"BET THE

BY JOHN DEGROOTE AND WENDY TOOLIN BREAU

"Company" Litigation from a Policyholder's Perspective

As anyone who has had to make an insurance claim knows, the relationship between insurers and insureds can have its low points. One court summed up how bad the problem can be: *Ambiguity and incomprehensibility seem to be the favorite tools from the policyholder's perspective, of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication.*[1]

However, it does not have to be that bad — and with careful claims management, it shouldn't be.

Any exploration of "bet the company" litigation necessarily lies at the intersection of defense strategy, insurance law and, though rarely mentioned, management skills. While there are many articles published and seminars run dealing with some of these issues, there don't seem to be as many designed to help guide policyholders through their relationships with their insurers when catastrophic litigation hits. Yet having good relationships with insurers can eliminate one of the major stresses of handling this type of litigation.

To be fair, carriers have a legitimate point when they claim that insurance isn't something to think of for the first time as you settle your case. Maintaining good relationships with your insurers, through the steps discussed in more detail below, can assist a policyholder in getting the insurance that has been contracted. This is the goal a policyholder should pursue when working with a carrier — nothing more and nothing less.

Beyond the specific terms of individual policies and applicable insurance law, policyholders will be well-served to keep four rules in mind:

1. **Always act like a reasonably prudent insured.** When confronted with a decision, what would you do if you were not insured?
2. **Never try to outsmart yourself.** Don't force an argument, rely on colluding with the plaintiff to secure coverage or falsely characterize one claim as another.
3. **Apply an age-old rule.** An insured cannot sue for bad faith without acting in good faith.
4. **Remember that insurers hate surprises.**

This quartet of rules can — and should — serve as every policyholder's North Star in the heat of the moment, when quick decisions with big consequences have to be made. These four rules underlie each of the following tips on how policyholders should govern themselves when the "big case" hits.

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Ten Tips from the Policyholder's Perspective in "Bet the Company" Litigation

1. Know Your Policies and Your Carriers Before a Crisis Arises

Sure, it sounds like an everyday "to do" list. Organize your closet. Balance your checkbook. Exercise. But policyholders need to know that keeping their policies organized over the long term and maintaining good relationships with their carriers is critical *before* the big case hits.

A. *Know your policies.* Policyholders pay dearly for insurance. They spend hundreds of thousands of dollars to tens of millions of dollars a year on it. Yet when they truly need coverage, they often are not ready to rely on it. We've seen countless policyholders who don't even know where their policies are, let alone have read them. This is a critical mistake. Notice provisions under differing policies have varying deadlines, but some require notice fairly quickly — 60 days' notice is not uncommon. When the big case arrives, the dispute may span years, various policies and several carriers. Without an organized insurance file that puts years of coverage at a policyholder's fingertips, and without a basic understanding of what those policies require, notice cannot be given responsibly without a diversion of resources. To ensure that all policies in question are considered, the policyholder must shift focus from the big case to finding and organizing its policies. Doubts about this process can linger for years, but having an organized policy file before disaster strikes will avoid this problem altogether.[2]

B. *Know your carriers (and their professionals).* While many policyholders may not feel it when their claim is called into question, insurers can't stay in business without policyholders. No relationship will secure coverage where none exists, but a good relationship between policyholders and carriers before disaster strikes can help all involved. The investment of time in face-to-face meetings between insurer and insured can yield tremendous dividends. As the carrier learns more about the insured, its people and its needs, policies can be modified to meet unique or new exposures, lines of communication can be forged and credibility can be established. Moreover, good relationships when a claim is not present or urgent can lead to a developing trust that will carry over to those times when you do make a claim. An insured having a good relationship with an insurer can lead to less time required for claims reporting due to fewer challenges/inquiries from insurers as a claim progresses. These less formal benefits can be extremely valuable in the long run.[3]

2. Know Your Case and Know It Early

Many defendants believe that litigation is defined as something you spend $100,000 a month (or more) on until you are ready to learn what it's really about. Sad, but true.

