

THE ROLE OF MEDIATION AND INSURANCE IN BET THE COMPANY LITIGATION

*Jed Melnick**

INTRODUCTION

When most of us graduate from law school, we are not able to read or understand our own car insurance policy, and yet the resolution of most commercial litigation would not happen without the involvement of insurance. The reality is that, in the context of class actions and “bet the company” litigation, insurance is usually the sole source of funds used to resolve the dispute. What follows is the transcript from a panel discussion that took place on February 9, 2012 at Cardozo Law School entitled, “The Role of Mediation and Insurance in Bet the Company Litigation.” The idea behind this panel was to convene experienced counsel conversant in the role of insurance in large complex litigation to provide an introduction to these concepts. No discussion of the settlement dynamics of complex litigation would be complete without also discussing those issues within the mediation context. The participants on this panel, grizzled veterans of numerous high stakes litigations and mediations involving insurance and insurance coverage issues, discuss the role of insurance and considerations related to insurance in the settlement dynamic.

TRANSCRIPT

MR. BRYAN BRANON: Good evening, everyone. My name is Bryan Branon and I am the Co-President of the Cardozo Dispute Resolution Society. I want to welcome you all here this evening and thank you for coming. Part of the reason I came to Cardozo from the State of Vermont where I was previously located, was the reputation of the ADR program here. Folks like Josh and Jed, the alumni that devote their time to this ADR community that’s one of the best in the country make the Law School so strong. It attracts students from all over the world, and we’re all here to build on the generations of tradi-

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tion that our alumni have set before us. Another reason why our program is so fantastic is because of the direction Lela Love, who is the director of Kukin Program for Conflict Resolution. So, without further ado, everyone, Lela Love.

[Applause]

MS. LELA LOVE: So, I'm the transition to Jed Melnick, who's going to introduce the panel and the topic. But I wanted to say a word about Jed and also I'm going to say a word about Joshua Schwartz, who is one of the speakers, because they're alumni and they're beloved by our program and so some of the things you wouldn't—even those of you who may know Jed or Josh—wouldn't know.

In 1999, Jed founded the *Cardozo Journal of Conflict Resolution*, and the innovation was we were to be the first solely on-line journal in the Lexis/Westlaw constellation. But we subsequently became both print and online. And I want to highlight this point just to say that our program is built on the shoulders of the students and alumni. This *Journal* was the vision of Jed. I was his humble and sometimes sort of begrudging servant who picked it up when he left. He has left Cardozo a legacy in this *Journal*, which is one of the pillar pieces for this school being the sixth most prominent school in the country in *U.S. News and World Report* for dispute resolution.

With the aid of Google since Jed's not going to tell you this about himself, I Googled him and was just amazed because I was still back in 1999 thinking about our discussions of this *Journal*. So Jed is the Pennsylvania Super-Lawyers' rising star and the only rising star in ADR. He was also selected to the 2010 list of "Pennsylvania lawyers on the fast track." From my point of view, JAMS is one of the largest and most significant providers of dispute resolution services. And, Jed, I think this is true, I'm making it up, it doesn't come from Google, but is the youngest mediator on the JAMS panel. Is that true?

MR. JED MELNICK: That's true.

MS. LOVE: That's true. Okay.

MR. MELNICK: The rest of it was made up.

[Laughter]

MS. LOVE: So you can imagine, the whole joy of teaching is having people just shoot right by you and here's somebody who speeded right on by to the stars.

Josh Schwartz when he was here at Cardozo was in our Mediation Clinic and one of its bright stars.

The other thing he did—and I was telling him it was kind of a pivot point for me—he wrote his Note for the *Cardozo Law Review* on mediation and the title of the Note was “Laymen Cannot Lawyer, But is Mediation the Practice of Law?” And it was one of the early pieces examining that question, whether or not mediation is the practice of law, whether mediators can draft agreements and the like. It was a wonderful article. It was cited soon after its publication, and it's been cited in multiple places since. But it alerted me to the importance of student writing. And so part of his legacy is that I hound students from the moment they come in my vicinity, “What's your paper about? When are you getting started? Where's your outline?” I can see Kiara Khapi is in the room. She's in the Mediation Clinic. And she laughed when I said that. That's happening to her.

But I have such deep gratitude to these folks, to JAMS, who is one of the sponsors of this program tonight. And thank you all so much for coming.

Jed, I'm going to turn it to you.

MR. MELNICK: Thank you. Welcome. Before we get started, I want to spend just a couple of minutes telling folks about the origin of this panel because I think it is testimony to everything that Lela said and to the strength of the program that she runs.

I was recently involved in the mediation of all of the securities claims that arose out of a large financial institution's bankruptcy. There were dozens of claims, dozens of cases against the directors and officers, hundreds of lawyers involved. There were numerous mediation sessions literally across the country. And there were hundreds of millions of dollars of insurance that were at issue. Along the way, we had reached impasse on a significant issue and had scheduled a meeting in New York of all of the insurance folks who were involved in the case. One of the lawyers came up to me and said we can't start yet because my client, Josh Schwartz, isn't here yet. And I thought to myself, “Josh Schwartz, I know a Josh Schwartz,

but, hey, it's New York and I'm sure there are lots of Josh Schwartz's. . ." I realize that this sounds like a story from a *New York Times* wedding announcement.

[Laughter]

MR. MELNICK: But, Josh showed up and we had the opportunity to work together on this case. And during some of the downtime, Josh and I found ourselves reminiscing about our fondness for Professor Love and what the Cardozo Mediation Clinic had meant to us personally and professionally in the years since, how we had developed this understanding of how critical it was to understand insurance in order to successfully navigate commercial mediation.

So this panel was the outcome of a joint effort to provide, in a short panel format, an overview of some of the key concepts and issues related to understanding insurance in the context of the mediation of complex commercial disputes.

I hope that one of the takeaways is not only the importance of understanding insurance-related issues, but also an understanding that mediation skills are critical to the navigation of commercial litigation.

I should mention that once Josh showed up, we got past impasse and actually a number of the folks who were involved in that matter and who were instrumental to getting many of those cases resolved are on the panel tonight. In the end, we were able to come up with an incredibly constructive resolution that brought peace to a lot of individuals, provided the insurance industry with a very constructive resolution, and brought money into the hands of claimants who otherwise would have seen that money go to feed the machine of litigation.

So, we've put together this panel. And I'm going to go through the folks on this panel who are far more distinguished with far more accolades than Lela had to provide for me, but I'm going to try to go through it briefly to give you some context for who these folks are and what they bring to commercial litigation and mediation and insurance.

Martha Solinger, is the co-General Counsel of the Lehman Brothers Holdings bankruptcy estate and prior to that Martha was a managing director of global litigation insurance and intellectual property at Lehman and had been there for 21 years.

During that time, her work focused on class actions, complex securities, recovery on insurance claims, and administration of Lehman's litigation disclosure and reserves. During that time, insurance risk management at Lehman reported to her.

Michael Goodstein focuses his practice on directors and officers insurance and liability. He represents carriers as coverage counsel and has extensive experience in representing carriers in all facets of litigation and arbitration around the country. Michael has been involved in representations in connection with D&O claims involving Adelphia Communications Corp., Montana Power, Enron, Dynegy, and WorldCom.

Lisa Brenner is claims counsel for XL Insurance. She handles a wide variety of matters from large security claims like the example we'll be talking about tonight and individual matters for smaller companies. Her specialty is handling complex and difficult cases with significant hands-on needs or ones with multiple parties and anticipated complicated settlement structures. Prior to XL, she was at Chubb Insurance and handled primary fiduciary claims.

Kim Melvin is from Wiley Rein and her practice focuses on the representation of professional liability insurers in a broad range of matters. Recently her practice has focused on advising clients like financial institutions, mutual funds, investment advisors, REITs, rating agencies all caught in the global credit crisis and subprime mortgage meltdown.

Joshua Schwartz is Associate General Counsel and Regional Compliance Officer for ACE Bermuda Insurance, Limited, and Special Counsel to the Enterprise Risk Management Group of the ACE Companies. His responsibilities include providing legal advice on professional lines, excess liability, and property claims, participating in mediations, arbitrations, and other litigation, counseling underwriters on policy wording, ensuring compliance with applicable rules and regulations and providing advice on enterprise risk management issues. Prior to joining ACE, Josh worked as counsel to O'Melveny & Myers and had also been at Fried Frank. And as Lela mentioned, in addition to participating in the Mediation Clinic at Cardozo, John taught a mediation course at NYU.

