2022 CLM Construction Conference
Sept 21st – 23rd 2022
San Diego, California

Creative Settlement Strategies when Coverage is Limited

Standard ISO form CGL policies contain an insuring clause subject to long-standing exclusions, which while remaining substantially the same, have been the subject of interpretation and case law over the years.

For instance, an exclusion defined as "property damage" to "property you [the insured] own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property." In a hypothetical scenario, assume a CGL insured, acting as an owner/builder, constructs a house for the purpose of renting it out on an internet site, and the owner and his renter store personal property in the attic. Leaks in the roof begin following the first heavy rainstorm, and subsequent investigation reveals that the roof was improperly installed. Some of the owner's, and renter's expensive belongings, including fur coats, are ruined as a result of the leaks, and walls are damaged by water intrusion. This exclusion excludes coverage for property damage to personal property owned by the owner/insured and its renter, as well as for damage to the structure.

The damage to the personal and real property in this case would presumably be covered by the owner's first-party property insurance policy, and a subrogation action by the carrier issuing that policy against responsible subcontractors could be covered by their policies. In the case of an Owner Controlled Insurance Program (OCIP) covering the original construction, while there may not be coverage for the owner, if there is a distinction between the owner and general contractor, the general contractor as well as its enrolled subcontractors could receive coverage for damage claims relating to the personal and real property.

In addition to the fact that a claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy, commercial general liability policies also expressly exclude coverage for the insured's faulty workmanship. The standard commercial general liability policy contains an exclusion which provides that there is no coverage under the policy for "property damage to 'your work' arising out of it or any part of it and included in the 'products-

completed operations hazard.' The primary purpose of this exclusion is to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business. Accordingly, where all of the damage that is being claimed is damage to the work of the insured, which is caused by the work of the insured, the "your work" exclusion will apply to preclude coverage.

The inclusion of the "your work" exclusion in a commercial general liability policy discourages the performance of careless work by requiring an insured to pay for losses caused by the insured's own defective work and further prevents liability insurance from becoming a performance bond.

Expert testimony should be allowed wherever it would be helpful to the understanding of the issues in the case. Counsel should seriously consider retaining an expert in a case with alleged structural issues at least for purposes of proving causation. There can be a myriad of factors which can cause or contribute to structural damage to a residence. Counsel is taking an unnecessary risk by relying on the homeowner or other lay witnesses to establish that the defendant's conduct was a proximate cause of the damages. A witness may qualify as an expert based on practical experience and need not necessarily be a degreed engineer or an academic.

Counsel should decide early in the case whether to retain an expert. An expert should be present with counsel at the time of the inspection of the residence. The expert may be needed to develop theories and strategies for prosecution of the claim. The expert can help formulate interrogatories directed to the defendant and prepare counsel on questions to ask or areas to be explored in depositions of other witnesses including experts. The expert may be able to provide drawings, charts, diagrams and other demonstrative evidence for use at trial.

A common defense is lack of maintenance. This should be examined early in a case. The developer may frequently acknowledge that a defect exists, but assert that it results from lack of proper maintenance rather than defective original construction. There undoubtedly are instances when this defense may be valid, particularly when the defective condition is degenerative, *e.g.*, roofing components. Consideration must be given to who had the duty to maintain the property before the filing of litigation. In most cases, the condominium association initially was controlled by the developer who appointed the first board of directors.

The tendency to lay the blame for defects on someone else occasionally manifests itself in the form of an affirmative defense, in which case a developer may claim it relied on the contractor and the architect, or a contractor may claim it relied on the architect, engineer, and developer. All parties may claim that they relied on a local or state agency that approved the plans and granted a certificate of occupancy and should therefore be absolved of liability.

Contributory negligence of a defendant is seldom, if ever, an absolute bar to recovery. The harshness of contributory negligence has been replaced in recent years in most jurisdictions with some form of comparative negligence that allows a plaintiff to recovery even if the plaintiff is partially at fault. Some states have adopted pure comparative fault that allows a plaintiff to recover regardless

of the percentage of his fault. Under the modified comparative fault system, the plaintiff can recover only when he is less than fifty percent at fault.

Obviously, comparative negligence principles apply only if the action is based on negligence. The economic loss doctrine bars tort actions and limits a homeowner to a contract remedy. Although comparative fault principles do not apply to contract actions, the defendant may be able to make the homeowner's failure to mitigate damages an issue in the case. The issue of the plaintiff's comparative fault is required to be raised in an affirmative defense in some jurisdictions. This issue must be preserved in the pleadings, or it may be waived. The failure of the plaintiff to mitigate damages is also commonly raised as an affirmative defense.