More than any other, the "bet the company" cases require immediate attention. As soon as the company recognizes that the case has hit — no easy task in itself — it must immediately deploy resources to secure an understanding of the facts, theories and potential damages in dispute. Usually, the big case is better suited for a proactive strategy than any other type of matter. If you suspect that is what you are facing, your insurer will appreciate knowing that up front, even if all you have at that stage is a suspicion. If there is one thing that insurers dislike, it is surprise. Using your relationship with your carriers to let them know that you might have a big case will be appreci-

ated. As discussed above, this sort of early communication can also give you early access to your insurer's experience with similar cases, something that can help you spot problem plaintiffs, potential defenses and critical steps to protecting your coverage.

A. *Recognize the "bet the company" case.* Recognizing the big case is not always easy. You can't rely on traditional indicators — there is no typical plaintiff and today's damage demands aren't always credible. But the insured has to see it coming. While not an exhaustive list, catastrophic cases often involve:
   - competitors;
   - regulators with political ambitions;
   - novel legal theories;
   - counterclaims (so be careful who you sue);
   - injunctive or equitable relief;
   - patents and business model challenges;
   - aggressive settlement stances; and
   - very good lawyers.

   Of course, the presence of any single factor on this list is not outcome determinative. But if several of these indicators simultaneously appear in a case, the insured should begin to prepare for "bet the company" litigation.[4]

B. *Why an early understanding of the case is important to you.* Litigation competes with other priorities within any company. It is never easy to secure the resources necessary to develop an early understanding of any significant case. A proactive approach will often conflict with short-term budgets, immediate time constraints and the traditional "ostrich" defense. While these real-life issues might justify putting off an in-depth understanding of the case for some people, having sufficient knowledge to ensure that your coverage is adequately addressed should counterbalance any desire to push the real work into next quarter. As shown below, notice to your carriers requires that you understand exactly what the plaintiffs allege, when they argue it happened, which corporate entities were involved, where it all took place and what policies may be in question.

   You can't make choices without information and as you prepare to notify your carriers, time is not on your side.

3. Once Disaster Hits: Notice, Notice, Notice

No insured can afford to have a "foot fault" when notifying its carriers, but it happens all the time. The primary carrier is notified, but the excess layers are not. The risk manager forgets about the umbrella policy that might be in issue. The broker doesn't know about the policy available after a merger. The in-house counsel misses a short notice period. Someone delays investigating a new claim, believing it to be low-risk, then later discovers that it is "the big one" and the insurer wasn't notified. And so on.

The virtues of knowing your coverage and carriers before a disaster have already been addressed, and notice to your carriers requires knowledge of your coverage. That said, to whom does notice go? The rule here is that, if there is arguable coverage, it is better to provide notice than not. Obviously this has to be done in good faith, but carriers know that a full understanding of the case and perfect notice to just the right carriers are difficult to achieve. So when in doubt, provide notice. If you already have established good relationships with your carriers, their understanding of why you've notified something that might not be covered will be greater than if you are a stranger to them.

The general rule to err on the side of giving notice still leaves open the question as to which policies might apply. The short answer is to look at every policy from every angle, and there are at least four places to look:

A. *The Horizontal Review.* What *types* of policies might apply? Primary policies, excess policies, umbrella policies, environmental policies, advertising policies — even homeowners' policies for certain claims. Look at all the issues involved in your claim and, with a critical eye, see whether those issues arguably fall within a policy's coverage.

B. *The Temporal Review.* Once you have considered what types of coverage might apply, you need to consider which policy year(s) are called into question by your "bet the company" case. Is your coverage written on a "claims made" basis or some other basis? Does your potential loss relate to a single year or does it relate to multiple years? Are you certain? If not, again, err on the side of more notice than less.

C. *The Vertical Review.* Notice to a primary carrier on a coverage tower is not notice to the rest of the tower. Excess carriers are often able to avoid coverage because they were not timely notified of a claim or circumstance, and the claim of the insurance novice that the primary carrier was given notice is generally not sufficient to preserve coverage. When in doubt, notify everyone in the tower.

D. *The "Did I Think of Everything?" Review.* There is no way to list all the miscellaneous questions, but consider reviewing policies of companies acquired over time, any favorable positions taken by your carriers in the past and any past judicial opinions construing policies that might apply (including similarly worded policies to which you are not a party).

