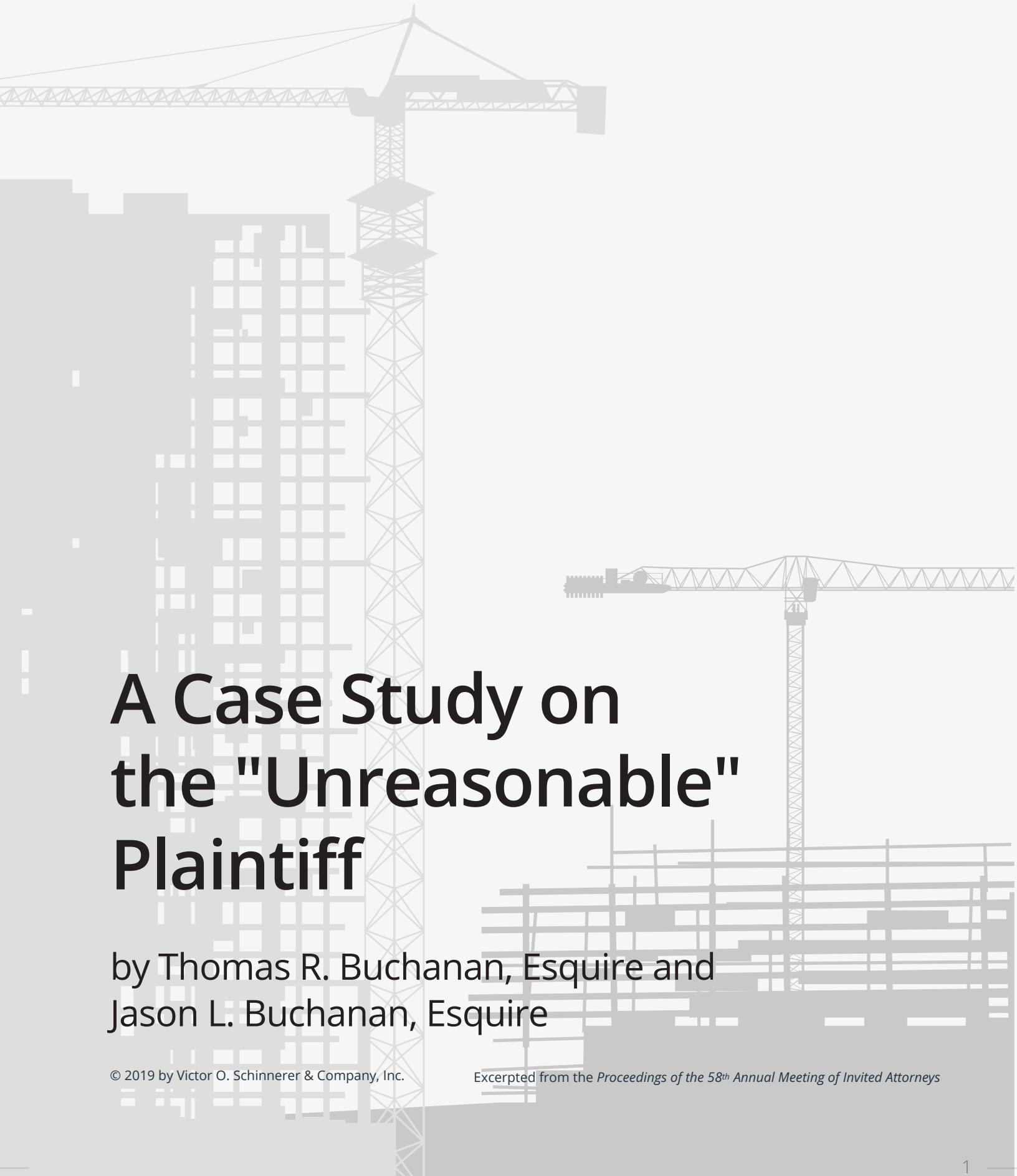

A Case Study on the "Unreasonable" Plaintiff

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When facing plaintiffs with multi-faceted power structures and unclear objectives, claims that originally appear manageable can snowball into major litigation quickly and unpredictably. This case study will provide practical strategies to consider implementing centered around holistic client and customer service, creative risk management and mitigation, strategic legal maneuvering, and resourceful negotiation techniques.