Settlement involves compromise. Clients are not interested in compromise when they seek justice in the form of monetary compensation, repairs or other relief. The lawyer who has the experience to know that settlement should be considered has a duty to explain it to the client.

There are several factors that make consideration of settlement a necessity even with the best of cases. There is of course the matter of attorney’s fees and costs of prosecuting the case. If the attorney’s fees are based on an hourly rate this is especially important to the client. Litigation costs can also be substantial. The filing fees, deposition fees, expert fees and related costs of litigation can often amount to several thousand dollars. If the case goes to trial there is always the possibility that either party may appeal the verdict which will result in more attorney’s fees and expenses. Legal fees for an appeal can equal the amount of time spent preparing and trying the case. If the defendant loses at trial he may be required to post a bond if there is an appeal of the verdict against him.

The time for the case to be set for trial is another significant factor. Cases filed in major urban areas may not be placed on a trial docket for two or more years after original filing of the suit. Even in rural venues with smaller populations it may take a year or longer for the case to be set for trial. There may be unexpected delays caused by the addition of parties to the suit, unavailability of witnesses to attend the trial and similar problems. Even if the plaintiff's case proceeds to trial in a timely manner and a favorable verdict is returned, there is the possibility the defendant will file posttrial motions and an appeal. A conservative estimate in most jurisdictions for disposition of posttrial motions and an appeal of the case is a minimum of six months and frequently a year or longer. Under these circumstances, a plaintiff should consider settling for a lesser amount before trial. The settlement funds can be used to make repairs to the residence before additional damage occurs.

In any civil action for damages filed in some jurisdictions, if a defendant files an offer of judgment that is not accepted by the plaintiff within 30 days, the defendant is entitled to recover reasonable costs and attorney's fees incurred by him or her or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least a certain percentage less than that offer, and the court must set off those costs and attorney's fees against the award. The reasonableness of the plaintiff's rejection of the defendants' offer of judgment is irrelevant to the question of the defendants' entitlement to attorney's fees and costs.

Parties and legal counsel need to be aware of the different mediation styles and strategies that are available and offered by providers mediation services. The principal or more common styles of mediation include the following:

Facilitative. A facilitative mediator structures a process to facilitate negotiations and to assist parties to reach a mutually agreeable resolution. The mediator asks questions, validates, and normalizes parties' points of view, searches for needs and interests underneath the positions taken by parties and assists parties in finding and analyzing options for resolution. The facilitative mediator does not provide any recommendations to the parties nor predict what a judge, jury, or arbitrator would do in the case. The mediator generally designs and structures the process while the parties remain in charge of decisions and the outcome of the process. Facilitative mediators seek to ensure that parties come to agreements based on information and understanding.

Evaluative. An evaluative mediator assists parties to reach resolution by pointing out the weaknesses of their cases and predicting what a judge, jury, or arbitrator would likely do. The evaluative mediator may make recommendations to the parties for resolution. Evaluative mediators help parties and attorneys evaluate their legal position, and the costs versus the benefits of pursuing a legal resolution rather than settling in mediation. Evaluative mediators are concerned with the legal rights of parties rather than their needs and interests and evaluates matters based upon legal concepts and principles.

Transformative. A transformative mediator focuses upon the relationship of the parties and their abilities to understand and communicate with each other. Transformative mediators seek to transform parties and enable parties in conflict to develop a greater degree of self-determination, understanding, and responsiveness to each other while they explore solutions to specific issues. The goal of a transformative mediator is to empower parties to see, consider, and recognize the perspectives of others and to strengthen their capacity to analyze situations and to make effective decisions. The guiding philosophy that underlies transformative mediation is the belief that as parties have strengthened capacity to understand each other and to communicate, parties will be empowered to make their own agreements and decisions now and into the future.

Please keep these points below during mediation:

(1) Be proactive. Take advantage of the flexibility of the process. Contact and communicate with the mediator to shape and design a process that most efficiently fits the circumstances and needs. Discuss whether joint sessions are desirable where position statements can be presented, and all parties meet to exchange information and discuss positions, ideas, and options for resolution or whether parties would be better served by being in separate rooms. The mediation process can and should be adapted to suit the needs and circumstances of the case. Determine if review and presentation of key information, testimony, or even expert opinions will be helpful to develop focus on the critical issues and establish the strength of the case. Parties do not need to agree on the facts

to settle. The key is that parties appreciate the risks and benefits of various settlement options and how they meet their particular needs and interests.

(2) Meet early with the selected mediator. Discuss and clarify expectations as to the structure, format, and style of the mediation that is desired and will be most productive. Confirm that all parties agree to general protocols and ground rules for productive mediation discussions.