Paul Ferrillo is at Weil, Gotshal and specializes in complex securities and business litigation. He has substantial experience in the representation of public companies and their directors

and officers and shareholder class and derivative actions. In particular, he has participated in numerous internal investigations on behalf of audit committees and special committees, as well as in the defense of numerous securities class actions alleging accounting irregularities and/or financial fraud. Paul has extensive experience in the area of directors and officers liability insurance issues by virtue of his prior employment with National Union Fire Insurance Company of Pittsburgh and frequently counsels public companies and their boards of directors on a vast array of issues related to the nature, extent, types, and availability of all D&O and management liability insurance-related products.

Okay, assuming we have time left—

[Laughter]

We're going to provide a very brief hypothetical that we can use to discuss some of the issues. Tonight we're talking about litigation involving a large public company that has made a disclosure of a restatement followed by a multi-billion dollar stock drop. To everyone's surprise, there was a 10(b) securities fraud class action filed and there have been initial demands far in excess of the available insurance.

The company has \$100 million in ABC insurance and a \$25 million Side A stacked on top. We'll explain what this means. And as we go along, we'll discuss the differences between dealing with this scenario with a bankrupt as opposed to a viable entity.

For purposes of the discussion, we're going to start with the good times before there was litigation. And I'm going to ask Josh to help us understand what is a tower of insurance, and to give us some perspective on how an insurance company works and what the products are that it offers to the market of large public companies.

MR. SCHWARTZ: Jed, just so that I have things straight, are we assuming also that there is a companion shareholder derivative action along with the 10(b)(5)? Or are we just going to straight 10(b)(5) on this?

MR. MELNICK: We should assume there are the usual plethora of accompanying actions.

MR. SCHWARTZ: Well, thank you, Jed, for the wonderful introduction for all of us and also thank you, Lela, and I don't

know where Bryan went, but thank you for all you did in setting this up.

It's great to be here. There are some folks who are current colleagues, former colleagues, and I also see some law students here, so it's a nice mix of people. We did want to give a very quick, brief primer for some of the folks who aren't as involved in insurance, like I was when I graduated from Cardozo. At that time I had no idea what an "ABC" tower was. So very briefly, it is a Directors & Officers insurance policy. ABC stands for Side A, Side B, and Side C coverage. Side A cover is personal asset protection for the directors and officers when the company can not indemnify them. Side A is thus the most important personal coverage for any individual working for a company. There's also a separate coverage as part of the ABC, which is Side B. And that is corporate balance sheet insurance protection for when the company has to indemnify a director or officer. Then the company is able to turn around and say to the insurer, we just had to indemnify; it's now your turn to indemnify us under Side B. Side C is when the company itself is sued for securities fraud. It's distinct from the A and the B because you don't need to have a director or an officer involved to trigger the cover.

What Jed explained was that there was an ABC tower of \$100 million and then there was a Side A tower on top of that of \$25 million. The way it works is that there are usually a number of insurers who provide the cover, with one layer stacked on top of the next. For example, each insurer can provide either \$10 million, \$15 million, \$20 million or \$25 million each. So you'll see these stacked layers one on top of the other. And that's how you'll sort of grow the \$100 million insurance tower of ABC cover.

The problem is that the Side B and the Side C cover trigger more quickly and more frequently than Side A (which is for non-indemnifiable director/officer losses). When you see a very big loss, the B and the C can exhaust all of the ABC insurance money and there is nothing for the individual directors and officers for the non-indemnifiable loss that they're facing. So folks often buy a Side A tower on top of the ABC tower, which sits excess of \$100 million in Jed's example. And after the \$100 million is exhausted, you still have this other \$25 million in Side A coverage for directors and officers. If the company is bankrupt or if there is a judgment or settlement in

a shareholder derivative suit, those are things that typically will not be indemnified either because the corporation's by-laws say you can't do it, the corporation is unable to do it because they're in bankruptcy or they're unwilling to indemnify for one reason or another.

That's the basic structure that we're going to be thinking about. And to answer Jed's question about what insurance companies think about when deciding to write a risk, it's interesting. I'm a litigator and I've spent the last five years working for a client, ACE. So I'm learning —well, by now, I'd like to think I've got the insurance, at least the principles down. More recently, I've started working with underwriters on their wordings and they occasionally bring me to meet with clients. It's very interesting to see what the underwriters look at. They really bore into the balance sheet. They study it to see whether there is a credit risk here, is this someone who might become bankrupt? The problem is that at times there are allegations of fraud in these securities class action cases, and it can be challenging for the underwriters to uncover the fraud when they're doing their due diligence to see if they want to write the risk. So there are some big judgment calls that get made. And about 90% of our clients come to Bermuda, so we sit down, we look them in the eye and get a feel for their culture and the way in which they handle risk and manage things. My company does a lot of Side A insurance, and it is really very important protection to these individuals. I mean, they could lose their home, all of their assets, if they don't have this insurance. So we take it very seriously. ACE Bermuda has a subsidiary, CODA, which has been doing it for 25 years. It's one of the flagship Side A carriers. I love working on this because we're really helping individuals to avoid a really bad day or more than that.

That's sort of our 101 on insurance for the folks who weren't familiar with that. And to the folks who advised me who are in the audience, thank you for bearing with that.

MR. MELNICK: Thank you Josh. What I want to do is turn to Paul, who as I described in his bio counsels companies on choosing insurance products. Paul, when you are advising a large public corporation that is going into the market and trying to determine what insurance they should buy, what are you talking about with that company and what are you advising them?

MR. PAUL FERRILLO: Well, first a couple of things. I didn't go to Cardozo, so I apologize. Don't hold that against me, please. I went to St. Johns, a lesser school. Second, as Jed said, I have a dirty little secret. I used to be one of those guys with the exception of Martha down on the corner. I used to work for a very big insurance company doing exactly what these guys are doing before I went to the side of good rather than the side of darkness. That taught me a lot. It really taught me that insurance companies are only good if they pay claims. And if they don't pay claims, they're not so good. And, you know, when I transferred over to Weil, day one they sat me down and said okay, you can do whatever you want on the securities side, but you have to counsel all of the public companies in the world on D&O insurance. I said thanks a lot.

But the real truth of it is that it all depends upon people like Josh who are at these insurance companies. It all depends upon the mindset of the insurance company. So the first thing I tell clients is to be careful who you choose as your primary carrier. Remember, your primary carrier controls the destiny of the rest of your tower. If the primary carrier doesn't pay, then the rest of the carriers aren't going to pay and it's a problem. And there are very few primary carriers out in the marketplace for big public companies who can provide large limits. Fortunately the two carriers on this panel I can't say anything bad about, at least today.

So this is a function of, Jed, who you use as your primary carrier. Second is a function of how much limit you buy. The biggest problem that we face is that clients tend not to buy enough insurance. And then they have a really, really, really big problem and they don't have enough insurance and it comes back to my group to figure out how the hell are we supposed to settle it within the limits. The other thing we deal with is, as Josh said, when there's a fraud involved or allegations of fraud, then there may be coverage issues involved, though there are never coverage issues with Weil, Gotshal clients. So, the basic rule of thumb—this is totally inexact—take your market cap, figure a 50% market cap loss, and take 10% of the number—that should probably be what your limit of insurance is in terms of what you buy. In terms of what you buy, A versus B versus C, good luck. Have at it. But, you know, governance says you really need to buy Side A only directors and officers or your boards of directors are going to

look at you and say no, I'm not sitting on this board because you don't have enough insurance and you don't have the right amount.

So I think, Jed, this is a who you know, how much to buy, and where do you go to buy it question. You go to a big insurance broker, one that really knows what they're doing, for instance, AON or Marsh, that has the ability to counsel corporations overseas and the like. So, complicated, but really simple, when you are counseling a big public company, especially when you're talking about a company with multinational operations, you have to go to the right carrier to buy insurance or they're not going to pay.