Introduction

There is an old saying that "trial dates settle cases." "The day of reckoning forces the parties to make serious evaluations that, for whatever reason, have been avoided before that date."[1] However, the threat of a pending trial date alone has no impact on a stubborn construction defect litigant. It is not uncommon for plaintiff's counsel and litigation experts to insist on a "remove and replace in its entirety" position to leverage a large monetary payment.[2] In response, construction defect defendants frequently advocate a much more minimum repair scheme at the lowest possible cost. In order for a plaintiff to be in a position to reevaluate its claims short of trial, a defendant must develop a case to accommodate and encourage such reevaluation. This paper discusses the efforts of a construction defect defendant, in cooperation with its insurer, to convince an unreasonable plaintiff to reevaluate its claims in a subject case study.

Case Study Background

The subject case study involved a lawsuit alleging defects in the design and construction of improvements to an earthen dam owned by a government entity plaintiff (the water district). The improvements included an overlay of fill material designed to improve the dam's slope stability. The improvements were designed by the defendant engineer (the Engineer), who also assisted in the bid process and performed certain construction observation services. After the overlay's completion, the water district alleged that the engineer allowed amounts of "dispersive soils" to be incorporated into fill placed as part of the overlay. "Dispersive soils" are a rare type of clay material that has the potential to be eroded by water that is low in ion concentration, such as rain water.[3]

The fill material was placed by a separate defendant contractor (the contractor), who had contracted to build the overlay in strict compliance with the design documents. The design documents specified that dispersive materials were not to be used. However, to save on project costs, the water district had requested that local fill materials be used, some of which apparently contained small amounts of dispersive materials. The water district rebuffed early settlement offers for repair of the dam to be performed in exchange for a release of liability. Instead, the water district elected to retain counsel and a litigation expert to aggressively pursue inflated monetary damages based on complete replacement of the dam overlay.

After the water district filed suit against the engineer for breach of contract and negligence, the engineer filed a third-party claim against the contractor. As a result of the engineer's actions, the water district added direct claims against the contractor. Throughout years of litigation, the water district delayed making routine repairs to the dam by filling erosion holes to advance its claims that full replacement was necessary. Outside the litigation, the water district made statements to the public that the dam was in no way compromised and was not at risk of failure. Nevertheless, in the litigation, the water district, its counsel, and its experts maintained that complete replacement of the dam overlay was the only possible resolution.

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Early Negotiations

In the subject case study, the engineer and its insurer were interested in early resolution of the dispute. To that end, the engineer developed a proposed repair of the alleged defect, including spot repairs and a soil cap that would prevent any further erosion. While monetary settlements are the most common resolution to litigation, potential litigants may also consider an offer of repair. In fact, most states have passed "Notice and Opportunity to Repair" legislation that requires a potential litigant to afford builders an opportunity to repair alleged defects prior to the commencement of a lawsuit.[4] One critical consideration with any repair based settlement offer is whether acceptance of the offer of repair will result in a release of liability. While many states who have passed "Notice and Opportunity to Repair" legislation preclude a contractor from obtaining a release in exchange for an agreement to repair,[5] such an arrangement leaves a construction defect defendant completely exposed to post-repair litigation. As part of its offer to repair, the engineer requested a release of liability from the water district, which was rejected. The water district's insistence on complete replacement of the overlay, the issue of a release of liability and the contractor's non-involvement resulted in a breakdown of early settlement negotiations, including several unproductive mediations.

However, the engineer continued to develop and keep its repair options on the table in an effort to settle the case. This included obtaining a local land expert to pursue the potential purchase of nearby property for use as a low-cost borrow area for fill repair options; retaining a drone service to provide aerial photographs to determine the scope of repairs; and continuously working with its design experts and the contractor to propose alternative repair options at a reduced cost. For all proposed repairs, the engineer endeavored to obtain bids, as opposed to cost estimates. A construction "bid" is a formal offer to perform a specific job at a specific price.[6] A construction "cost estimate" is merely an estimate of expected costs to complete services, but is not actually an offer to perform those services at the estimated cost. In construction litigation, bids carry more weight that an expert's opinion of cost estimates because they demonstrate that the construction professional submitting the bid is sufficiently confident in its accuracy that it is willing to risk its bottom-line. By providing the water district with real world bids, the engineer made a repair-based settlement a realistic prospect for resolving the dispute.

Building a Case to Encourage Reevaluation by a Plaintiff

Additional Insured

A critical aspect of pursuing resolution in any litigation is bringing all possible responsible parties to the table. Where a potential co-defendant is not engaging its own insurer, it may be necessary to take creative steps to bring additional resources to bear. In the subject case study, the contractor was not named as a defendant by the water district, was not participating in early settlement negotiations, and had not tendered the claim to its insurer. In addition to filing claims in the litigation against the contractor, the engineer also elected to pursue an insurance claim through the contractor's insurer on its own, under an additional insured theory.

