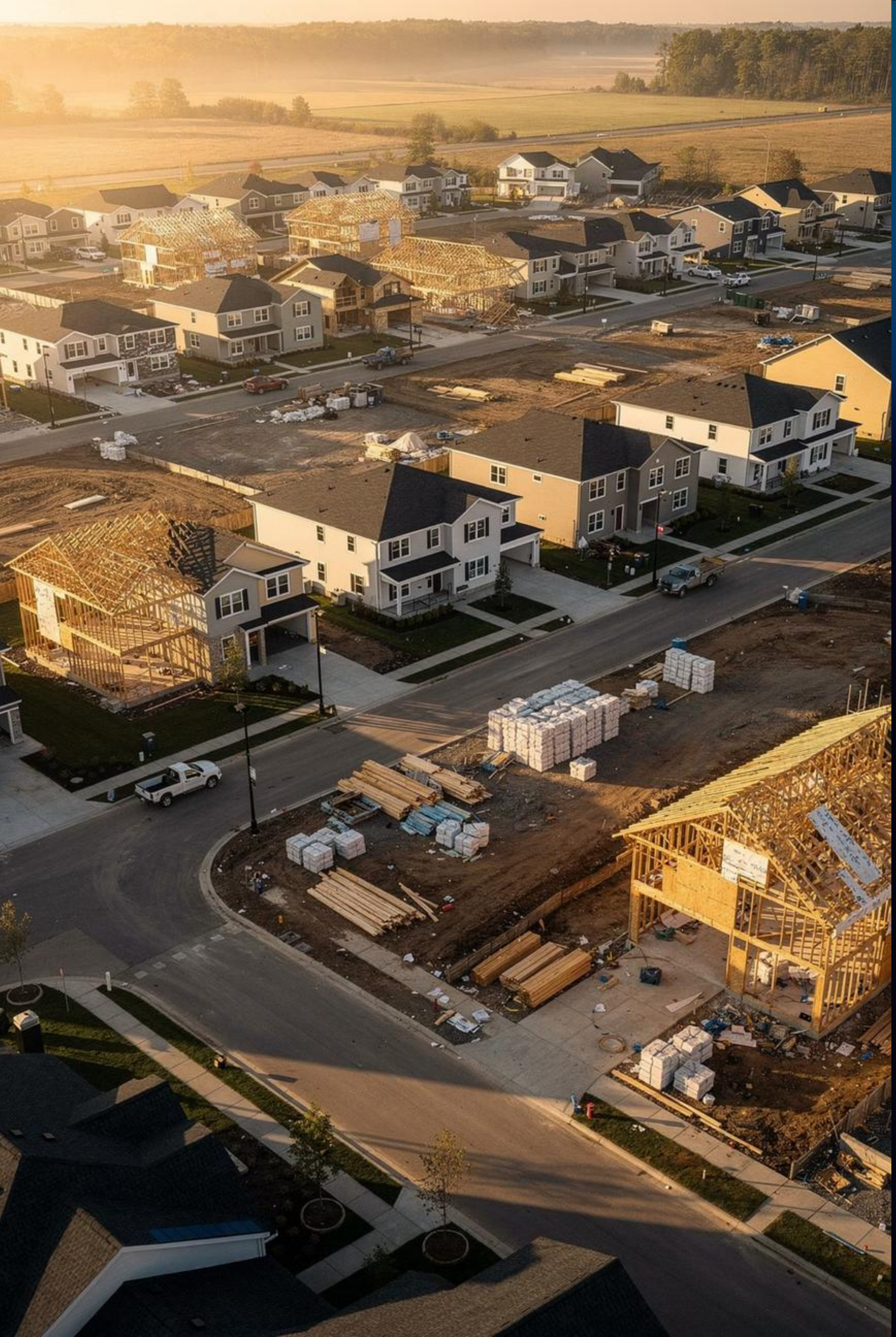

ADR SERVICES, INC.

Your Partner in Resolution

COVERAGE DRIVES THE DEAL

Navigating Insurance in Construction Defect Mediation

A practical framework for plaintiff counsel, defense counsel, personal counsel, and developer/GC counsel — examining how coverage dynamics shape every phase of construction defect settlement negotiations.