MS. MARTHA SOLINGER: As a buyer of insurance in my past, I would also just add that it was interesting, Josh mentioned looking at the company's balance sheet, one of the things that we always did was make sure that we had a very highly-rated company so that you knew that they could pay when the time came to pay. And one of the ways that we would always achieve the determination of how much to buy was by pure benchmarking and working with our broker to figure out what everybody else—what all of our competitors had and adjusting it in that range.

MR. MELNICK: Well, Martha, I actually wanted to turn to you for the next question. Unfortunately, the good times have ended and—,

MS. SOLINGER: [Interposing] Don't I know it.

[Laughter]

MR. MELNICK: —and the restatement has been disclosed, the stock has dropped, and the company has been served with the class action and derivative litigation. Give us a window into what the company is doing and thinking in terms of assessing their insurance and starting to develop a defense strategy?

MS. SOLINGER: Sure. Well, first I want to say that while I am very familiar with the concept of the good times ending having worked for a bankrupt company for three years now, I don't know anything about restatements because we never had to do that. But what we assume is that the company has bought this D&O insurance and this is exactly the kind of situation that you look to it for. It should cover all of the individuals named, which are probably the board of directors and some of the se-

nior officers within the company. And that's specifically what Side A is there for.

The insurance is going to cover the legal fees after the so-called retention is met. Retention is basically just a deductible like in your health insurance, like in your auto insurance. You agree on some number that you, the company, will pay before the insurance kicks in. And in a big company it could be \$10 million, it could be \$25 million or probably something in between. But it's going to be in that range so that the company has skin in the game so that they are, you know, not just sort of building up fees randomly and without caring.

So that's what the insurance is going to do here. And what is the company is going to do? Well, the first thing that I think you're going to do is very broadly think about your defense strategy because that's going to drive who you select as counsel and it's going to drive some of what you say to your carriers and sort of how you begin to approach them.

And so you're going to first look at the complaint and you're going to think about whether there's a clear motion to dismiss there. You're going to think about who the witnesses are going to be here and are they some of your most favorite, articulate, smart, well-spoken people or are they sort of maybe your trader types who can't focus on anything for more than ten seconds and are just sort of scattered and—or maybe they're people who were just fired in some reduction in force and aren't too happy or maybe they're people who were, in fact, the confidential sources for some of the allegations in the complaint.

So you sort of need to think about who—where did they get this information—it's not in the public domain—and will those people be involved.

And the very first thing you're going to do is send out a document retention notice, although you've probably done that as soon as the restatement hit. And you're going to think about what kind of documents are involved.

So that's going to lead you next to putting the carriers on notice. You're going to write a letter and say we've got this lawsuit, here's a copy of it. Depending on who your primary carrier is, you're either going to clear your selection of counsel or you're going to be limited in your selection of counsel to

their panel. My preference is I get to pick who I want and they, within reason, will agree to it.

And then I'm going to think about counsel and I'm going to have a number of considerations there that come out of my thinking about the strategy. Is this something that the company feels so strongly about that we're really willing to go to trial? Not often. It's not going to happen in a case like this. But if it is, then you're going to really pick someone who's going to be a great trial lawyer. Do you think you have a great motion to dismiss? You're going to pick a fabulous writer. Or, if, this is really bad, we restated this, it's ugly, it's bad publicity, we want to get this settled as quickly as possible—you want the person who is really great negotiator, is going to get along with people and get it done.

And so that's one way your strategy is going to impact who you pick. Obviously where the case is going will impact that selection. Your own chemistry with those people, you may know a lot of lawyers and some of them—may be screamers, some of them may be easygoing. Some may have a sense of humor so that when you talk to them every day about this case you enjoy it.

Then you have to think about the judge. We had a case not so long ago where there was a law firm we would have used, but we really liked the judge that we drew and he was out of this law firm and he would have recused himself from any case that this law firm had. So that knocked them right out of the box. So you've got to think about who your judge is.

And you might want to think about who the plaintiff's lawyer is and what kind of relationship that lawyer has with the lawyers you're thinking about because you don't want it to be that they are blood enemies and it's just going to be ugly and not a lot of fun for anyone.

So I think that's where you're going to get started and you're going to be pretty busy for a few days doing that.

MR. MELNICK: Martha, what about price or the cost of the defense counsel?

MS. SOLINGER: Oh, what do I care about that?

[Laughter]

MICHAEL GOODSTEIN: Paul, what about your skin in the game?

Mr. FERRILLO: We're worth every penny, Michael.

Mr. GOODSTEIN: But it's important in the context of what we're discussing here because we're assuming \$100 million, perhaps \$125 million of insurance available to, at the end of the day, settle the case. And it's important to understand that these are wasting policies.

MR. FERRILLO: So if Martha goes out and hires Weil, Gotshal and Weil, Gotshal is, as we said well worth every penny and there are a lot of pennies, there's not going to be \$100 million, \$125 million come settlement.

MS. SOLINGER: Well, I think there are two or three different answers to that. The most glib is probably that we're positing that this is bet the company litigation. And in that instance, I'm not going to pick the local guy or the small boutique firm in New York who charges, you know, 30% less than Weil, Gotshal because I've not only got to get the best representation—but representation that the board of directors is comfortable with, one that, nobody is going to question, that the president or the CEO is not going to say, “why did you pick those schmoes?” So I have political cover, to be blunt, and in the context of bet-the-company cases, I care. In any event, I think that the carriers often extract a discount, so we're going to get a discount, and we can always talk about budgets. But the main thing we're going to do is to work really closely with the lawyers we pick and we're going to make sure they don't have six billing lawyers at meetings and we're going to make sure that we take the discovery in-house and we're going to do things to make that as cost-effective as we can without sacrificing quality.

MR. MELNICK: Lisa, please give us some perspective from the primary carrier. We've heard from the company and we've heard about the company's considerations. But now, Lisa, you're sitting there and you are from the insurance company that holds the primary policy. You have now been put on notice that the company has been sued. What do you do next?

MS. LISA BRENNER: Well, okay, so we've been put on notice. We often don't get much when we're put on notice, usually just a complaint. Sometimes we get a cover letter with a lot of names on them and, you know, nothing really attached to those names. And usually I go and get the insurance policy, which isn't really discussed here. But I need the policy to fig-

ure out what's going on, because really it is a contract. And I have to follow that contract to the best of my ability according to the complaint that comes in.

So we've been put on notice that our insured has been sued. I go through the complaint, I go through the policy, and I look at the list of names. The first thing I try do is to make a phone call. I try to make some sort of contact with that list of names, even before I've made any decisions, even before I really know what's going on, because I find that the best way to know what's going on is to talk to the people who have already been dealing with this pre-litigation. They've thought about it and wrestled with it to some extent already. And, in fact, usually the things that we think about are very similar. Ultimately I have found that no matter what kind of case it is, I hope anyway that the insurance company and the insured have very similar goals. It doesn't always work out that way. We'll get to that in a second. But at least at the beginning everybody wants this resolved in an effective, efficient manner and hopefully quickly.

MS. SOLINGER: And Lisa is discussing how little she knows and rightly so because we just have sent her a cover letter, here is this complaint, you're on notice, you know, start paying fees when we're ready. One of the things that I forgot to say is that something we will try to do as early as possible is once we've got counsel in place and we sort of have something of a plan, you know, we're going to make a motion to dismiss and we're going to, you know, here's how - - what we're going to say in it is to call a meeting of all of the carriers and their counsel if they have them and tell then what's going on. And that way is the beginning of a very important relationship that we're going to continue to follow here.

MS. BRENNER: Yeah, and I think that's really important. It doesn't always happen and so—

MS. SOLINGER: [Interposing] It doesn't usually.

[Laughter]

MS. KIM MELVIN: I have to say that as the primary insurer, at least if I represent a client in that position, I would also call that meeting if it isn't already done because a lot of these things start with the relationships. If you don't know who defense counsel is, if you don't know who the insured is, if you don't know what people are thinking, it affects the case as it

goes on. And I think you get further and further apart and can disagree on ways to move the case along. Usually someone in Martha's position has already thought about how they want the case to go to, who they want to defend it. And we may not always agree, but if I at least know what you're thinking, if I at least know what defense counsel is thinking right off the bat, then even if we don't agree, we can talk it out and figure out a good way to solve whatever problems come up. And so, I think that that's one of the most important things - to set something up right away.