E. *Who does the notifying?* A final question for your pre-notice policy review is who should do it. Risk managers may not have the legal training to see tech-

nical nuances in policies that might expand coverage. Coverage counsel may be unaware of past relationship issues between the carrier and the insured, or they may be less familiar with the company itself. The easiest answer here is that — in a "bet the company" case — both should participate as a team.

4. Know Your Coverage Issues Before the Case Progresses

At some point after the case begins, and hopefully sooner rather than later, carriers reserve their rights by sending a letter to the insured listing various defenses to coverage. These "reservation of rights" letters take different forms, from the 15-page missive to something a bit more oblique. Either way, there are almost always questions as to whether a loss will be covered. An insured needs to know early what those questions are in order to avoid uncertainty later in the case.

As the case begins in earnest, the insured needs to know what issues the insurer may invoke to deny coverage. Is it a well-known, anticipated issue such as fraud or punitive damages? Or is it something more specific, like the number of occurrences, the policy year in question or something else? Will the carrier attempt to characterize the notice of loss to a different year, will it argue that the matter relates to an exclusion specifically listed in the policy or will it raise some other defense? This is the time to have a frank discussion with your carrier. What problems does he/she see and how can those be solved?

The insured should work to avoid the situation where the insurer relies on a specific exclusion not anticipated until the case has matured. Usually focused on the dispute between itself and the plaintiff, the insured often gathers documents, questions witnesses and prepares its case without attention to policy exclusions. Unfortunately, this leaves unanswered many policy ambiguities that will eventually need to be addressed. The defense team sensitive to these issues will work to discover facts relating to any potential disagreements between insurer and insured as the case progresses, so that unnecessary coverage uncertainty can be avoided.

Worse than leaving facts undiscovered that could have assisted in construing the underlying policy is the defense lawyer who — unwittingly and perhaps unnecessarily — undermines his client's coverage position. The defense team should understand that, if a coverage dispute matures, every word and every act in defending the underlying case will be scrutinized, and there will not likely be any attorney/client privilege to cloak counsel's most secret thoughts. This is truly an area where the conduct of the self-described "victim" is squarely in issue and for good reason.

As mentioned above, in these instances (and in all instances) the insured must act like a reasonably prudent self-insured. If the insured defends the case knowing the applicable policy sensitivities and is given the opportu-

nity to discover the facts to avoid coverage ambiguity, the insured should have no trouble so long as he is not working to generate coverage where there is none.

5. Know Your Team

The "bet the company" case requires many players: lead counsel, local counsel, in-house counsel, coverage counsel, expert witnesses, witnesses and more. Perhaps the most important decision an insured will make in the big case will be lead defense counsel. Policies differ on how defense counsel is selected and local laws vary on how this relationship must progress, but the insured cannot allow this decision to be made without voicing an opinion. (If the policy in question allows the insured to select counsel, all the better.)

A. *Lead Counsel*. While a primer on how to select outside counsel for the big case is beyond the scope of this article, the insured should require *at least*:

- Actual trial experience (a trait less common than many appreciate);
- Experience before the judge and in the forum involved;
- Specialty counsel for any highly technical or specialized issues;
- Prior exposure to, or the ability to quickly grasp, the insured's industry and business model or way of doing business; and
- Familiarity with, and sensitivity to, insurance issues in general.

In addition, many insureds believe they are best served by using their usual outside counsel for "bet the company" litigation. This may be true, but it may not be — the insured should not let familiarity eclipse a better choice.

As important a factor in selecting lead counsel as all of the above is the independence of outside counsel. Outside counsel occasionally fail to properly serve their clients in order to stay on carriers' "approved lists." If outside counsel is retained by, at the recommendation of, or from a list provided by the insurer, a frank, candid and healthy discussion between counsel and the insured (as the client) must take place. *If the insured is unable to establish that outside counsel is truly independent and not beholden to the insurance company at the outset of the case, alternative arrangements must be made.*[5]

When faced with the desire to retain counsel not included in the insurer's approved list, again your relationship with your carrier can help. Be prepared to demonstrate why the firm you've selected is the best firm for the job, how they understand the insurance issues in the case, and how their fee structure for the case can fit within the insurer's guidelines, whether through actual fee adjustments or through increased efficiency and effectiveness flowing from past experience in the same sort of case or working with your company.