ADR SERVICES, INC. CONSTRUCTION POWERHOUSE SEMINAR - JULY 1, 2026

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The Hypothetical: A Subdivision in Dispute

The Facts

Multiple plaintiffs sued the **developer, general contractor, and subcontractors** for damage to homes in a large subdivision built in **2022**. Suit was filed in **2026**. Alleged defects include:

- Roof and window leaks — defective construction and/or poor installation
- Cracking stucco — possibly poor installation, structural settlement, or foundation issues
- Peeling paint — painter's insurers deny coverage as "insured's own work"
- Malfunctioning electrical systems and intermittent HVAC failures

Contracts require subcontractors to name the developer and GC as **additional insureds** on their GL policies.

The Coverage Battlefield

- Insurers acknowledge water intrusion interior damage — but **deny coverage** for roof repair and window replacement
- Some subs' insurers accepted tenders under **reservation of rights**
- Some denied outright; others have **not responded**
- Developer/GC insurers claim subcontractors' policies must **exhaust first**
- Multiple **Cumis counsel** demands pending from developer and GC

⚠ This tangle of coverage disputes is actively impeding settlement with the plaintiffs and creating uninsured risk exposure.

The CGL Policy: What the Form Actually Says

Important construction defect provisions are highlighted in the attached **CG 00 01 04 13** form. Generally:

Property Damage

During the Policy Period

Caused by an Occurrence

Excluded

(e.g. the insured's work)

Look at the relevant policy for other potential exclusions

(prior work or prior damage, subsidence exclusion, etc.)

No coverage under supplementary payments for prevailing party attorney fees.

Plaintiff Counsel: Should You Take Less Because of Coverage?

The Core Dilemma

Plaintiff counsel must realistically assess whether the **defense's coverage limitations** constrain the practical recovery available — regardless of the case's theoretical value. If multiple carriers are denying coverage for major categories of damage (roofs, windows, paint), the aggregate pool of available insurance funds may fall well short of full damages.

The question is not whether you *should* take less — it's whether accepting a lower number now is strategically superior to pursuing full value against potentially judgment-proof defendants.

Consider: A $10M verdict against defendants with $3M in available coverage may yield less net recovery than a $5M mediated settlement fully funded today.

Shaping the Claim Presentation

Plaintiff counsel can **strategically frame damage categories** to maximize covered losses. Presenting claims in ways that align with covered triggers — e.g., emphasizing water intrusion interior damage over roof repair costs — may expand the pool of available coverage.

- Engage **coverage counsel early** to audit defense coverage positions
- Dispute meritless coverage denials through demand letters or declaratory relief
- Assess whether **bad faith exposure** against a carrier strengthens leverage
- Evaluate whether prevailing party fee provisions create uninsured defendant exposure

Should Plaintiff Counsel Consult Coverage Counsel?

The answer is almost always yes — and the earlier, the better.

Audit the Defense Coverage Positions

Coverage counsel can review the reservations of rights letters, identify where carriers have overcorrected in denying coverage, and assess the strength of each coverage defense. This intelligence directly informs your settlement demand strategy.

Evaluate the Real Settlement Fund

Not every dollar on the table is equally accessible. Coverage counsel can help map out which policies are likely to fund, which are in dispute, and what the realistic aggregate available to settle the case actually is — before you make your demand.

Attorney Fees: A Hidden Exposure

If there is a prevailing party attorney fee provision, confirm whether the carrier covers that exposure. The CG 00 01 form does not extend supplementary payments to prevailing party fees — creating a potential uninsured personal exposure for the insured defendant that may motivate a personal contribution and earlier settlement.

Defense Counsel: Duties, Conflicts, and Coverage Reporting

How the Claim Is Reported Matters

Defense counsel must be deliberate about how the claim is described in reports to the carrier. Coverage can be inadvertently undermined by characterizations that trigger exclusions — for example, describing damage as purely the insured's own defective workmanship rather than resulting property damage to third-party structures. Every status report, coverage memo, and deposition summary is a potential coverage document. Treat them accordingly.

⚠ Sloppy claim reporting is one of the most overlooked sources of uninsured risk in CD litigation.