Liability insurers typically have the contractual right and duty to defend and duty to indemnify for covered claims made under the policy.[7] Insurers owe an implied duty of good faith and fair dealing to their insureds in performing under the policy of insurance. The threshold issue for an insurer's duty to defend is whether it appears from the face of the complaint, or the information obtainable by a reasonable investigation, there is the potential for coverage under the policy. Where there is no potential for coverage under the policy, there is no duty to defend.[8] Thus, the duty to defend arises whenever there is a potential for coverage based on the face of the complaint or petition or the facts obtainable by a prompt, reasonable investigation.[9] It is beyond question that the insurer's duty to defend is broader than its duty to indemnify under the policy. The circumstances in which coverage is found to exist or is found to be excluded are too varied, as well as policy and fact specific to address exhaustively here.

However, whether an additional insured, here the engineer, was covered for its own allegedly negligent acts depends on the language in the policy/endorsement.[10] For example, in *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, Atofina hired a contractor, Triple S, to perform maintenance at its oil refinery. Atofina was an additional insured on Triple S's indemnity policy with Evanston Insurance Company. A Triple S employee was killed while servicing equipment at the refinery, and the employee's family sued Atofina along

with Triple S. Triple S was later dismissed from the suit. Atofina asserted its status as an additional insured and requested coverage related to the remaining litigation. Evanston denied the request, arguing that Atofina was not an additional insured because the policy language did not cover an additional insured for its own negligence. The additional insured endorsement at issue in Evanston provided coverage for "A person or organization for whom [Triple S] [has] agreed to provide insurance as is afforded by this policy; but that person or organization is an insured *only with respect to operations performed by [Triple S] or on [Triple S's] behalf, or facilities owned or used by [Triple S]*." Atofina claimed it was covered by the endorsement because it was an entity for whom Triple S had agreed to provide insurance. Evanston countered by arguing that Atofina was not an additional insured because the endorsement did not cover an additional insured for the additional insured's own negligence.

Although the focus of the *Evanston* decision was indemnity coverage, the court reiterated that the insurer must "determine its duty to defend solely from terms of the policy and the pleadings of the third-party claimant." The court then rejected the fault-based interpretation of the additional insured endorsement. In determining the effect of the policy's limitation of coverage based on allegations that the additional insured itself was negligent, the court held "[t]he particular attribution of fault between insured and additional insured does not change the outcome." The court also noted that had the parties intended to insure Atofina only for vicarious liability, such language was available.

Likewise, in *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, the court found that a railroad listed as an additional insured was covered in litigation that alleged negligence by both the insured and the railroad.[11] The applicable endorsement provided:

> "Blanket—as required by written contract, ***but only with respect to liabilities arising out of their operations performed by or for the named insured***, but excluding any negligent acts committed by such additional insured."

The court explained that the railroad qualified as an additional insured if the plaintiff in the underlying lawsuits sought recovery based on the insured's negligence and not the railroad's. The court applied the "eight corners rule," and compared the policy provisions to the allegations in the underlying petition. Ultimately, the court found that the fact that the petition contained factual allegations that the railroad was at fault—either because of its delegation of duties to the insured or because of its failure to properly supervise and manage the insured's work—did not change the insurer's duty to defend the entire suit.[12]

In the subject case study, the endorsement on the contractor's policy provided that "[the Water District] and [the Engineer] are additional insureds, within the scope of the insured's operations on the General Liability & Umbrella policies." Under "Description of Operations," the endorsement listed the dam overlay project at issue. The contractor's policy further provided that:

> **A. Section II** - Who Is An Insured is amended to include as an additional insured any person or organization whom you are required to add as an additional insured on this policy under a written contract or written agreement. Such person or organization is an additional insured only with respect to liability for "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part, by: (1) Your acts or omissions; or (2) The acts or omissions of those acting on your behalf, in the performance of your ongoing operations or "your work" as included in the "products-completed operations hazard," which is the subject of the written contract or written agreement.

The water district's claims were that the engineer failed to prevent the use of dispersive soils by not testing for them during placement of fill. Thus, the allegations related to the insured contractor's operations in placing the fill and allegations of the engineer's own negligence were not a bar to coverage. There was no language limiting the scope of coverage to vicarious liability. In fact, the endorsement made no reference to vicarious liability whatsoever. By the plain language of the policy, the only limitation on additional insured coverage for the engineer was that the alleged conduct be "within the scope of the insured's operations" on the dam overlay project.

