MEDIATION IN ACTION

(THE PICKENS COUNTY SCHOOL BUS ACCIDENT CASE)

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I. INTRODUCTION

In 2015, a 2011 Chevy Equinox ran a stop sign at a county road intersection in rural Pickens County and collided with a school bus owned by a local school board. As a result, the bus driver was killed and 13 students, all minors ranging from kindergarten to high school age, were injured, some seriously and others with only minor injuries. Two students had to be evacuated by helicopter from the accident scene to get needed hospital treatment. The injured parties were all residents of Pickens County.

The driver of the Chevy Equinox was a minor and his grandfather owned the car. They were residents of Mississippi. The driver and owner of the automobile had liability coverage and the limits of their automobile liability coverage were $125,000 per person/$350,000 per occurrence. Their insurer is hereafter referred to as the Liability Carrier.

The school board's bus was covered under a fleet policy insuring multiple school buses. The policy of the school board's insurer (hereafter referred to as the UIM Carrier) afforded uninsured/underinsured motorist coverage on each school bus, including the bus in question, with per person limits of $25,000 and per occurrence limits of $50,000. Thus, the uninsured/underinsured motorist coverage available under the UIM Carrier's policy totaled $75,000 per person/$150,000 per occurrence. See, Alabama Code, §32-7-23(c); Travelers Insurance Company, Inc. v. Jones, 529 So.2d 234 (1988). The school bus driver and some of the injured students also had available to them uninsured/underinsured motorist coverage under their own personal automobile insurance coverage.

All the injured students received hospital emergency room care. Some required surgery and substantial follow up care. Some had health insurance coverage through Medicare. The most

seriously injured student had no health coverage at all. Substantial hospital liens were outstanding on this child and some of the others.

In summary, here was a case of clear liability with multiple claims arising from a single accident but, unfortunately, there was inadequate liability coverage and uninsured/underinsured motorist coverage to fully compensate the injured parties. There had arisen from the accident a wrongful death claim and 13 injury claims. The combined, per person limits of coverage available under the policies issued by the Liability Carrier and the UIM Carrier were $200,000. The death claim and at least three injury claims were each worth potentially more than the combined per person limits. The combined per occurrence limits available were $500,000.

The families of the deceased bus driver and the injured students retained attorneys. One attorney had the death claim. Another attorney had the most serious injury claim and another injury claim. One attorney had nine injury claims and two other attorneys each had an injury claim. So, five attorneys were handling between them 14 claims, whose combined value was probably three times the available insurance coverage. Also the prospects of getting a significant recovery from the driver or owner of the Chevy Equinox were slim to none.

The Liability Carrier hired a defense attorney from Mississippi to represent the driver and owner of the Chevy Equinox. The UIM Carrier retained defense counsel as well. The insurers were willing to pay their policy limits to settle the claims but felt their hands were tied on how to apportion the insurance funds among the various claimants. For example, the Liability Carrier had received already a settlement demand for payment of its policy limits on one claim with a warning a bad faith action would follow if it failed to pay its limits. Consequently, its defense attorney was reluctant to suggest any proposed allocation of the insurance funds that would result in that particular claimant receiving less than the per person limits. Because of this and the clear risk for an excess

verdict, the driver and owner of the Chevy Equinox retained their own personal counsel to advise them.

So, how would the parties resolve a difficult case like this? Three options were apparent:

(1) **Litigation** with the claimants racing to the courthouse and with multiple civil actions pending in state or federal court. The result, however, would have been an expensive, procedural nightmare. There would also be the chance for inconsistent results or outcomes. Considering the inadequate insurance coverage available, this option was clearly one to avoid.

(2) **Litigation** through an interpleader action filed by the insurance companies with the goal of getting their insureds and the companies released and discharged from further liability or obligation to the claimants in exchange for their paying into court their combined limits ($500,000). See, Rule 22, ARCP. An interpleader action would require the court to determine a just apportionment of the insurance proceeds between the various claimants. In such a case, the right to a jury trial should apply. See, Poss v. Franklin Federal Savings & Loan Association, 455 So.2d 9 (Ala. 1984); In re Larsen, 172 B.R. 988 (D. Utah 1993); Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960); Wright & Miller, Federal Practice & Procedure §1718 (3rd ed. 2001). The problem with this option, like the first, was the potential for an expensive, complicated and time consuming legal proceeding. For example, the trial court could impanel one jury to determine the value of all 14 claims in one giant trial or 14 juries to value each claim separately. Neither alternative seemed promising considering the available insurance coverage was inadequate, the legal expense would be substantial, and the net amounts some claimants would receive would be so little as to make the process impracticable for them.