B. *Coverage Counsel.* No matter how tempting it may be to cut this corner and have in-house counsel or in-house risk management staff handle this task, the insured should never do so when truly significant sums are on the line. From the first notice to the carriers to candid (and privileged) discussions about potential exclusions to settlement discussions at the end of the matter, the insured should not try this alone.

Coverage counsel should be sufficiently informed about the case to give guidance to the defense team in terms of evidence that needs to be gathered to support coverage, to aid in ensuring that reports to the insurer are complete and timely, and to help you avoid the pitfalls discussed above.

6. Overcommunicate. Early and Often.

A. *Establish a regular communication protocol.* The need for the insured and insurers to communicate cannot be overstated. A CEO whose company suffered an unexpected, devastating loss once told his lawyer the following, and it applies equally to the carrier/insured relationship as well:

> You can bring me good news. You can bring me bad news. But never bring me a surprise.

The insured should never let its carriers claim surprise. This is easier said than done. As the big case begins to take shape, the insured should establish a protocol for communicating with its carriers: perhaps a monthly status report, a monthly packet including bills and pleadings, or a quarterly email with copies of pleadings attached. In addition, truly significant developments in each case, from settlement demands to substantive motions, should also be communicated to the carriers. While the communication protocol will be somewhat case dependent, it is important that the plan is proactive, that it includes all policies and all excess carriers in question, and that it absolutely, positively gets done.

B. *Communicate beyond the regular communication protocol.* Beyond the regular communication protocol, additional communications can be truly beneficial. For the big case, insureds should consider an occasional "all hands" meeting where the insured, its counsel and relevant carriers can discuss the case. Rather than requiring the insurer to extract the details from cold pleadings and correspondence, an in-person meeting can serve to enhance everyone's understanding of the case, humanize the players in the insurer/insured relationship, and go a long way to working through lengthy reservation of rights letters.[6] Last but not least, insureds should never forget that insurers have plenty of cases their clients consider to be "big cases," and the carriers have likely seen similar disputes play out before. Informal discussions of these prior cases and the ideas that stem from them are often the most overlooked benefit of the insured/insurer relationship.[7]

Whatever your communications strategy, remember to set expectations and exceed them — and never bring your insurer a surprise.

7. Agree. Or Agree to Disagree.

Insureds and carriers occasionally disagree so vehemently that they forget their common enemy: the plaintiff. Reservations of rights letters, coverage counsel and the uncertainty that a potential coverage lapse brings often create chaos on the defense team.

A. *Can you get comfortable with a reservation of rights letter?* Contrary to popular belief, insureds can get comfortable with reservation of rights letters — in fact, they have to, since these letters never seem to go away. The first step in getting comfortable with the carrier's position is to remember that, for a portion of the case, the interests of insurer and insured are perfectly aligned — in the case against the plaintiff. At some point, however, these interests may diverge. This divergence can take place at some of the most tense moments in the case, as this seems to be when many insurers choose to remind their insureds that coverage is in question. The first manifestation of this divergence, however, is the reservation of rights letter.

B. *Get past the boilerplate quickly and begin to move on.* The most productive way to address the divergence of interests between the carrier and its client is to carefully analyze the carrier's reservation of rights position and work with the carrier to determine which points in the letter are "boilerplate," or included in an abundance of caution, and which are genuinely believed to be in issue. Once a productive discussion along these lines has taken place, the insured should provide additional information and perspective to remove any doubt on as many points in the reservation of rights letter as possible.

C. *Agree to disagree, for now.* As the case proceeds, additional facts will be discovered, additional discussions with relevant carriers will take place and the matter will move toward resolution. Entering into a standstill agreement with your insurer at this point can be quite effective. The agreement can be tailored to postpone dealing with coverage disputes until a specific future date or a specified point in the case. They can be tailored to provide continued reimbursement of defense costs, subject to recoupment, thus not completely drying up funds for litigation.

Throughout this process the insured (and coverage counsel), should continue to chip away at inapplicable points in the carrier's reservation of rights letter, with

the ultimate goal of pushing the carrier to a decision as the matter moves to settlement or trial. Absent this, the insured is forced to engage in settlement negotiations or, worse yet, trial with no real comfort on coverage. With any luck the insured will have minimized this or, for all intents and purposes, eliminated it altogether by the time tough decisions have to be made.