Ultimately, the contractor's insurer provided the engineer a defense under a reservation of rights. By pursuing the additional insured theory, the engineer increased the chances of resolution by bringing additional resources to bear. More importantly, because the contractor's insurer was covering litigation costs for two defendants, an otherwise disinterested defendant was now actively involved in resolving the case.

Challenging Experts and Summary Judgment

Two common methods of case development are expert or "*Daubert*" challenges and motions for summary judgment. In construction litigation, expert witnesses are necessary for establishing a breach of the standard of care and damages. A *Daubert* challenge asks a court to exclude an expert or certain expert opinions from trial. A summary judgment motion asks a court to enter judgment in favor of the moving party because there is no material factual dispute on a determinative issue. By creating the threat that a defendant can potentially eliminate a plaintiff's critical expert or critical claim, a defendant can encourage a plaintiff to reevaluate their prospects in the litigation.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court charged courts to act as "gatekeepers" to exclude irrelevant and/or unreliable expert testimony.[13] The Supreme Court set forth several factors that courts must consider when evaluating expert opinions, including the testability of the expert's method; whether the expert's method has been peer review or published; the error rate for the method; and whether there is general acceptance of the method.[14] Since *Daubert*, case law has developed significantly to eliminate junk science or non-expert opinions masquerading as expert testimony. A successful *Daubert* challenge often leads to a successful summary judgment motion.

In the subject case study, the engineer developed and filed multiple challenges to multiple expert witnesses designated by the water district, including a motion challenging an opinion of one of the water district's experts that the contract at issue was breached. Whether a breach of contract occurs is generally a question of law and while parties may present legal arguments and opinions to courts through legal briefs, expert opinions on legal questions are generally unnecessary and inappropriate.[15]

The engineer also moved to exclude a standard of care expert who had no experience with dispersive soils on earthen dams. An expert may not testify on an area he is not sufficiently qualified in.[16] The water district's chief liability expert had no demonstrated expertise on dispersive soils and his early opinions demonstrated as much. In early reports, the expert:

1. opined that piping was occurring through the dam, which was an impossibility;
2. opined that "rapid draw down" was a concern despite the fact that condition could not have existed with regard to the downstream embankment; and
3. used rainfall data from a location 120 miles away from the dam to suggest the dam had experienced less rain.

The expert had never been an engineer-of-record in charge of a project where dispersive soil was being tested for. Nor had he ever been in charge of the design of any dam, the design of an overlay, the repair to an overlay of an earthen dam, and had never published soil testing guidelines for the construction of a dam. The expert was not a member of the Association of State Dam Safety Officials or the United States Society on Dams, and had never provided design or construction guidelines for dams. He also had never performed an engineering investigation of the soil conditions in the area. As a result of well-developed *Daubert* challenges, the expert had already been forced to withdraw many of his opinions and the water district's confidence in their expert was greatly reduced.

Multiple motions for summary judgment were also developed. One critical expert challenge developed by the engineer attacked a computer generated animation of the scope of damage and repair options developed by the water district's expert using dubious and self-serving input data. The expert provided no source data or methodology for how the animation was created and even testified that he had no opinions about potential repair options. Expert reports that do not disclose the methodology, techniques, and foundational data upon which their opinions are purportedly based should be excluded.[17] A naked and unsupported opinion of a witness is incompetent evidence.[18]

Another interesting aspect of the subject case study was that the engineer was compelled to oppose a summary judgment motion filed by the contractor against the water district. The contractor's agreement with the water district included strict conditions precedent to the water district filing suit, including notifying the contractor and submitting any dispute to the engineer to render a decision. Thereafter, the water district was afforded approximately 90 days to initiate a lawsuit. The water district had not complied with the notice or dispute requirements in the contract and the contractor moved for summary judgment. The water district did not file a strong opposition to the motion, and the engineer was compelled to take action to ensure that the contractor remained in the case and "at the table" for ongoing settlement negotiations.

The engineer effectively opposed the contractor's summary judgment motion by demonstrating that the notice and dispute provisions in the contract only applied to defects discovered during construction. "Because of their harshness and operation, conditions precedent are disfavored."[19] Forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible.[20] Where, as here, the dispute involved latent defects discovered post-construction, the contract provisions were not applicable. Further, the applicable contract provided that the engineer was the initial arbiter of its meaning in any dispute between the contractor and the water district. To defeat summary judgment, the engineer provided the court an affidavit that provided its interpretation of the notice and dispute provisions was that they did not apply to latent defects.