(3) The third option, the only one that made any sense, and the one the parties ultimately chose to use was **pre-suit mediation**. The rest of this paper is devoted to showing how the parties,

their attorneys and the mediator (me) came together, and with help from others, to get a daunting case settled in probably the only practical way to settle it.

II. MEDIATING THE CASE

While pre-suit mediation seemed like the only option to getting a satisfactory resolution of the case, there was a problem. None of the attorneys or the mediator knew exactly how to proceed. We were traveling in uncharted territory. One thing was abundantly clear. This was not going to be a conventional mediation. The approach that was taken went as follows:

1. The decision was made to assemble all the parties and their attorneys at one location to see if a mediated settlement could be reached resulting in a just and equitable allocation of the $500,000 available from the two insurers. One of the claimant's attorneys graciously made his office available.

2. Prior to the mediation, I, as the mediator, asked the claimants' attorneys to provide me with medical bills, medical records, collateral source information, and anything else they had to assist me in evaluating their clients' claims. I also had them agree I could then, prior to the mediation, send all the attorneys a letter summarizing the information I had received so all the attorneys, and especially the claimants' attorneys, could assess for themselves the value of each claim prior to the scheduled mediation. All the attorneys agreed to this.

3. The scheduled mediation was well attended. We had a full house. Attending were the representatives of the deceased bus driver's estate, the parents of the injured children, the claimants' attorneys (one of whom participated by telephone), the driver of the Chevy Equinox and his parents and his personal attorney, and the defense attorneys hired by the insurers. The claimants were put in separate rooms based on who represented them (because of this, we were able to put ten of the claimants in the same room). A separate room was also available for the defense side of the case.

The plan was for me to go from room to room communicating offers on how to divide the insurance proceeds among the various claimants. However, it soon became clear this would never work. First, for the reasons mentioned, the defense attorneys hands were tied other than to reaffirm the insurers' willingness to pay policy limits for the release and discharge of liability they were seeking. Also, they were not in a position to settle any claims unless all claims could be settled. So, the proposal for allocating the insurance proceeds would have to come from the claimants' attorneys (which seemed unworkable, since four of them felt they each had a claim worth more than the $200,000 per person policy limits) or from me. About an hour into the mediation, I advised the parties and their attorneys the only way to proceed was for me to make a mediator's recommendation on how to fairly allocate the insurance proceeds on the 14 claims at issue. They agreed. I then spent the rest of the mediation that day meeting with the families of the injured parties and their attorneys to make sure I had or would be provided with all the information I would need to fairly assess the claims and calculate a fair allocation of the insurance funds. As I stated later in an email to the attorneys, my job would be to make a non-binding recommendation the parties could use as a basis or starting point for settling the case. This would be a formidable task. However, I was willing to do it and the attorneys were willing to let me try rather than rush into litigation.

4. The process of making my non-binding mediator's recommendation came down to this. The total value of the claims were not as important as their relative value to each other. That is, once I determined what each claim was worth relative to the other claims, I could calculate an allocation of the insurance money on a percentage or pro rata basis. That would be my starting point. I also felt I would need to tweek my allocation based on which claimants had, for example, other funds (such as their personal underinsured motorist coverage) available to them, or had their medical bills significantly discounted due to Medicaid, and which claimants, for example, had no other source of

recovery or were getting squeezed by medical creditors. I felt those things should be taken into account even if they would not necessarily affect the relative value of the claims. In other words, as much as possible, I wanted my recommended allocation to be fair and equitable taking into account all the circumstances. As far as assigning values to the individual claims, I used this approach. I took the death claim (which I considered to be the most valuable) and assigned it a $500,000 value (an arbitrary amount but one probably reasonable for Pickens County). The death claim was my highest benchmark and I valued the other claims accordingly. For instance, I valued the most serious injury claim at $350,000, another at $250,000, and another at $150,000. Those claims became my benchmarks for the remaining injury claims, some of which I valued as low as $7,500. These numbers would be the starting point for the pro rata allocation I would eventually make.