MS. SOLINGER: While I think that best practice is to get together as early as possible, outside counsel particularly often view the insurance group as at least quasi-adversaries. And, in some measure, until you know you're going to get the coverage for sure everyone treads carefully. There are certainly attorney/client privilege issues, but, you know, on the other hand, you're not going to get something from someone you're not friends with.

MS. BRENNER: No, no, or at least cordial enough that you can exchange information in a very, you know, evenhanded manner. And I don't expect to get everything when we have these meetings. I don't expect to have everything that's in their minds. But even just to start out and determine that at least we're all on the same page, even if we don't agree, which leads me to the next thing that I do after I introduce myself and try to start that relationship and this is where I risk being perceived as the force of darkness in some circumstances.

MS. MELVIN: No, Paul thinks you're the ATM.

[Laughter]

MS. BRENNER: Yeah. And, I like to think that, my role in part is to try to blast away that image of the force of darkness, you know?

MS. MELVIN: How could you be the force of darkness?

MS. BRENNER: Exactly. In any event, that's when I finally know a little bit about what's going on, I reread the complaint and I read the policy and I look at who they've chosen as defense counsel. The policy will tell me whether they get to choose defense counsel or whether I, have to choose defense counsel. And most of the time in these sorts of circumstances, the insured will choose defense counsel. So then I have to go

through a very similar process and decide if it is someone that I can work with, is it someone that will work with the insurance company and give me what I need to move forward with the case. And that's not always the same information or the same goal as what the insured needs or what the company needs to move the litigation forward. And so it's good if we can all agree on counsel. We tend often to use similar people because it doesn't work quite so well if you've got unfamiliar or antagonistic defense counsel - - which happens sometimes. It's unfortunate, but it does happen sometimes.

MS. SOLINGER: Plus the carriers recognize it's about bet the company litigation.

MS. MELVIN: Let's remember that you're not talking about some small public company having a dispute in Alabama. These are really significant cases and the insurance company realizes that they're going to push on the rates and—it behooves Martha to work with us on that because she wants to get the discount, too. But for the most part and there may be some exceptions that I'm sure Paul will chime in about, but the carriers respect that. The primary carriers that play in this space are repeat players and they get that the board is going to demand of Martha that it's a name they know and that if things don't go exactly right they're not left wondering what the heck did you do here.

MR. MELNICK: In a moment I'm going to turn to coverage counsel and what they're doing in all of this, but before I do, I want to ask Josh what are the considerations for an excess carrier at the start of litigation and how an excess carrier is looking at a file and a claim that's come in as distinguished from a primary carrier?

MR. SCHWARTZ: Sure. Just for everyone's benefit, excess carriers are the folks who we could say in this hypothetical attach excess of \$50 million or excess of \$75 million. If there's a big loss, they're going to be called upon to potentially fund part of the settlement. So what our claims folks do, and I work with them, is analyze the same information that's given to Lisa, the primary insurer. Usually we're a Side A carrier, so in our hypothetical, we would be that \$25 million excess of \$100 million. We would first investigate the claim and determine whether this claim could trigger Side A? Has the company filed for bankruptcy? If so, the company would most likely be

relieved of its obligation to indemnify its directors and officers. Is there a derivative suit? Because in a derivative suit, while the defense costs are indemnifiable by the company, the settlement or judgment likely would not be indemnifiable. So if there is a derivative suit or insolvency, we pay a little bit closer attention and may get more involved in the underlying claim. One of the things we're always looking to do is partner with our insureds because if we're high up and we're making a payment, there's the possibility the insured(s) may have to make a payment, too. So if we could work together to devise a strategy that gets it resolved below my attachment point, that's a great day for me and it's a great day for my clients. The plaintiff is the adversary, not my client who is the defendant-insured, and let's go fight this case together. But you don't want to get into a fight with your client. It's not a very good business model to pick fights with your clients. So we do try to think of ways that we could add value, get in early to benefit both of us.

MR. MELNICK: Let me turn to Michael to give some context to the panel and talk about the role of coverage counsel as we go through this. Let us assume the litigation battle is now going full steam ahead and the insurance carrier has hired coverage counsel. Why? What does that mean and does it mean that you're now at odds with your insured? And then if you could transition us to the settlement process and what kind of conversations are you having with your insured and what are kinds of considerations are you having about initiating mediation?

MR. MICHAEL GOODSTEIN: We're assuming a bet-the-company scenario. So coverage counsel is typically retained. And this might've been a better question for Josh. But because there is a recognition of significant exposure, that exposure needs to be policed and monitored and evaluated. If it's a serious and significant case that presents allegations of serious fraud, coverage counsel will be asked by the insurance carrier (our clients) to ascertain if there are coverage issues. This is a contract and like any other contract it has terms and conditions and some things are covered and some things are not. You know, Paul will tell you everything is covered, but that's not the way of the world and that's not what our underwriters pay. So we generally have a dual role in working with the insured and their defense counsel in partnership, on a non-ad-

versarial basis is the aspiration in order to manage and understand the risk. So it should not be an adversarial relationship in the real world. And even where coverage issues are raised, they still should be discussed and debated in a polite way because we are all regular players in these situations. We see each other all the time. So if I raise a coverage issue, Paul is going to tell me what he thinks of it. And, you know, it's not going to poison the relationship. It really comes down to at the end of the day when it comes time to settle it, is a settlement achievable? And we work around the exposure and any other issues, coverage or otherwise, that may be present.

MR. FERRILLO: I think Michael's right. Coverage counsel is somewhat of a bad moniker because in most cases Michael and his partners and the insurance carriers have been in so many cases that essentially they are your advocates and your helpers as you're turning the dial towards the settlement mode. They've been in so many terrible cases. You know, we joke about coverage, but in this day because the underwriting of policies is so broad, mostly everything is covered and even allegations of fraud unless there has been a final adjudication is likely to be covered as well. So at the end of the day, though Michael may be "coverage counsel," he is there to assist and stand by me and Martha, for instance, in a particular case and help figure out how do we achieve the best resolution possible. And, again, we're speaking about the case where in all likelihood you are not going to win the motion to dismiss and the defense side is going to have to give serious consideration about how and when to get into settlement mode.

MR. GOODSTEIN: And here I thought you were going to say we were non-coverage counsel.

[Laughter]

MS. MELVIN: —I think that's important. When I get this complaint in, I know that there are certain coverage defenses that are going to arise and we are going to be reserving rights and I'm, maybe not saying the nicest thing in a letter that's going to be going out. Even if I do say yes, this is covered, it's always yes, it's covered, but, and then there's a list of things that may or may not come into play later on. Certainly in a mediation, which we'll talk about soon. But, I'd like to think that, I don't want to raise or push too hard on a position that I don't

want to be faced with later because we are all going to run into each other again and we are all going to be discussing things very similar to this in the future. So I may talk about a lot of the coverage defenses and we may think about things that could be raised, but one of the reasons why I would look to do as coverage counsel is to be able to flesh those out to make sure that when we do make a real coverage defense argument that we mean it, we understand it, and we believe in it, at least enough to be in a position to negotiate or work with the insured.

MR. GOODSTEIN: So you asked me about the timing of the mediation.

MR. MELNICK: I'm glad you raised that, Michael, because at some point we have to talk about mediation.

MR. GOODSTEIN: Okay, in my humble opinion and if the world works the way it should and these policies do contain cooperation clauses, the insured can't settle without us unless it's within the retention. It's defense counsel and it's the insured who are on the frontline and who are having first party contacts with the plaintiff's counsel and they have the better sense of what the appetite is towards settlement and can take their temperature. So in the best of worlds, if the dynamic is working and the insureds and the insurers are sharing information and are acting in partnership, then we rely on defense counsel to tell us when it's right to approach the plaintiffs about mediation. Now 9 times out of 10 that's not going to happen until after a motion to dismiss, in these cases in particular, is decided so that the parties have a better understanding of what the real case looks like and perhaps what the court is thinking about it. But generally in terms of when to initiate it, I generally defer to defense counsel when they're working in partnership with us.

