

**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re:

USA GYMNASTICS,

Debtor.

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: Chapter 11
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: Case No. 18-09108-RLM-11
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**LIBERTY INSURANCE UNDERWRITERS' OBJECTION TO
JOINT MOTION REQUESTING THE COURT TO CONDUCT A
SETTLEMENT CONFERENCE AND FOR OTHER RELIEF**

Defendant Liberty Insurance Underwriters (“LIU”) objects to the Joint Motion of USA Gymnastics (“USAG”) and the Additional Tort Claimants Committee (the “Committee”) to schedule a settlement conference and require specific insurance carrier representatives to participate (ECF 1230, the “Settlement Conference Motion”). In support thereof, LIU states as follows:

INTRODUCTION

1. USAG and the Committee are plainly disappointed that the recent mediation did not result in a settlement on their preferred terms. But mediations are not always successful. And courts cannot compel a settlement on terms a party finds unacceptable. *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989).

2. The fact that USAG’s insurers did not offer amounts that USAG and the Committee are willing to accept does not mean that they violated this Court’s order directing the mediation, failed to make meaningful settlement offers, or are acting in bad faith to delay this case, as the Motion claims. It just means that the insurers have a

different view of the merits of this case, whether as to the merits of the claims of Nassar's victims or as to the insurance coverage issues.

3. Instead of facing that possibility, USAG and the Committee have violated the mediation privilege in order to present vague (and unsubstantiated) claims about the insurers' (including, presumably, LIU's) participation in the mediation. But LIU cannot respond to these claims without violating the mediation privilege. In fact, USAG and the Committee have offered no valid support for their contention that a settlement conference would advance resolution of this case.

4. In addition, this Court should deny the Settlement Conference Motion because: (1) USAG and the Committee have not identified any basis for requiring specific representatives from LIU, such as its CEO, to attend a settlement conference; and (2) this Court, as the initial trier of fact (subject to the District Court's *de novo* review) for USAG's coverage claims against LIU, should not conduct a settlement conference.

**THE SETTLEMENT CONFERENCE MOTION VIOLATES THE
MEDIATION PRIVILEGE IN ORDER TO CAST ASPERSIONS
ON LIU AND THE OTHER INSURERS**

5. USAG and the Committee base their Settlement Conference Motion on their characterization of what happened at the recent court-ordered mediation. They claim that “[t]he insurance carriers...did not comply with this Court’s June 19 Order to make meaningful settlement offers,” and “have acted in bad faith with the goal of delaying this case for their own benefit.” (ECF 1230, Settlement Conference Motion, at 2-3.)

6. USAG and the Committee's (incorrect) characterizations of what happened during the mediation is an obvious violation of the privilege governing mediation.

7. Indiana law "embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation." *Horner v. Carter*, 981 N.E. 2d 1210, 1212 (Ind. 2013). "All matters discussed in mediation are strictly confidential and privileged." *Marchal v. Craig*, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997). Federal Rule of Evidence 408 also bars any use of information about what happened during a mediation. Fed. R. Evid. 408.

8. The mediation, which this court ordered, is also subject to the stringent limitations imposed by this Court's May 17, 2019 Order and the Local Rules. This Court's initial May 17, 2019 Order (ECF 514, at 3) absolutely bars use of information from the mediation:

All communications, information and evidence exchanged within the mediation shall be treated confidentially by all parties and shall remain confidential following the mediation's conclusion. To the extent any information or evidence disclosed within the course of the mediation is privileged, its disclosure amongst the parties to the mediation and Judge Zive does not waive or adversely affect the privileged nature of such information or evidence. Any party who improperly discloses communications, information, and evidence exchanged confidentially during the mediation may be subject to sanctions.

(ECF 514, at 3.) Similarly, Local Rule B-9019-2 provides: "Any written or oral communication made during mediation is confidential unless otherwise agreed by the parties. The unauthorized disclosure of confidential communication by any person may result in the imposition of sanctions under subparagraph (j) of this rule." Bankr. S. Ind. L.R. B-9019-2(i)(1).

9. Notwithstanding the clear requirement that all information relating to the mediation be kept confidential, USAG and the Committee discuss and characterize the insurers' mediation conduct. And this is not the first time that USAG has sought to disclose confidential mediation information improperly. (*E.g.*, Adv. Pro. No. 19-50012 ECF 354, Order on Plaintiff's Motion to Seal Documents.).