Key Defense Counsel Obligations

- **Excess carrier notice:** Recommend tender to excess carriers when exposure approaches primary limits — delay creates coverage risk
- **Conflicts of interest:** When carrier interests diverge from the insured's, defense counsel must raise the Cumis issue — it is not optional
- **Outside coverage counsel:** When the carrier asserts coverage defenses or demands personal contribution, advise the insured to retain independent coverage counsel immediately
- **Personal contribution requests:** Defense counsel should not facilitate the carrier's pressure campaign; the insured needs independent advice on whether to contribute

Cumis Counsel: When Is It Triggered?

When a carrier defends under a **reservation of rights** on grounds that may leave the insured personally liable, the insured's right to independent "Cumis counsel" — paid by the carrier — is triggered. In this hypothetical, the issue arises on multiple fronts.

Reservation of Rights to Additional Insureds

Subcontractors' carriers accepted the developer's and GC's tenders under reservation. If the coverage defenses could result in personal liability for the developer or GC, Cumis is triggered for those additional insureds.

Defense Counsel's Conflict

Carrier-appointed defense counsel represents both the insured and the carrier's interests. When those interests diverge on coverage, a conflict exists — and defense counsel has an affirmative duty to disclose it and advise the insured of their right to independent counsel.

The Practical Consequence

Unresolved Cumis disputes among the developer, GC, and subcontractors' carriers are consuming time and resources that could otherwise be directed toward resolving the homeowners' claims. The coverage fight is the deal killer.

Defense counsel's obligation to raise the Cumis issue is not discretionary — failure to do so can expose counsel to malpractice liability and the carrier to bad faith.

Personal Counsel: To Contribute or Not?

When Should Personal Counsel Recommend a Contribution?

Personal counsel — retained independently of the carrier — must give the insured an honest assessment of personal exposure. A personal contribution may be warranted when:

- Coverage denials leave a meaningful gap between policy funds and total exposure
- A prevailing party fee provision is uninsured and a verdict is a realistic risk
- The insured's reputation or ongoing business relationships make prolonged litigation untenable
- A modest personal contribution unlocks a global settlement that fully resolves all claims

Approaching the Carrier Effectively

Personal counsel's most effective approach to the carrier is not confrontational — it is strategic. The goal is to align the carrier's financial self-interest with settlement:

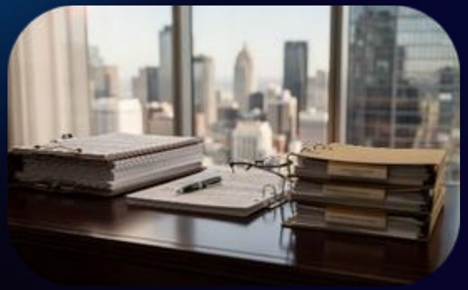
- Document the carrier's coverage exposure fully and present it clearly
- Quantify the cost of continued litigation versus settlement
- Identify bad faith exposure if the carrier is unreasonably withholding settlement funds
- Frame the personal contribution — if any — as a tool to close the gap, not an admission of uninsured liability

The insured should never make a personal contribution without fully understanding the coverage picture from independent counsel.

Developer & GC Counsel: Balancing the Multi-Party Coverage Puzzle

Uninsured Risk Exposure

Developer and GC counsel must map the uninsured gaps created by coverage denials and exhaustion-first arguments. Each uninsured dollar of exposure is a litigation risk that must inform settlement authority — and accelerate pressure on subcontractors and their carriers to contribute.



Additional Insured Coverage Arguments

Developer and GC counsel should aggressively pursue additional insured rights under subcontractors' policies. Where carriers have denied or not responded, consider declaratory relief. The additional insured endorsement — if properly worded — may provide primary, non-contributory coverage ahead of the developer/GC's own policies.

Coordinating the Coverage Fight with Settlement

The Cumis disputes, additional insured arguments, and exhaustion-first positions must be managed in parallel with — not ahead of — settlement efforts. Developer and GC counsel should push for an inter-carrier mediation or coverage roundtable separate from the homeowners' mediation to resolve contribution allocations before the main mediation session.

Coverage Counsel for the Carrier: Playing the Long Game

Is This a Liability Case or a Coverage Case?