MS. SOLINGER: I find there's a little bit of a dance. I agree that I'm certainly always the first to say, "when are we settling, when are we settling, and stop spending all of this money because you know the case is going to settle." That's what litigation does. As I always say, discovery is the thing that goes on between the filing of the complaint and the settlement of the case. And so, the dance I see is that you have this cooperation situation, this cooperation requirement, and you don't really want to get too far out ahead of the carriers, but you don't

want to start talking about settlement if there's just no possibility at all. You want to come to the carriers with a little bit more meat than that. So you go and talk to the plaintiffs and you say, will you talk about settlement, can we maybe mediate, if you think we can, who would you like to mediate with and, you start to dance with the plaintiffs a little bit. And then you go back to the carriers and put a lot of it in the passive voice- there was this conversation so it doesn't seem like necessarily you were initiating settlement discussions without consulting them.

MR. FERRILLO: There was some chitchat.

MS. SOLINGER: Yes. There was chitchat or there wasn't, yeah, exactly. And I think that the carriers appreciate the fact that you've got to get it going somehow and you can't really start it with three parties. Two have to start talking and then you need to bring your partner in.

MR. GOODSTEIN: Well, and the fact of the matter is, again, if we're talking about people who do this all the time, the members of the plaintiffs bar who prosecute these claims and are bringing them, they understand that the way they're going to typically monetize their claim is through the insurance. They also understand how the insurance works. Under the PSLRA, discovery is stayed pending a motion to dismiss. And so that's usually when they probably want to talk, because they understand that discovery in these kinds of cases is outrageously expensive.

MR. MELNICK: So let me turn to Kim for a moment and we've talked about towers of insurance and coverage counsel and coverage issues, but I'm wondering if you can let everyone in on the practicalities of how coverage issues and layers of insurance drive settlement strategy with plaintiffs.

MS. MELVIN: Well, that's not an easy one to touch in a few seconds, but, let's talk about it. If you have a policy, it's a contract. The coverage issue just means your defense as to whether something falls within the scope or is otherwise excluded from the policy. And coverage issues come in a variety of gradations. When you're talking about a securities claim like we are here, though, that's what these policies are typically intended to cover, if Paul will allow me to say that in this context. And certainly with respect to the litigation costs, that's one of the fundamental reasons why this insurance is out

there and is bought and sold so frequently. So when we're talking about coverage issues within mediation, these aren't the dispositive issues of whether there's no coverage for the litigation, right? You're not going to be at the mediation table then. And we're not talking about the points that Lisa was saying where an insurer is never going to say yes, there's coverage, full stop. They're going to say there's coverage, but we reserve rights on these things that'll probably never happen, but because the law requires us to articulate it, we're going to send you this reservation of rights letters. And then in between those two extremes are significant, real coverage issues that impact the quantum of insurance available, the players involved, and potentially that if certain facts were to develop a certain way these issues could take out or significantly decrease the amount of insurance available. And those are the issues that the carriers have to raise. They must raise them or else they'll waive them. And at the outset, when at the same time you have Martha and Lisa and Paul all trying to row the boat together and trying to defend this litigation, the insurers have to come out with these seemingly adversarial positions. And then to add to the complexity to it, you've got the primary carrier and usually numerous excess carriers if it's \$125 million tower, I don't think carriers are writing \$25 million limits any more so you're probably talking \$15 million, \$10 million, and \$5 million layers.

[Laughter]

MS. MELVIN: And so you can get 8 to 15 carriers in the room at this mediation when we get there. And it's probably not surprising to anybody in this room that a primary carrier facing a significant securities case knows that the moment the PSLRA bar is lifted, their policy is toast. Their motivation in the context of settling could be very different than Josh sitting in excess of \$100 million. He may want this case to settle as soon as possible. On the other hand, the people in the middle of the tower may have a different motivation because they don't know if they're toast yet. They don't know. When you are facing a huge stock drop, plaintiffs are going to be able to whiteboard \$1 billion of damages, but if I'm excess of \$75 million, I have to analyze the question of whether my limit really in play? So it creates a lot of different dynamics. And it can be as much about mediating between those layers, so Jed could talk about it at length. Then it really is even mediating

between the insured defendants and the plaintiffs. So the coverage issues are interesting. One thing to keep in mind is notwithstanding the potential or the actual adversarial relationship between the insureds and the insurers or among the insurers, it is very important to have a good mediator that helps keep all of that closed kimono to the plaintiffs as much as they possibly can. I say this because the plaintiff's counsel, they know the insurance, they know the coverage issues just as well as, and perhaps even better than the insureds. The danger for the carriers and the defense side is that the plaintiffs will use those fault lines they see on the defense side, they will use it and exploit and try to drive wedges wherever they can to raise the settlement value of the case.

MR. MELNICK: [Interposing] But, Kim, doesn't it happen the other way as well?

MS. MELVIN: Yeah.

MR. MELNICK: I mean, don't carriers share coverage issues with mediators in an effort drive the value of a case?

MS. MELVIN: That is a good lead-in, Jed. You know, if you can build that relationship with Martha early and say look, we get it. We've heard from Paul. We get it. You think we're dead to rights and totally wrong on this coverage issue. We think that we're right. Before we get to the courthouse to fight about that, why don't we use that coverage issue and threaten those precious dollars that the plaintiffs, who brought this case to monetize their litigation as Michael said, to try to drive down the settlement value. If the coverage issues are significant, we can, through the mediation process, raise those coverage issue with the plaintiff who is sitting across the table and show them the potential for these dollars to evaporate if the insurers are right. Then yes, there is the possibility of driving down the settlement value of their case. It happens time and time again, especially when the coverage issue goes to an issue of the total quantum available—for example, is this one \$125 million tower or is it two \$125 million towers.

MR. FERRILLO: It's always two.

[Laughter]

MS. MELVIN: But those are the critical questions—if in this hypothetical, we're right, we're looking at \$125 million in insurance and if the carriers are wrong and it's \$250 million potentially,

then those are critical and important issues to the plaintiff's bar and to the insureds.

MR. MELNICK: Paul, you are representing the company. You have a sense of the scope of the litigation, who the plaintiffs are, and you probably have some assessment of where the case should settle based on various issues and metrics. How are you herding the cats on your side of the table to get to that point?

MR. FERRILLO: Guys, this is where the fun stuff is because it is truly herding cats. You know, this is where the rubber meets the road for defense counsel because at the end of the day I represent somebody like Martha who wants to get the case settled - - and to do that it's working in a partnership, with the carriers, making sure they understand every bad fact in the case, every bad piece of deposition testimony that's coming out, and to lay it on as thick as possible for them so that they know that at the end of the day there are no good and redeeming qualities in the case—

MS. MELVIN: [Interposing] That's the flip. That's what the insurance carriers call the defense counsel flip.

[Laughter]

MS. MELVIN: Before the motion to dismiss they wanted the \$1,000-an-hour fee to write the motion to dismiss brief that was going to be the big winner.

MR. FERRILLO: There should always be a careful assessment of whether the investment of defense costs into a case is going to get at least a corresponding reduction in the settlement value of the case. If the plaintiffs are completely unrealistic then we have no choice but to litigate to bring down their expectations. On the other hand, it doesn't do us any good if we spend \$10 million or \$15 million defending the case and it erodes the policy without making the plaintiffs more realistic. Obviously, members of the board of directors don't want to write a check from his or her own checking account because the available insurance has been spent defending the case instead of settling it. So at the end of the day, we can all talk about defense costs and everything else, but at the end of the day we recognize the case needs to get settled. So we're working with the carriers. We will have them to our offices. A case that Jed and I did, we had them to our office six times from start to finish between the end of the motion to dismiss and the final mediation ses-

sion leading to settlement. We'll have the carriers in our offices to review deposition transcripts, review bad documents, making sure they understand.