Post-*Daubert*, expert challenges result in some relief being provided from a court on 55% of motions filed.[21] Approximately 25% of expert challenges result in complete exclusion of an expert.[22] Summary judgment motions have a federal success rate between 20% - 40%, with a state defendant success rate below 35%.[23] Accordingly, the presence of a well-developed pending *Daubert* motion or motion for summary judgment creates significant pressure on a plaintiff. Before these motions were filed, settlement negotiations were at a stand-still in the subject case study. After the motions were pending, settlement negotiations became more productive.

Late Negotiations

With multiple motions pending that allowed the water district to reevaluate its position, settlement negotiations became more productive. However, significant effort was required to ensure that those persons actually interested in resolution of the claim were at the table. For settlement to occur, it is imperative that the ultimate decision makers participate in settlement negotiation.[24]

To effectuate any resolution, it is critical to understand a plaintiff's motivations and goals.[25] The water district, a government entity, was composed of various persons and representatives, all of which had their own agendas. The water district's attorney had an interest in a large monetary settlement, not only to ensure his fees were paid, but also to justify his aggressive litigation strategy and recommendations that repair offers be rejected. The water district's litigation experts had an interest in confirming their opinions and/or possible publication. The tax payers comprising the water district had an interest in a timely and effective repair without the risk of a defense verdict. The water district's board members, who were responsible for management of the water district and ultimately controlled the decision to settle the case, had an interest in resolving the case while avoiding public embarrassment.

However, at the original mediation, no board members from the water district were present. While the water district's manager was present, he had no voting authority to approve settlement and largely acquiesced to the positions of the water district's attorney.[26] Both the water district's attorney and its manager seemed unable to fully move away from anything other than a monetary payment for the exaggerated full repair they had been advocating for throughout several years of litigation.

The Engineer ultimately filed a motion to compel another mediation with water district board members present. Board members commonly attend mediation in similar cases and, in the authors' experience, their attendance is often essential to the resolution of an action because it ensures the mediator may engage directly with the most neutral decision makers. For example, in *The Board of Trustees of the Big Spring Independent School District v. Terracon Consultants, et al.*,[27] the entire Big Spring school board attended to discuss resolution of major damage to a new middle school in Big Spring, Texas and the case settled. Similarly, in *Lake Zurich Community Unit School District 95 v. Legat Architects Inc., et al.*,[28] the school board attended and the case involving construction issues with a new school were settled. In *Board of Regents of NorthWest Missouri State University v. Lawhon Construction Company, et al.*,[29] the board of regents attended and the case involving major claims with regard to a new dormitory settled.

Board member attendance at the final court ordered mediation provided fresh eyes with which the water district could reevaluate its claims in light of the litigation realities developed by the engineer. This included the board members' realization that, as part of the water district's litigation strategy, it had been obfuscating its statutory duty to make routine repairs in an effort to chase complete replacement damages that were unreasonable from the outset. Ultimately, the combined efforts of the engineer and its insurer convinced an otherwise unreasonable plaintiff that a favorable settlement short of trial was the best possible outcome.

Endnotes

[1] Choyce Jr., Charles, "Avoiding and Addressing Construction Disputes," 2013 WL 5755157, at *5 *Construction Dispute Resolution*, (2014 Edition).

[2] Jeffrey Weinstein, "Common Sense Strategies to Avoid Construction Litigation," *Prac. Real Est. Law.*, January 2000, at 29.

[3] Conversely, runoff water has the opportunity to attain ions from land surface contact, making it more in ionic balance with the dispersive clays and less erosive.

[4] Anna Amundson & Jessica Thompson, "Does 'Fix-It' Legislation Really Fix It?." 48 No. 9 *DRI For Def.* 28 (Sept. 2006).

[5] See, e.g., Cal. Civ. Code §§ 895-945.5 (West 2014); Nev. Legis. 2 (2015), 2015 Nevada Laws Ch. 2 (A.B. 125) (amending Nev. Rev. Stat. §§ 40.600 – .695 (West 2013)).

[6] BID, *Black's Law Dictionary* (10th ed. 2014).