10. USAG and the Committee's breach of the mediation privilege is particularly egregious because LIU cannot respond without itself violating the privilege.

**THE SETTLEMENT CONFERENCE MOTION DOES NOT
SUPPORT COMPELLING THE ATTENDANCE OF
PARTICULAR LIU REPRESENTATIVES**

11. Although USAG and the Committee request that this Court compel particular representatives of LIU to attend the settlement conference – including their respective CEOs and “all other persons necessary for final, unrestricted settlement authority” – nothing in the motion supports such an order.

12. Even if this Court were to accept the movants' statements about what happened at the mediation, the Motion does not make any particular claim about LIU's participation in the mediation.

13. Contrary to USAG and the Committee's claim, a representative of LIU with full authority to settle the claims participated. Given that LIU has already done what this Court required in participating in the mediation, nothing in the Settlement Conference Motion suggests that further settlement efforts are any more likely to resolve USAG's claims against LIU.

14. Moreover, none of the cases cited in the Settlement Conference Motion support this Court ordering LIU's CEO or other particular representatives to attend a

settlement conference. Most of the cases cited only recognize the authority of a court to compel a party to send a representative to a settlement conference, not any particular representative. *G. Heileman Brewing Co.*, 871 F.2d at 652-53, 656 (affirming order requiring party to provide representative at settlement conference); *Neal v. Target Corp.*, No. 13 C 5907, 2016 WL 3365432, at *3 (N.D. Ill. June 15, 2016) (requiring insurer to attend settlement conference).

15. Only one of the cases USAG and the Committee cite involved an order requiring a CEO to participate in a settlement conference. *See ARAC Roof It Forward v. Nationwide Mut. Ins. Co. of Am.*, No. 17-CV-4468, 2019 U.S. Dist. LEXIS 94077 (S.D. Ind. June 5, 2019). In that case, unlike here, the court only ordered the CEO to attend after an initial conference where the CEO was excused from attending and the carrier refused to make any settlement offer. *Id.* at *4. None of these cases support the order USAG and the Committee request.

**THIS COURT SHOULD NOT CONDUCT A SETTLEMENT
CONFERENCE BECAUSE IT WILL BE THE TRIER OF
FACT IN FUTURE PROCEEDINGS**

16. This Court should not conduct a settlement conference in this matter because this Court will try the claims at issue in the first instance.

17. “If the assigned judge would serve as the finder of fact, many authorities agree that it is unwise and perhaps improper for that judge to host a settlement conference....” 3 Moore's Federal Practice - Civil § 16.53[c][i] (2020). “[M]ost judges and lawyers probably share the view that in non-jury cases the more appropriate course is to have the settlement conference hosted by a judge who would not preside at trial.” *Id.* § 16.53[c][ii].

18. USAG and the Committee appear to acknowledge that this is an issue, as they note that this Court “will never be called upon to try the Survivors’ claims given that the district court will be required to withdraw the reference of any objection to the personal injury claims” (ECF 1230, at 4.)

19. However, they conveniently ignore that USAG’s coverage claims against LIU and other insurers remaining pending in this Court, are the subject of active litigation, and this Court will need to decide them in the first instance (subject to the District Court’s *de novo* review).

20. Accordingly, if this Court believes that further settlement discussions are necessary, they should not be conducted through a settlement conference with this Court.

WHEREFORE, Defendant Liberty Insurance Underwriters respectfully requests that this Court enter an order denying the Settlement Conference Motion.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN &
SCHILLER

/s/ Ronald P. Schiller

Ronald P. Schiller (admitted *pro hac vice*)
Matthew A. Hamermesh (admitted *pro hac vice*)
Bonnie M. Hoffman (admitted *pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200 (telephone)
(215) 568-0300 (facsimile)
rschiller@hangle.com; mhamermesh@hangle.com;
bhoffman@hangle.com

and

Ginny L. Peterson, ID No. 20305-41
KIGHTLINGER & GRAY, LLP
One Indiana Square, Suite 300
211 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 638-4521
gpeterson@k-glaw.com

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*Counsel for Defendant Liberty Insurance
Underwriters Inc.*