The most important part of the case, frankly—is getting a damage analysis done by someone like a NERA or a Cornerstone to understand the settlement value of the case, a whole other separate mediation topic about what that really means. Over-simplified, it means the case, that the plaintiffs might claim has aggregate damages of \$5 billion, a more realistic view might be that the class period should be cut, meaning the real aggregate is \$1 billion and a rough guess of settlement is that if you take 10% of that, it's really \$100 million, and that's how guys like me think and as Martha would think. Hey, these are percentages of percentages of a phony, inflated number of a plaintiff, but you need to start somewhere. The important thing is that you're getting everybody in the same room to confront the alternatives. You're bringing the excess carriers in, you're talking to, the Side A carriers. And by the way, we're talking to derivative counsel as well, because you need to understand whether or not you're going to rope in the derivative actions and try to have a flow-through settlement or are you going to leave them out in the cold because they're being unrealistic and they don't want to take a half a million dollars to settle the case. You really need to understand those sorts of dynamics. Throughout, you're working with coverage counsel. Again, they're our friends. You know, they're not raising coverage defenses. They may be thinking about creative ways to get the case settled, but you're working very hard prior in order for everyone to understand the downsides of not settling the case. And by the way, you're also working with the mediator, too. You're probably having conferences with the mediator. So the mediators understand the case. You know, there's a lot of education in some heavy accounting cases about what the issues are. There may be some heavy damages issues as well, too, on some of these cases, especially the credit crisis cases, which are full of, loss causation and damage issues. The lead up and preparation period to get everyone on board and ready for a mediation may be several months. Somebody like Martha may say okay, do we have the tower in place? Are we ready to go here? We want to know where we're going because at the end of the day it's the plaintiff's firms who are the guys and we want to know where we're going to start, where we're going to

end up, what's the bid, what's the ask, and where we're going. So this is a fun time. This is a really busy time for anybody prior to heading to a mediation before you get there because you really need to get people on the same page.

MR. MELNICK: Kim, Paul talked a little bit about valuing the case. Are the carriers doing the same kind of valuation? Are they relying entirely on defense counsel or are they doing their own work as well?

MS. MELVIN: You know, our hope is that we are in a position at the same time to be evaluating the case, but notwithstanding that there are companies and there are folks like Paul who are very good about the sharing of information and having those meetings and allowing the deposition transcript review, many are not. And whether in part driven by confidentiality concerns, if there is a reservation of rights out there, you will frequently get pushback – defense counsel will claim they can't share information with you because it would destroy the privilege.

MR. FERRILLO: That's wrong.

MS. MELVIN: We can agree to disagree about whether sharing that information will destroy privilege or not, but when you've got a mediation teed up, there's an easy solution—cloak it all in the mediation privilege. And then you don't even have to worry about whether we have a common interest, and while there is a question as to whether our reservation may destroy the common interest, you can deal with that. You get past that hurdle and this is the common scenario that we will find at the sit-down meeting where the company wants to pursue mediation and they've had chats about settling and the insurers ask the question okay, well, what's the case worth? And this is a very common response. Well, here, the plaintiff-style damages number is \$2 billion and it's going to cost \$60 million to litigate the case. It's going to be super expensive to litigate the case, so we think the appropriate settlement value is that the tower should be prepared to be at the mediation. And then you'll hear a question of, well, what's the defense style analysis of the damages? Well, we're working on that and we'll share that with you, and it's not always the case, but this definitely happens. And then the next question is well, what are the roadblocks here? What are we going to argue now? We're past the motion to dismiss. Do we have class certification argu-

ments? What's our hook, what's our leverage going into the mediation? And it is often radio silence. And the problem with that, and I'm sure Martha has heard me say this before, is that insurance companies are large global companies and all that they do is evaluate risk. So when Lisa and Josh have to go into their management to say this is the settlement authority I need, they can't say it's \$1 billion of plaintiff-style damages and it's going to be really expensive. A global company that specializes in evaluating risk isn't going to take that. And so they need to be able to have a more robust view of the case to articulate. And it's in everybody's interest for the carrier to be able to respond in those settings and get the authority that Martha and Paul and defense counsel think they need to resolve the case. And not only do they need the information. They need it in time. Insurance companies are aircraft carriers. They do not turn on a dime. And so if you want to avoid delays and frustration, you have that initial meeting and you partner from the start.

MS. SOLINGER: Okay, so we've had this meeting. Now you'll get back to us, let's see, the mediation's in three weeks, so you can get back to us what, in two weeks and five days? Would that be enough time for you?

[Laughter]

MS. MELVIN: That's sort of your sense of turning that aircraft carrier around.

MR. MELNICK: Josh, could you comment on that from the carriers' perspective - both in terms of counsel seeking authority before the mediation, but also troubleshooting during the mediation and the calls that you get.

MR. SCHWARTZ: Sure. The excess position is a bit different. We talked a little bit earlier about coverage issues. I'm going to start using some of Lela's terminology now. Coverage issues can generate movement amongst the parties because often times, the plaintiffs will no longer have this expectation of, "I have \$125 million in insurance and then I'm taking another \$100 million from the company." It's suddenly, "if I want to get \$100 million from the company, the company is either going to have to litigate or they're going to have to work something out with the coverage issues. Some clients get very upset when insurers send letters addressing coverage issue. For example, the claim belongs in year 1, not year 2, and

you therefore only have \$125 million instead of two policy limits (\$250 million). But when you're partnering with your insured/client, you can show them how the coverage issue can actually generate movement, how this can calm down the expectations of the plaintiffs and keep a loss inside of an insurance tower. The thing I just find so interesting is we've been here talking for a while now and I think you see that there's so much going on amongst the insurers that is completely behind the curtain. If you're a plaintiff's lawyer or if you're a defense counsel, you're litigating a case, but there are all of these other people who care an awful lot about what's going on and they're the ones that are going to be asked to pay at the end of the day.

So when it comes to getting authority, I don't want to talk to you about that, Jed, because you're trying—

MR. MELNICK: [Interposing] To get some information for our next mediation.

[Laughter]

MS. MELVIN: But, Jed, I would be remiss not to say—

MR. MELNICK: [Interposing] I was hoping Josh would just spill the beans.

[Laughter]

MS. MELVIN: —I would be remiss not to say that once you've got that information, there is the herding of cats that go on amongst that tower of insurance that has to take place in advance and has to be on a parallel track. And the finger can be pointed back at the gaggle of carriers and the challenges and the issues that they have in moving in a logical and coherent and rational way, too. And so it's very important that at the same time whether it's the primary carrier, whether it's the mid-level carrier who really thinks their limit could potentially be saved or in play, somebody's got to convene this carrier group and get everybody either rowing the boat together or the people that aren't on the boat just need to be silent and on the sidelines. But the problem and the challenges is that when you're high excess, you may not want to spend money on counsel to evaluate this case because you think your limit is safe. But if it then turns out that it isn't and you don't have counsel in place and you're not paying adequate attention, well, you could have Martha and Paul and defense counsel giv-

ing the best information to be able to realize your limit's in play, but you don't have the right people there to pay attention to it. And so part of the role of the primary carrier and the lower level carriers is to make sure that the tower is prepared just as well as you need the information from the insured.

MR. SCHWARTZ: To answer your question, though, Jed, I do feel you deserve an answer regarding authority.

[Laughter]

MR. SCHWARTZ: We can't go to our management every time there's a mediation coming up and ask how much authority will you give us because maybe the plaintiffs are going to come in with a normal demand and maybe the defendants will respond with a somewhat reasonable response. There can be multiple sessions before realistic demands and offers are made, and a question would be put to an insurer for consent to a settlement. However, before a mediation on a high-severity case, management will be aware of what's going on. And it might be something where we or our counsel need to make a telephone call during the mediation for instructions. We do our best to be nimble and prepared heading into any mediation. In Bermuda, we're not admitted in the U.S., so often times we'll be sitting in Bermuda with our counsel present at the mediation in the U.S. As a company we understand that we might need to make a quick decision. It is the mediator's job to ensure that all parties appreciate that decisions may need to be made quickly. At times, though, there are some parties who are unable to make a decision on the day of the mediation, for a number of reasons, which can slow the process down. But we talk about these claims internally. And it's a lot of money at stake, so we take our jobs seriously in assisting our insureds reach positive resolutions at mediations. We are always looking for a win-win.

MR. MELNICK: It is that time in this discussion and in the litigation for us to turn to the mediation. I, the mediator, have done a spectacular job and brought in an opening demand of \$1 billion. And it's time to actually implement a strategy and start putting money on the table. Michael, after the mediator has left and everyone has vented about the high demand, what are the insured and the insurer doing?

MS. MELVIN: Putting on their coats.

