverable, it's almost always in your client's interest to produce it before the settlement negotiations. A party always assumes that withheld information is favorable to its side, and it calculates its settlement position accordingly. A classic example is a defendant who argues that a judgment would be uncollectable. I have never seen a plaintiff reduce its demand on that basis without first seeing credible financial information from the defendant.

3. Look for settlement opportunities.

Windows of opportunity for settlement open at various times in a lawsuit. For a defendant, it's almost always worthwhile to ask the plaintiff's lawyer during the first phone call, "What is your client really looking for in this case?" The answer to that question will tell a lot about whether to start negotiations then or wait.

Another opportunity is when the most important information has been gathered; for example, when the key witnesses have been deposed.

Yet another opportunity is at a hearing in court. Most judges will ask at a status hearing whether the parties have talked settlement. Before appearing at the status hearing, decide with your client how you want to use this opening: to get a settlement conference with the judge, to start lawyer-to-lawyer settlement talks or to discuss the possibility of private mediation.

While you can call opposing counsel at any time, scheduling a private mediation or judicial settlement conference requires matching the parties' schedules to the judge's or mediator's schedule. It's important to foresee and thus schedule settlement opportunities early.

Waiting until a summary judgment motion has been filed risks missing the window of opportunity. A defendant that has invested significant fees in discovery and the summary judgment motion usually wants to see if that will end the case. Plaintiffs are rarely sufficiently intimidated by a summary judgment motion to reduce the demand dramatically.

4. Consider the best context for settlement discussions.

Settlement talks can take place in a number of contexts. Direct, lawyer-to-lawyer talks can be effective when the lawyers have a good rapport and the necessary authority from their clients, and when money is the only (or primary) topic of negotiation. They are not as effective when the clients want to control the negotiation or there are many variables to the settlement.

A settlement conference with a sitting judge works well when one party wants "a day in court." Judges, however, can give only a limited amount of time to any particular case, and only when their calendars permit. Not every judge wants to conduct settlement discussions or has mediation skills. The fact that a settlement conference was held and whether it resulted in a settlement will be on the docket available to the public and media.

A private mediation is completely confidential. The parties can choose the mediator and schedule a convenient time and place. The mediator will be available for as much time as the parties need, which can be important in a business dispute with a number of aspects to work out.

5. Prepare carefully to maximize the settlement opportunities.

The choice to settle or not belongs to the client, but it is your responsibility to make sure the client makes an informed choice.

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Effective lawyers inform their clients about the judge's or mediator's procedures, the schedules for exchanging written pre-mediation submissions and how the session will be conducted.

Meet in person, if possible, with the client representative who will be attending. Make sure your client understands the alternatives if an agreement is not reached, including a realistic budget and timeline for getting to a judgment and the unquantifiable costs of stress and distraction.

Your client should read the opposing party's submission as well as yours. Sometimes it's the first time the client has heard the case described directly from the other side's viewpoint.

A pre-mediation submission should read like an opening statement to a jury—concise, easy to understand and confident but not aggressively off-putting. Avoid inflammatory rhetoric and table-pounding.

The opening demand and offer should tempt the other side to continue the negotiation. A plaintiff with an unreasonable opening demand invites an unreasonably low opening offer in return. Likewise, an unreasonable opening offer can make a plaintiff think that significant movement on its part is pointless.

Consider all the material terms necessary for settlement. Think about what kind of release the client will want and whether there should be a confidentiality clause. If possible, send a draft of the standard terms your client will require to opposing counsel in advance so that those terms don't become last-minute bargaining chips.

Bring the real decision-maker to the negotiation, the one who can make a deal that you might not have anticipated back in the office. Negotiations develop a dynamic that can slip away if the mediation is adjourned to allow a party to get more authority.

Settlement discussions are almost certain to occur in every civil case. Effective lawyers work strategically to get their clients a satisfactory result.

Hon. Geraldine Soat Brown (Ret.), *served as a U.S. Magistrate Judge for the Northern District of Illinois from 2000-2016. Prior to that, she represented a wide range of parties in litigation and arbitration of complex construction and commercial disputes for 25 years. She can be reached at* ***gsbrown@jamsadr.com****.*

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