8. Settlement: It's Never as Easy as You Would Think

A. *The carrier's interest in settlement*. Even assuming everyone is acting in good faith, settlement is a difficult time for both insured and insurer. Expectations have been set, reserves have been set, and the ever-unpredictable settlement negotiation process has matured in the case to the point that the insured desires to engage the plaintiffs in settlement. The carrier(s) have several interests at work simultaneously:

- *The fact of settlement*. Some policies give the insurer the right to object to settlement independent of the quantum of the settlement. While this right has to be exercised in the context of the insurer's overall duty of good faith, insureds must realize that many policies require the insured to seek carrier approval — no matter how good the deal offered by the plaintiff.[8]
- *The quantum of the settlement*. How good is the deal for the insurer? Just as you have to consider how good the deal may be for your company, including such issues as whether it could encourage others to pursue claims and whether it sends the right message to opposing counsel, your insurer has to consider these issues, as well. And their views on these risks may not match yours.
- *Other incentives driving the settlement*. This is where insureds occasionally try to get "cute" with their settlements, trying to turn a purely commercial-based settlement into a merits-based settlement — and it usually does not work. Is the settlement to avoid bad publicity? The carrier may not care and, unless the policy dictates otherwise, they may have a point. To repair a customer relationship? This is not the carrier's business. To avoid an embarrassing deposition of the CEO? If it doesn't impact the value of the case, this won't likely be a concern to the carrier, and the carrier may not approve the settlement. In each of these cases, the end result is not a denial of settlement, but the insured should recognize that it may be forced to settle with no coverage or a doubt as to coverage, requiring the

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Sample Form

- *Insurance Obligations and Indemnification Provisions* Sample Form and Policy (March 2006) *www.acc.com/legalresources/forms*

Survey

- *Emerging Liability/Indemnification/Insurance Issues for In-house Counsel (February 2004).* Respondents to this survey provided information on indemnification and insurance coverage available to lawyers at their companies, as well as their thoughts on coverage options and emerging liability issues of concern. *www.acc.com/legalresources/surveys*

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insured to prove in a subsequent dispute with its carrier that no economic value was exchanged for these nonmonetary benefits.

- *The wording of the settlement documents.* Carriers will want to review the wording of the settlement documents for two primary reasons: to ensure that they are released and coverage issues. Releasing the insureds is easy. Coverage issues can occasionally be addressed by settlement documents but, consistent with the idea that nothing will help a policyholder secure insurance where there is none, a settlement agreement entered through collusion or mischaracterization will achieve nothing for the insured.

B. *Recognize that your carrier's settlement timeline and legal fee economics may be in direct conflict.* The insured must always keep in mind the economic drivers of the plaintiff's case: damages, likelihood of success and, significantly, the plaintiff's lawyers' investment in the case. Perhaps this view is cynical, but this makes it no less true — everything else being equal, when plaintiffs' fees or contingency efforts are lower, plaintiffs' lawyers may have more incentive (and the ability) to settle the matter early. But this incentive, which leverages counsel's potential early return on investment, conflicts with traditional insurer settlement economics. Right, wrong or otherwise, carriers have long been accused of delaying settlement — appropriate or not — as a part of their business model. Again, the insured's job is to act like a reasonably prudent self-insured: if an early settlement makes sense, the insured should pursue it, but a premature settlement may not be in the best interests of anyone. And again, regular communication with your carrier can help, since those communications may move the insured off its usual approach to settlement and make the carrier more open to the economic benefits of earlier settlement (i.e., reduced defense costs).

C. *Keep the carriers involved to avoid late-case surprises.* Insurance is a business and it has to be run responsibly. The insured cannot wait until the eleventh hour to raise the possibility of settlement. Insurers require time to consider potential settlements, to gain internal approvals and to secure settlement funds. The more notice that can be given, the better. The insured should use natural points in each case to raise the possibility of settlement, from requests for summary adjudication to harmful testimony to me-

diation. It is important to keep the carriers engaged as the big case moves along, so an approval of any settlement (and, just as important, approval of the quantum of settlement) can be secured.