[Laughter]

MR. MELNICK: Assume I have convinced you to stick with it and play out the negotiations, what's happening on the defense side as it becomes necessary to put authority on the table?

MR. GOODSTEIN: Well, first of all, we're annoyed. This thing started at nine o'clock. It's now 2:30 in the afternoon. We've got \$1 billion demand. We've read the Wall Street Journal 15 times and had ten cookies at JAMS.

CHORUS OF VOICES: Played Angry Birds, watched Netflix.

[Laughter]

MR. GOODSTEIN: It's frustrating because what I've just described glibly, actually happens. I mean, plaintiffs show up, and it is incumbent upon the plaintiff to make the opening demand. And they make you sit there for three, four hours, as if they're scientifically coming up with some demand that you would think they would've come up with before they even got to the mediation. And then it's \$1 billion. And they know they're not going to get \$1 billion. So there are generally two schools of thought short of getting up and leaving. One is you respond in kind, right? You say okay, \$1.

[Laughter]

MS. MELVIN: [Interposing] But there are mediators who won't let you do that.

MS. SOLINGER: [Interposing] Good mediators won't let you do that.

MR. GOODSTEIN: There are mediators who will tell you to do that, but if you have a mediator that you have used and you can trust, the better strategy is to make an offer that is, in your valuation, a step in the direction of the reasonable settlement value of the case. The better strategy is to make an offer that is designed to get you to a reasonable settlement value - so you put something meaningful on the table, but you then signal in your next moves that you're going to be taking baby steps after that until the plaintiffs get somewhere in the ballpark that the game needs to be played in.

MS. MELVIN: If their opening demand doesn't match the limit of the tower in a normal securities case, right, where plaintiffs are not looking for individual or corporate contributions, then one, you probably selected the wrong mediator because that

groundwork should've been laid from the beginning, and two, a \$1 billion demand in a mediation is just a classic way for the other side to say, "I don't want to go first." And so Michael's exactly right. If you're there prepared to try to meaningfully settle the case, you just have to psychologically set that aside and make a move and send all of the messaging and have the mediator say give me this and you're allowed to stay here. You're allowed to park until I can get these people down. They didn't want to go first. They wanted to know you were really here to be serious.

MR. MELNICK: [Interposing] Kim, what's the difference between getting a demand within the tower as opposed to getting a demand above the tower in terms of the impact that it has on the defense side?

MS. MELVIN: Well, Paul can definitely speak to this, but there is an overarching issue or aspect of an insurer's role at a mediation—it's called their duty to settle. And if there is an ability to settle a case within limits—and it varies a little from state to state, but if there is an ability to settle within limits, it's like that time Paul is waiting for, the moment, as he should dutifully representing his client, that the demand is within limits because at some point—and hopefully it's not at the beginning of the day, but it's at the end of the day when there is an impasse, if that number is within limits, there is a significant leverage point that can be brought to bear on the insurers – to say if you don't settle for this number within limits, I can sue you for bad faith, which means your \$125 million limit doesn't mean anything. It's whatever my damages are in the case. That's what they'll say. And there's limitations on the issue and there's a lot of context to that the analysis, but it can be a leverage point for an insured. And the goal of partnering with an insured at the beginning is to allow that process to play out, to work together to drive the number down, knowing that whenever it is, whenever the music stops and there's not a chair left for the person wherever it is in the tower, that the insured will still have this argument. It works best if it can be played out. There are companies and there are counsel that play that card before you're even in the mediation and then it creates this very adversarial process that I just don't think is productive—

MR. FERRILLO: —it creates a disconnect between the insured and an insurer and what it effectively says, in my cynical opin-

ion, is that the reasonable settlement value of this case is whatever is left on the insurance.

MS. MELVIN: Sounds right.

MR. FERRILLO: Well, this all is overly dramatic because at the end of the day, if we're getting into a mediation, we probably have done some groundwork with the plaintiffs in adjusting their expectations and they're not going to come in at \$1 billion because we're going to say you're out of your freaking mind if you come in at \$1 billion. You need to come in at something that makes rational sense given the fact that you know and I know your damage analysis at the high end is a half a billion.

MR. FERRILLO: I want to change the hypothetical because we're making too much of the fact here, but my point goes back to the mediator. What you really need at the end of the day is a really good mediator involved because you are going to get involved in cases where there are really good class certification arguments, really good loss causation arguments where you have 16 disclosures during the class period, but only five actually where there was a statistically significant stock drop where you can say X plus Y, that equals damage, and that should be in the case. And unless you have a really good mediator who has the ability to make those arguments to the plaintiff's counsel, it's going to be a terribly long, long day because your message isn't getting down and you're not driving down the settlement value below the policy limits where then I can go to a carrier and say gee, you've got a demand within the limits. But, you know, I think what most of the defense bar really understand, it's not about necessarily the carriers, sorry, guys. It's about the mediator and getting the right person involved in the case at the right stage of the case to get the case settled who has the ability to jostle with the plaintiffs, jostle with the defense counsel, and jostle with the carriers all at the same time. And that is a very rare thing in our world.

MR. SCHWARTZ: You know, Paul, to overlay some mediation principles onto what everyone was just discussing, the allegations of bad faith for not agreeing to settle, that requires the insurer to really look and make sure that they're acting in good faith and if they are taking coverage positions that are legitimate coverage positions. But that whole process, that forces you to think well, what's my BATNA, what's my best

alternative to this negotiated agreement? Is it ending up in litigation in Idaho with a friendly judge and being accused of bad faith? So that will cause an insurer—at times it will cause an insurer to move a bit, but at other times it's just such a baseless allegation that it just walks like a duck and quacks like a duck. Similarly, the loss causation points that Paul was talking about, that's forcing the plaintiff to think about what happens if you don't settle today? You're going to go to court. You're going to have to argue before Judge Rakoff about whether or not there's loss causation. And he's going to dismiss this case and you're going to walk away with nothing after investing a few hundred grand in it, so—

MR. FERRILLO: [Interposing] Maybe.

[Laughter]

MR. SCWHARTZ: So, having had the benefit of working in Lela's program, you're able to think about these different pressure points and the trigger points that might be able to get the parties moving in one direction or another. And you really do use the mediation skills either as an advocate in a mediation or as the mediator. And when you do see a good mediator, it's very impressive what they can do. It's really magic. And I think when you think about Kim's example of 15 carriers, you need someone to help. And, you know, I'm looking right at Bob Juceam, who I'm sure has played that role while acting on behalf of the defense counsel.

MR. SCWHARTZ: And, Paul, I'm sure you've done that at times where you've gotten deals done without the use of mediator. But mediation, it's an event. And it causes all of the parties to figure out how strong is my case, how much legs does this case have, and it brings everyone together.

MR. GOODSTEIN: Well, I think what's interesting about your comments and Paul's comments about the quality of the mediator is that in this particular field, while there are countless mediators around the country, you know, there's probably less than five, maybe six—that they'll even consider, you know, because picking a mediator is a negotiation in and of itself. You have the plaintiffs who have to agree, everyone in the tower has to agree. And the irony here is you end up before the same two or three people all the time. And so everybody, you know, you sort of trust it. So when the demand comes in, whatever it is, you're able to say all right, you just sat there

with the plaintiff for three hours. What is your impression? What is your sense of where they are the end of the day? And if it's people that we use all of the time, their instincts are pretty good and on target. And you can then ascertain whether you're willing to negotiate towards that or not. But the pool—it's always mindboggling to me at how small the pool of mediators is that we use and everybody is afraid to try somebody new because god forbid—two days there and people just dig in and nothing happens.

[Laughter]

MR. MELNICK: So, Martha, we have a few minutes left and ingrained in this conversation have been different ways to move things along, but whether you've chosen the right mediator or the wrong mediator, let's assume that things have bogged down in the mediation and the herding of cats is failing and maybe you could talk about some strategy and options from your perspective of getting things back on track.

MS. SOLINGER: Well, I mean, obviously as a defendant you have two people, two sides of that—this triangle that you've got to get on track. And one is the insurers. And there I think there is a lot to be done and there are a lot of carrots to play with. And you've heard about the stick. That's the bad faith thing. And that's about the only stick you got. So being nice and doling out the carrots is probably the best way. And what do you have? Well, if you're a solvent company, you have next year's renewal and you have the premium for next year's renewal or maybe it's a two-year or a three-year program. And sometimes insurance is insurance and sometimes it's kind of more like a loan and in that that you—you pay it back.