[7] *Bollinger v. Nuss*, 202 Kan. 326, 449 P.2d 502 (1969); *Rector v. Husted*, 519 P.2d 634 (Kan. 1974); *Associated Wholesale Grocers, Inc., v. Americold Corp.*, 261 Kan. 806, 934 P.2d 65 (1997); *McCormack Baron Management Services, Inc., v. American Guarantee & Liability Ins. Co.*, 989 S.W.2d 168 (Mo. 1999); *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655 (Mo.App. 2008); *Trainwreck West, Inc. v. Burlington Ins. Co.*, 235 S.W.3d 33 (Mo.App. 2007).

[8] *South Central Health Ins. Group v. Harden & Co. Ins. Services Inc.*, 97 P.3d 1031 (Kan. 2004).

[9] *Gilmore v. Beach House, Inc.*, 174 P.3d 439 (Kan.App. 2008); *Shobe v. Kelly*, 279 S.W.3d 203 (Mo.App. 2009); *Miller v. Westport Ins. Corp.*, 200 P.3d 419 (Kan. 2009); *Kansas Health Care Stabilization Fund v. St. Francis Hosp.*, 203 P.3d 33 (Kan.App. 2009); *Custom Hardware Engineering & Consulting, Inc. v. Assurance Co. of America*, 295 S.W.3d 557 (Mo.App. 2009).

[10] *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 664 (Tex.2008) (holding additional insured endorsement providing coverage "with respect to operations performed by [the named insured] on [its] behalf]" provided additional insured coverage for its own negligence because it arose out of the operations of the named insured).

[11] *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 394 S.W.3d 228 (Tex. App. 2012).

[12] *Id.* at 236.

[13] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[14] *Id.*

[15] *Technip Offshore Contractors v. Williams Field Services*, 2006 WL 581273 (S.D. Tex. March 7, 2006) (citing *Interstate Contracting Corp. v. City of Dallas*, 407 F.3d 708, 712 (5th Cir. 2003)); *Sheet Metal Workers, Int'l Assn., Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F3d 418, 424 n. 4 (6th Cir. 2001); see, also, *Vanderbilt Mortgage and Finance, Inc. v. Flores*, 2010 WL 4595592 (Nov. 1, 2010, S.D. Tex.); see, *Koch v. Koch Indus., Inc.*, 2 F.Supp.2d 1385, 1401 n. 4 (D. Kan. 1998) ("Absent any need to clarify or define terms of art, science, or trade, expert opinion testimony to interpret contract language is inadmissible").

[16] See, e.g., *Daubert*, 509 U.S. 579; *Nichols v. Allstate Texas Lloyd's*, 2005 WL 2405922, *2 (S.D. Tex. Sept. 29, 2005) (in claim involving mold growth caused by a leaking roof, expert was permitted to discuss general causation issues concerning mold growth, but, as the expert was not an engineer or a contractor, the expert was not qualified to testify as to whether any construction defect or engineering issues may have caused or contributed to the mold); *Johnson v. Inland Steel Co.*, 140 F.R.D. 367, 372-73 (N.D. Ill. 1992) (prohibited occup. health physician from testifying regarding design and construction of staircase).

[17] See, e.g., *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816-17 (Tex. 2009).

[18] See, *Coastal Transp. Co. v. Crown Cent. Petro. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004); *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 131 (Tex. App.--Texarkana 2008), review granted, judgment rev'd, 313 S.W.3d 837 (Tex. 2010).

[19] *Gulf Liquids New River Project, LLC v. Guisby Eng'g, Inc.*, 356 S.W.3d 54, 64 (Tex.App.-Houston 2011, no pet.), citing, *Criswell v. European Crossroads Shopping Cir.*, 792 S.W.2d 945, 948 (Tex. 1990).

[20] *Criswell*, 792 S.W.2d at 948.

[21] (Dixon/Gill, 2002; Searle, 2015).

[22] *Id.*

[23] (Rindskopf, 2007); Burbank, (2004); (Aberson, 2012).

[24] See, e.g., *Wilson v. Smith & Nephew, Inc.*, 2013 WL 1875949 *1-2 (N.D.Tx. April 10, 2013) (requiring representative of parties to attend the mediation with "full authority to negotiate and settle this matter.").

[25] Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 *U. Pitt. L. Rev.* 701 (Spring 2007).

[26] V.T.C.A., Water Code § 49.103. V.T.C.A., Water Code § 49.051.

[27] 118th Judicial District Court Howard County, Texas, Case. No. No. 00-10-41350.

[28] Circuit Court of Lake County, IL, Case No. 08 L 30.

[29] Circuit Court of Nodaway County, Missouri, Case No. 12ND-CV00288.