

Perrin Conferences

National Construction Defect Conference



Improving the Strategic Partnerships Between Claims Professionals & Defense Counsel

Moderator



Cynthia Pertile Tarle, Esq.
Tarle Law
Carlsbad, CA



Kevin Follett
The Riverstone Group
Manchester, NH



Sabrina Rochelle
North American Risk Services
(NARS)
Winter Garden, FL



Emma Tortorici
AmTrust Financial Services, Inc.
Danville, CA

PERRIN NATIONAL CONSTRUCTION DEFECT CONFERENCE

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**Improving the Strategic Partnerships Between
Claims Professionals & Defense Counsel**

Before We Start...



The material presented and discussion points in this presentation are not to be construed as or assumed to be the opinions or positions of the companies with which the panel members are affiliated. No legal or claims handling advice is intended to be relied upon by the audience.

DISCLAIMER

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The Tripartite Relationship – Carrier Perspective

- Immediate tensions in the relationship;
- Hesitancy to communicate openly;
- Claims professionals tasked with determining coverage;
 - Adjusters evaluate coverage issues internally, generating either a reservation of rights or denial; and/or
 - May need to retain outside coverage counsel to evaluate the issues on the insurance companies' behalf;
- Independent counsel demands by insured;
- Layers of complexity to day-to-day caseload management.

The Tripartite Relationship – Defense Perspective

- Stuck in the middle;
- Defense counsel's duty is to the insured and policyholder;
- Case may be impacted by the coverage decisions;
- Tenders of defense and indemnity; Primary, Excess, & AI;
- Insured's expectations;
- Affirmative claims;
- Insured's personal counsel;
- Independent counsel demand by insured.

Strain on Third-Party Vendor Cost & Capacity

- Mediation, expert, and court reporter costs escalating;
- Serious strain on third-party vendor capacity;
- Delays in expert analysis of liability and damages;
- Delays in tracking down cost estimates of product manufacturers and labor prices;
- Product and labor shortages;
 - Direct impact on the ability of defense experts to evaluate damages and cost of repair;
 - Materials have increased 30% to 40% in construction in some instances;
 - Labor and product shortages expanding relocation estimates and diminution in value numbers;
- Transparent communication between claims professional and defense counsel regarding delayed response times and specific basis for same is crucial to avoid further frustrations.

Timely Preparation - Mediation

- Carrier to be notified at least 30 days prior to mediation;
- Difficulty in securing settlement authority on short notice;
- Time is required for carrier to address multiple levels of internal authority;
- Consider Pre-Mediation meeting with client and carrier to discuss strategy;
- Address time on risk among the carriers before the mediation;
- Provide sufficient notice of coverage issues impacting mediation efforts;
- Defense counsel to provide effective analysis;
 - Need reasonable settlement range analysis;
 - Need evidence and information to back up the numbers analysis.

No Surprises!

- Set parameters of the representation from day one;
- Potential impact of defense counsel's deliverables;
 - Might be turned into an internal report by the carrier or client; or
 - Submission to upper management which extends time to respond;
 - May impact an insurer's coverage analysis;
- Claims adjusters pressed for earlier indications of claims with potential to expand;
- Proactive steps to mitigate costs earlier;
 - Allocate appropriate resources and identifying possible preventative measures;
- Insurers need straight answers;
 - Judges, juries, venues, and other case developments beyond their attorneys' control;
 - Insurer sees these outside factors as the exception, not the rule;
- Defense counsel to provide well thought out case assessments and stick to them, avoiding substantial last-minute changes in legal analysis on the eve of trial without proper justification.

Excess Carrier Monitoring

- Tensions between primary and excess carriers;
- Trust factor of underlying counsel;
- Second pair of eyes by excess;
- Impact upon defense by primary carrier;
- Expectations;
 - Reporting to excess carrier;
 - Excess carrier's access to information;
 - Excess carrier's participation at mediation.