MR. FERRILLO: Because payback's a bitch.

MS. SOLINGER: Yeah.

[Laughter]

MS. SOLINGER: And so, you know, you can certainly sort of work on that side in a, you know, to some extent to get the carriers more willing to come up at this point. You have—you can talk about possibly—if you think the case you're settling is about all you have under that policy year, you can talk about giving a policy release even though you're not exhausted. You can—I—years ago and I'm not sure whether anybody would ever do this now. I was able to convince the carriers by giving

each one a—each layer a little bit of a discount and then the company filling in. And the problem is that you always hit some carrier who says—as you go up the tower, no, no, no, I’m not paying because it wasn’t fully exhausted below and my contract says I don’t have to pay until every penny has been paid by an insurer and it doesn’t matter that you’re trying to pay it. You don’t count. But if you can get everyone—to agree to it, then you’ve got a great deal. You can—maybe the company can put in \$5 million and—or you can get, you know, \$60 million or \$70 million.

Ms. Melvin: That’s the cats that we get to herd.

MS. SOLINGER: I said there weren’t really other sticks, but there’s a little stick, if you have a good broker, you go to your broker and you say this carrier, just isn’t doing anything and it’s holding up the whole works and then, you know, maybe some of their relationship people at the broker have a little talk about the carrier and about how that’s going to look in, you know, future policy purchases. And so you have a lot of ways to work with the carriers in a business relationship because that’s what it is. As Josh was saying, you don’t want to piss off your carriers. And you know the client relationship sort of goes both ways. And so, if you’re going to force them to pay out this money, what are you going to give them for it? And that’s a way to get some movement.

MR. MELNICK: Given that we only have a few minutes remaining, I want to give folks the opportunity to make any last comments or invite questions.

MR. FERRILLO: I think the buzzword is pigs get fat, hogs get slaughtered. And if you’re plaintiff’s counsel, come in reasonably and come in, not, where the Sun and the Moon and the stars shine, but at a place where an insurance carrier will understand that you are economically driven to get the case settled as opposed to asking for \$1 billion when your aggregate damages are half a billion dollars and you know you’re never going to get it. So I would say one of the things that I think the defense bar appreciates and this is a big problem right now in the derivative action area where you have new firms coming into the mix that we don’t necessarily deal with is many of the plaintiff’s firms, many, not all, are economically motivated as Michael said to cash out or to monetize their claim and they’re not going to come in at \$1 billion. So be reasonable, under-

stand your case, and, you know, I think the one thing I can tell you about the carriers and I was on both sides, don't be a jerk because if you're good and you've got a good case, you don't need to be one.

MS. MELVIN: And if your issue is getting past a defense counsel who's not motivated try to resolve the case, put it in writing, put a settlement demand in writing. It's going to be harder for that defense counsel to not take some action on it. I mean, ethically he should take it back to his client, but you're more likely to get it in the hands of the carrier and mediation would be a golden opportunity for you because you're going to get a carrier there. And that, you know, whether directly or through a mediator, you're going to have a line of communication with the economically-motivated carrier, not the defense lawyer, who maybe have very different motivations in your setting.

MR. GOODSTEIN: If you have a good mediator you might be able to get him to broker a sidebar between the principals without their lawyers and try and avoid the defense counsel that's in the way.

MS. BRENNER: Well, also, I mean, I'll say that in certain circumstances, if plaintiff's counsel doesn't appear to be catching on or doesn't understand the insurance dynamic, I am not opposed to talking to them directly. Back in the day I was a plaintiff's lawyer, so I have no problem going in and talking to plaintiff's counsel and speaking their language. Sometimes I take my counsel with me to do that and sometimes I don't depending on the circumstances, but certainly if there's any sort of confusion about what's actually in the policy or why the insurance company or the defense takes the position that we're not going to pay that for some reason, I have no hesitation trying to make the reasons clear. I mean, it's just as easy if everybody's in the same space anyway. You know, if it's a reasonable request, if there's a reason behind it, most of the time I'll just go in and talk everybody through and then everybody knows what's going on. And it's usually much easier to either settle it that day or having to think about it a little bit and then settle it a little bit later. Not everything happens sometimes at that mediation. It's just as likely that it takes a couple of days, a couple of weeks after the mediation and all is well.

MR. GOODSTEIN: Brokers need to put back the hammer.

[Laughter]

MR. MELNICK: We are out of time.

MR. SCHWARTZ: We do have cocktails, and it's always risky to hold people back from the cocktails. But I did see one person, with a question. Can we take one or two quick questions?

MR. MELNICK: We would be happy to entertain some questions.

MR. SCWHARTZ: Oh, boy, it's been a number of years since I've had to answer one of your questions, Bob.

[Laughter]

MR. SCHWARTZ: But that sounds great.

MALE VOICE Question: One of the problems that arises in mediation is how the tower is arranged. I can imagine that what you're seeing is that you end up with a primary insuring saying that it will not pay a dime and they eventually compromise and give you 80% of the primary layer in partial settlement of the claim. But it's no good because of the exhaustion problems created for the insured relevant to the next excess layer. There are at least two published decisions where the insured took the deal where the primary got in effect paid out at 80% and then was given a release of the additional 20% by the insured, who is essentially infilling the load, and the excess insurer takes the view that we're not triggered unless and until the underlying has been exhausted, quote - - close quote. The two cases that I'm aware of concluded that the giving of a release is payment unless the policy says payment by cash. The court was unprepared to view the insurance contribution as something other. To me, getting a mediator to be able to review, understand and use the legal materials is important, as this is a way of getting some of the excess carriers back off of certain positions, which can lead to a settlement.

MS. MELVIN: You want to go?

MR. SCHWARTZ: No, you can go first.

MS. MELVIN: The default rule is that if your contract isn't very specific about it, it's going to get construed to allow infilling by the company. But language evolved over time. Then you had the Comerica case and then you had Qualcomm that said well, the default rule was infill, but if your contract specifically says that it has to be paid by the carrier then there is no infill. I was

involved in the Comerica case. I represented the primary carrier. We cut our deal. And they went after the excess carrier and the court said no, you can't infill. But it's not an issue anymore because the beauty of these policies is they are written every year and you've got brokers and Paul pushing for language that allows for infill and the carriers agree to it because we all want settlements to happen.

MR. SCHWARTZ: Right. But to pull away from the legal issue and to tie it back into the mediation, one of the most contentious issues that a mediator has to deal with is a situation where you have the primary, who collected the most premium, saying I want a discount. And we're sitting way up high saying the loss doesn't come anywhere near us. Why are you asking me for any money? And you can just imagine how challenging a negotiation that can be.

MS. MELVIN: Let me give you what I would say representing the primary carrier, "this loss is undeniably at your limit. You can suggest that that it's not, right—but the only reason why this settlement demand is below your limit is because we leveraged the coverage issue that we all have and why should the primary carrier buy out your risk?"

Female Voice Question: What leverage is there to get the excess to pay in a settlement?—

MR. MELNICK: Well, it depends on what a fair analysis of the case is. If the excess carrier is right and the reality is that the settlement should not come anywhere near them, then you probably don't have a lot of leverage to get them to just chip in because they're good people.

[Laughter]

MR. SCHWARTZ: Try explaining that to your reinsurer.

[Laughter]

MR. MELNICK: That's an important comment, and an aspect of insurance that has gone largely untouched during our discussion. Most insurance companies reinsure parts of the insurance they write with another set of insurance companies so that there is a level of complexity that goes beyond the first level of insurance. Depending on the situation, an insurance company may have to go their reinsurers and explain why they're going to pay and justify it if they expect to be reimbursed. So the answer is that settlements are much more

likely to be achieved if they fall into territory that is reasonable and justifiable. In your scenario, you're unlikely to get money from insurance companies that insure loss above the reasonable settlement territory of a case.

MR. MELNICK: Okay, so thank you to Cardozo Law School and Lela and the folks that helped to set this up—Glen, Romina and Bryan. And please join us for a drink. Thank you.

[Applause]