D. *Be prepared as the settlement gets closer.* As settlement gets closer, the game often looks more like musical chairs than an orderly discussion of settlement merits. Cases requiring extreme diligence include those with multiple defendants, multiple carriers, and varying policy limits and other economic drivers for each. No "catch all" advice will work here other than an overarching recommendation to rely on knowledge of the case, knowledge of applicable policies and issues, and knowledge — on a personal level — of your carriers' professionals.

9. Simultaneous Settlement Talks and Coverage Negotiations: It Can Be Done

The worst case for the insured is the fight on two fronts: the underlying litigation proceeds toward trial and the coverage dispute gets no better. The insured may be put in the unenviable position of having to address the underlying lawsuit while reserving the right to pursue its carrier in a subsequent coverage battle. Handling these two matters simultaneously — particularly when one is a "bet the company" matter and the other involves multiple carriers — can be a nightmare. If settlement negotiations progress in the underlying case, the insured will be wise to seek consent to settle and approval of settlement within a stated range. This practice can be used to negate the carriers' coverage defenses on quantum and settlement consent. Although this still does not get coverage to attach, it avoids a dreaded "foot fault" at the least opportune time.[9]

10. Resume Your Relationship With Your Carriers and the Insurance Markets When Your Case Is Done

Few insureds have just one loss, and the insurance markets are an awfully small world. Whether an insured's dispute generated goodwill with its carriers or dissatisfaction, the insured must emerge from every dispute where it started — building and maintaining a relationship with its carriers, organizing and understanding its coverage, and preparing for the next big case.

Remember the Four Rules

No one can anticipate every issue the insured will face, so we leave it where we began. The four rules insureds should always use to govern their conduct include:

1. **Always act like a reasonably prudent insured.** When confronted with a decision, what would you do if you were not insured?
2. **Never try to outsmart yourself.** Never rely on colluding with the plaintiff to secure coverage, force an argument or falsely characterize one claim as another.
3. **Apply an age-old rule.** An insured cannot sue for bad faith without acting in good faith.
4. **Remember — insurers hate surprises.**

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NOTES

1 *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 451 S.W.2d 616, 622-23 (KY 1970)(Osborne, J.).

2 In addition to maintenance of a complete policy file going back many years, the authors recommend that the general counsel and the company's risk manager maintain a continuously updated "Insurance Notebook" containing major policies currently in effect, a list of current contacts for those policies, and a one-page summary of each policy's key terms (e.g., notice requirements, deductibles, limits and key exclusions from cover). These summaries can save you from having to wade through policy language repeatedly to find critical information.

3 What's more, never forget that your insurer has much more experience than you do in handling large claims, and independent of any formal role, they can be a valuable sounding board when the big case hits.

4 See generally John DeGroote, James L. Golden, John R. Linton and Frank C. Vecella, *Taking a Proactive Approach to Catastrophic Litigation*, October 17, 2005, Association of Corporate Counsel *(www.acc.com/legalresources/resource.cfm?show=20317)*.

5 These "alternate arrangements" can take many forms and should take into account the carrier's stated objection. If this is truly a "bet the company" case, compromises can be made. For example, if the carrier objects to outside counsel's hourly rate, rates can be reduced, the insured can make up the difference, or some combination of the two can be discussed. As long as the counsel being objected to is competent, all other objections should be negotiable.

6 One of the most beneficial communications one of the authors ever had with a carrier took place in an all-day, all-hands meeting complete with counsel, carrier and insured to discuss whether to settle the underlying dispute. In this case, no agreement was reached on whether to settle but the insurer was unable to question the level of disclosure by its insured when the subsequent coverage dispute matured.

7 These meetings have at least one additional benefit, as well. In the event any excess carriers are in the room for an all hands meeting, significant issues between the insured and the primary carrier can be subtly raised. These issues come up most frequently in the context of a primary carrier's refusal to settle within the primary carrier's limits; this is a good time to engage the excess carriers in the discussion so the primary carrier is not permitted to refuse to settle based on self-interest alone.

8 As stated above, as settlement negotiations close is not a suggested time to begin educating the carrier on the case.

9 While not for the faint of heart, one of the authors has previously engaged in simultaneous mediation with an underlying plaintiff and a carrier. The fact that the carrier appears in a third room creates uncertainty in the underlying lawsuit, which can help to bring the underlying matter closer to a reasonable settlement range.