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When defendants are fighting each other

How to settle a multi-party case where the defendants are fighting with each other over liability and coverage

This story is for you if . . .

- The defendants are acting dysfunctionally with each other;
- The case would be settleable if you had one defendant to negotiate with;
- There are insurance coverage disputes that are preventing the defendants from properly assessing your case.



Krivis

Jeffrey Krivis

The problem

Certain types of disputes, including product liability, construction and catastrophic events involve multiple defendants who get busy poking holes at each other instead of organizing a way to properly assess your case. The defendants mean well in that they tell you that they would like to settle but they are pressured to redistribute the liability pie among each other, which inevitably delays the proper evaluation of the case until excessive costs are spent. These costs come out of your client's share of the proceeds.

The solution

Find a champion among the defendants and begin an informal negotiation with that party to determine how they view the overall settlement range. Enlist that party as a collaborator toward pulling the other defendants together so that a proper apportionment can be discussed. This might occur by way of a separate "defendants only" mediation without you. However, it would require your providing the champion with some hope that the case is settleable in a range that you can both recommend to your clients.

Another approach is to have the mediator arrange a simple negotiation that results in a tight settlement range but not a specific number. Based on this conversation, the defendants can then agree on a deferral of the final resolution while they arbitrate their percentage of apportionment.

The "pay and chase" approach is often recommended and rarely accepted. This technique requires that one or more of the defendants pay a negotiated settlement amount with you and "chase" the other parties through indemnity actions in the civil case or through a private arbitration.

Another common method is to have the defendants agree to allow the mediator to come up with a recommended apportionment of liability. Since this is non-binding, there is no downside to the defendants and it sets the agenda for further apportionment discussions.

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