5. After doing the math and wracking my brain, I arrived at my recommended allocation of the $500,000 from the Liability Carrier and the UIM Carrier. I then prepared and circulated to the attorneys a draft of a proposed settlement agreement. Under my proposed allocation, some claimants would receive as much as $170,000 and others as little as $2,500. I tried to cover in the proposed agreement everything the attorneys would need to address before concluding a settlement. For example, the proposed agreement addressed the need for hospital and subrogation liens to be paid or protected out of the settlement proceeds. This was needed especially in light of Alabama's hospital lien statute, which makes parties and attorneys potentially liable for the full hospital bill when the lien is ignored in the settlement. See, Alabama Code, §35-11-370, et seq.; Progressive Specialty Insurance Company v. University of Alabama Hospital, 953 So.2d 413 (Ala. 2006). The proposed agreement also addressed the need for some of the claimants' attorneys to get consent to the settlement and waiver of subrogation from their clients' personal underinsured motorist carriers.

This was due to Alabama case law enforcing policy provisions disallowing the recovery of uninsured/underinsured motorist benefits where the insured has settled with the tortfeasor without first seeking the insurer's consent. See, Brantley v. State Farm Mutual Automobile Insurance Company, 586 So.2d 184 (Ala. 1991); Jones v. Allstate Insurance Company, 601 So.2d 989 (Ala. 1992). Because the injured students were minors, the proposed agreement made the settlement contingent on court approval following a pro ami hearing to be conducted in the Pickens County Circuit Court. Under the proposed agreement, the insurers would be responsible for paying the mediator's charges, court costs and guardian ad litem's fee associated with the settlement and the contemplated pro ami proceeding.

6. To my great relief and satisfaction, none of the parties' attorneys objected to my recommended allocation of the insurance funds or the terms of the proposed settlement agreement. There was a problem, however. Some of the claimants' attorneys had problems getting their clients to sign the agreement. They were thus unable themselves to sign the agreement. They essentially said they would need help from the judge and the guardian ad litem at the pro ami hearing to get their clients' final consent to the settlement. I advised the other attorneys of the situation. While we were uncomfortable about it, we concluded we had come too far to quit and would just have to make arrangements for the pro ami hearing, get a guardian ad litem appointed and hope for the best.

III. THE PRO AMI SETTLEMENT HEARING

The pro ami settlement hearing held in this case was a thing of beauty and one of the most rewarding experiences I have had in my legal career. I called the judge to let him know what was needed to finalize the settlement. He was completely on board. We discussed who needed to be the guardian ad litem (it needed to be an attorney from Pickens County of high standing and reputation) and the right choice was made. The defense attorneys prepared and filed the pro ami petition. The

claimants' attorneys entered notices of appearance. A date for the hearing was selected. The judge was willing to give us access to his courtroom for a half day if needed. All the parties and their attorneys would attend. The hearing would require the judge to take enough evidence and testimony on each claim for him to approve each individual settlement and the entire settlement in totality. One of the attorneys had a great idea. The individual settlement hearings should be held separately and outside the presence of the other claimants to avoid the risk of some claimants feeling they were getting short changed and others paid too much in comparison.

On the day of the hearing, the parties and attorneys initially assembled in the main courtroom. I was called on to explain to the claimants and their families how the settlement hearing had come about, how the insurance proceeds were woefully inadequate, but that the course we were taking was the only practical resolution and far beneficial to contested litigation. After the general announcements had ended, the judge then moved to a smaller courtroom where he directed the parties to send the claims to him one by one. It was arranged for the guardian ad litem to meet with the claimants and their families first one by one. After the guardian ad litem met on one claim, he would send that claim on to the judge along with his recommendation that the settlement be approved as to it. In approximately two hours, the guardian ad litem and the judge were able to get done what they needed to do for the parties to get court approval of the entire settlement. Amazingly, everything went without a hitch. I could not tell which claimants had been unable or unwilling to sign the settlement agreement. All the claimants acknowledged in open court they felt the settlement was in their best interest. That some parties or their attorneys had not signed the written settlement agreement no longer mattered. The judge had approved the settlement and would be entering a binding order incorporating all the terms of the agreement I had drafted.

None of the above would have happened without a universe of at least eight attorneys, a mediator, a judge and a guardian ad litem all coming together to find a way to settle this case. Settling the case any other way would have been a disservice to the parties. In summary, the mediation of the Pickens County school bus accident case shows how good things can happen when lawyers, while adversarial, can work together toward a common goal that is in their clients' best interests.