Virtual World – Defense Perspective

- Virtual meetings replaced in person encounters essentially overnight;
- Went from dragging banker's boxes to immediately maneuvering brand new technology;
- Virtual depositions limit important observations;
 - Attorneys taking or defending are unable to control environment of the witness;
 - Cannot see fidgeting, hand wringing, sweating, actions during breaks;
 - Witnesses may act different behind the screen than in-person which impacts trial testimony;
 - Cannot "look under the table" to see witness wearing stilettos but claiming vertigo;
 - Impact on ability to fully account for the witness' demeanor and credibility;
- Depersonalized the process of communicating with and obtaining information from clients;
- Ability to even access a client's information and documents became an immediate challenge;
 - Delaying the discovery process, impeding settlement discussions, and postponing trial dates;
- Clients, witnesses, carriers, other attorneys, and even judges and mediators struggle with technology;
- Emboldens plaintiff's and other parties to not engage effectively in mediation efforts.

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Virtual World – Carrier Perspective

- Offices became vacant and adjusters were suddenly required to modify “home space” to “workspace”;
- Reduced collaboration can be detrimental;
- Increased isolation reduces access to information and education;
- Efforts to communicate with their defense counsel disrupted;
- Need for clear concise communications more vital than before;
- Successful mediations and file closure rate of cases higher in-person versus virtual.

Unpredictability of Courts

- Courts continue to be behind in their dockets;
- Tremendous pressure to push cases to trial;
 - Judges more unpredictable as to trial continuances, even when agreed;
- Impact of reduction of personal appearances in the courtroom;
 - Impassioned three-dimensional oral argument has been reduced to sterile interactions between judge and counsel behind a computer screen;
- New onset of PowerPoints during virtual court hearings;
 - Law has not yet caught up.

Social Inflation & Socio-economic Pressures

- Growing number of “nuclear verdicts”, with a seeming lack of sensitivity and even numbness by jurors to multi-million-dollar verdicts;
- Increased need to evaluate potential resolution earlier in the process;
- Plaintiffs and policyholders expect swift resolution of their cases;
 - Often with little understanding of the tremendous burdens the pandemic has placed on these industries to be able to provide that same level of pre-pandemic efficiency;
- Frustration on all sides has increased;
 - Lack of civility between opposing counsel has escalated, creating an inverse reaction on productivity and cost effectiveness.

Expectations

- Evaluate elements of damage against insured and dollars allocated;
- Defense cost of repair and allocation of risk transfer;
- Is additional testing or investigation warranted;
- Carrier conversation with expert, especially as prepare for trial;
- Experts at mediation? Value added?
- What shapes the case: volatile venue; pre-judgment interest; prevailing party and attorneys fees costs; capability of plaintiff's counsel and expert's performance and credibility;
- Percentage of success of certain defenses and how that impacts carrier's view of authority and whether to take the case to trial.

Legal Spend

- Discovery, settlement, and trial decisions cannot be made in a vacuum;
- Carrier guidelines require defense counsel to seek authority related to advancement of litigation, but should include counsel's recommendations and explanation as to why it has "value add";
- Recommendations regarding discovery;
 - Should targeted written discovery be issued prior to fact witness depositions;
 - Is there an opportunity for resolution prior to taking expert depositions;
- Collaboration on litigation strategy necessary between carrier, defense counsel, and insured to effectively manage legal spend;
- Take an honest look at burn rate of legal spend and assess whether to modify or increase budget after communication with claims professionals;
- And, then there is the "principal" of the matter...

In Summary

- Build a solid relationship between claims professional & defense counsel;
- Being proactive strategic partners in defending the claim or lawsuit is the key to managing litigation and obtaining successful result for the insured;
- Trust is at the core of the relationship, which must be earned on both sides;
- Ongoing and open communication is where the heart of the strategic partnership lives, and the constant attention to this vital aspect of the relationship can determine the outcome and success of the strategic partnership both now and in the future.

Questions



Emma Tortorici, VP, Claims Construction Defect,
AmTrust Financial Services, Inc.

Kevin Follett, Executive Claims Analyst, Riverstone
Resources, LLC

Sabrina Rochelle, Construction Defect Manager,
North American Risk Services (NARS)

Cynthia Pertile Tarle, Esq., Founder & Managing
Partner, Tarle Law

Email: CPTarle@tarlelaw.com



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