Coverage counsel must assess not just whether a coverage defense is technically available today — but whether it is **defensible in a future direct action or bad faith suit**. A reservation of rights letter that is legally imprecise, or a denial issued without thorough investigation, can become the centerpiece of a bad faith claim years later.

In a multi-party, multi-policy construction defect case, the stakes of a coverage misstep are compounded. A single carrier's improper denial can delay settlement, expose the insured to uninsured verdicts, and ultimately cost the carrier far more than timely performance would have.

Inter-Carrier Contribution Allocation

When multiple carriers defend a single insured — across different policy periods or with overlapping additional insured obligations — the carriers must establish their **respective contribution shares** before meaningful settlement can occur. Common allocation frameworks include:

- **Time on risk** — pro-rata allocation across policy periods
- **Per-occurrence limits** — allocation based on triggered policies
- **Targeted tender** — specific claims assigned to specific policies

⚠ Failure to resolve inter-carrier allocation before mediation is one of the most common reasons construction defect mediations fail at the table.

Practical Takeaways for the Mediation Table

01

Map the Coverage Landscape Before Mediation

Every party should enter mediation with a clear picture of available coverage, active reservations, denials, and uninsured gaps. Surprises at the table kill deals.

02

Resolve Carrier Allocation in Advance

Inter-carrier disputes over contribution shares — time on risk, additional insured priority, exhaustion order — must be addressed before the joint mediation session. Consider a separate carriers-only session or pre-mediation coverage conference.

03

Identify Independent Counsel Needs Early

Cumis issues, personal exposure, and carrier conflicts should trigger independent counsel well before mediation. Unresolved conflict issues will paralyze settlement authority at the table.

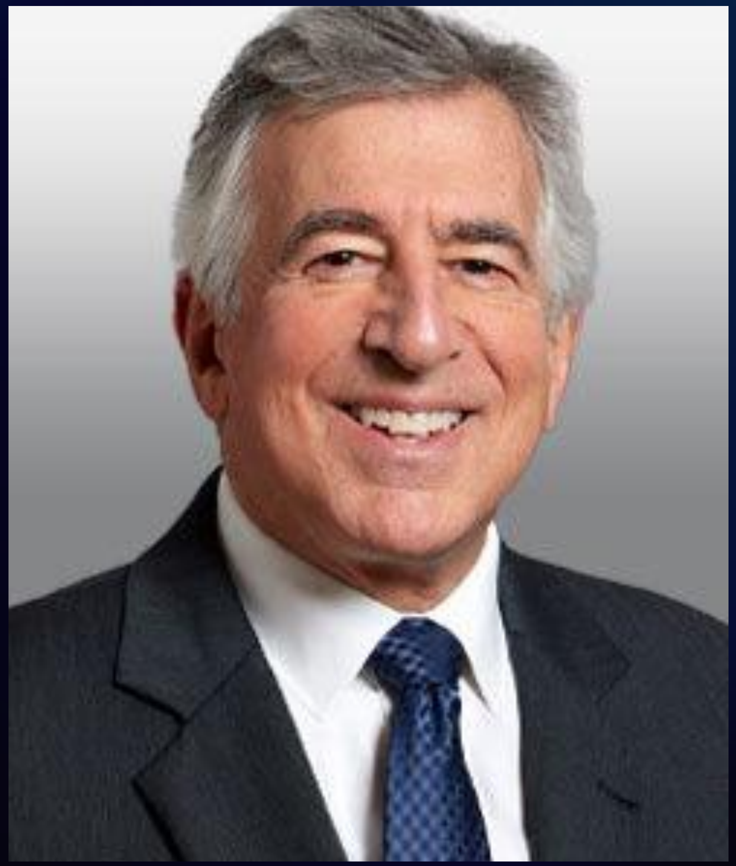
04

Use Coverage Arguments Strategically, Not as Weapons

Coverage defenses wielded to obstruct rather than inform settlement create bad faith exposure and erode credibility. The most effective coverage positions are the ones that produce a funded, global resolution — not the ones that win the coverage argument while losing the client's deal.

Coverage drives the deal — but only if counsel on all sides treat coverage not as a shield against payment, but as the architecture of a solution.

Thank You. Questions?



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