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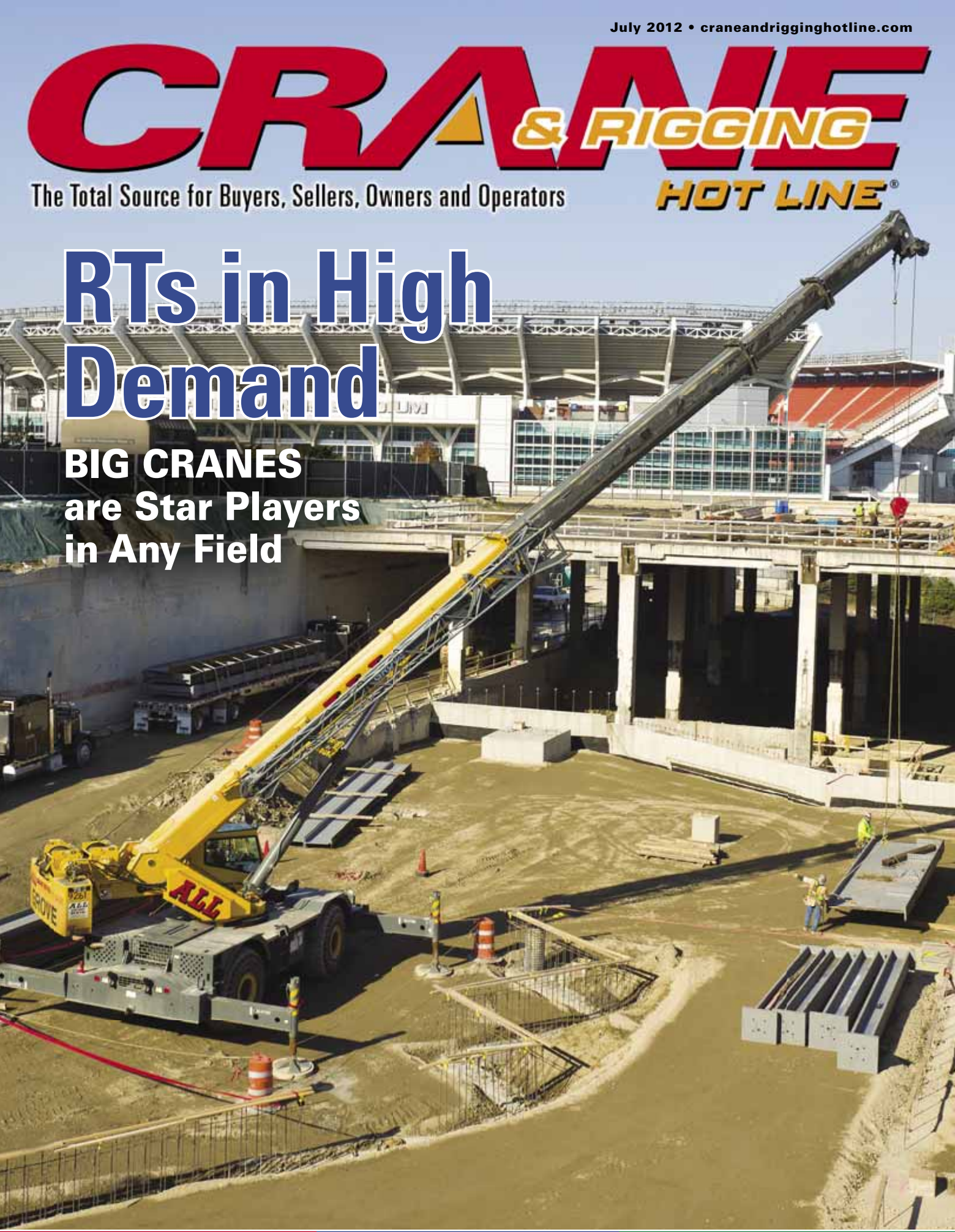

CRANE & RIGGING HOT LINE®

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Cover:
When called on for iron to help build the new Cleveland, Ohio, Convention Center, ALL Erection & Crane Rental Corp. provided several cranes of differing capacities, including a 130-ton Grove RT9130, for the project, which took place in the crane rental company's hometown.

Departments

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Does My Attorney Really Represent Me?

Treat your insurance-appointed attorney as your own

Ryan Warren is an attorney based in Denver, Colo., who is also a certified crane operator. He is a shareholder in Polsinelli Shughart, a law firm with 16 offices and more than 600 attorneys across the country. A former trial attorney with the U.S. Department of Justice, Warren now specializes in defending crane-related accidents involving both personal injury and property damage claims in the millions of dollars. He can be reached at rwarren@polsinelli.com.

NOTE: The following scenario is based upon real events that happened in a case I handled a few years ago in Colorado. In that particular case, the injuries were not as serious, but otherwise, it pretty much happened as described. And despite the seemingly clear culpability on the part of the injured worker, the worker sued the crane company.

When a crane accident happens and an attorney is appointed by an insurance company to defend an insured from a claim, the insureds often ask themselves whether this attorney really represents the interests of the crane owner. Consider this scenario.

One of your operators calls, panic in his voice. He was performing a blind pick, he explains, using one of the general contractors' signalers. As the load was being lifted, it became stuck between beams the signaler was supposed to keep an eye on. Your operator tells you that instead of signaling an immediate stop, one of the signaler's buddies ran over with his pry bar and, while leaning over the load, pried the load loose from one of the girders. The load immediately snapped upward due to the released tension, hit the worker in the face, and the worker may now be permanently blind.

Your operator says there was no way he could have known what was going on—the pick was being made in the blind and it all happened so quickly that he did not notice any increased engine strain or movement in the LMI. One of the worker's buddies, though, apparently yelled at the operator that he was at fault because he should have known the load had become stuck.

You tell the operator not to talk to anyone until you can get there. You immediately call your insurance company. Your insurer, being responsive, immediately calls an attorney. That attorney responds to the scene within an hour, introduces himself, and tells you he is representing your company, but the insurer is paying his bill.

You think to yourself, "Is this guy really working for me, or is he just watching out for the insurance company?" The appointment of an attorney by an insurance company to defend an insured from a claim happens hundreds of times every day across the country. Such attorneys, often called "insurance defense attorneys," are appointed in accident and defect claims involving cars, trucks, manufacturing plants, construction, and of course,

cranes. And every day insureds legitimately ask themselves, "Who does this attorney really represent?"

The tripartite relationship

The relationship of the insured crane company, its insurance carrier, and the insurance appointed attorney is called the tripartite relationship. Think of it as a three-pronged partnership.

This relationship stems from your insurance policy, a contract between your company and the insurance company. That contract specifies that if a claim is made against your company that arguably falls within the policy coverage, then the insurer must appoint an attorney to defend your company against the claim. This is called the insurer's Duty to Defend. The policy also says that if, as a result of a lawsuit, a judgment is entered against your company, and the facts of the case fall within the policy coverage, the insurer must pay that claim up to the limits of the insurance. This is called the Duty to Indemnify.

The insurer's Duty to Defend is broader and more easily triggered than the Duty to Indemnify. For example, your insurance policy may

contain exclusions for coverage that might or might not apply to a claim. Often the insurer cannot know whether an exclusion applies until the facts of the claim are further developed, or possibly not until a claim is resolved through a lawsuit and trial. In this situation, the insurer may agree to defend its insured subject to a reservation of rights. This is how the insurer preserves its ability to deny indemnity later on, while providing the insured a defense now.

In the scenario above, the insurer sent an attorney to the scene immediately. Many insurers refuse to take such action in a short-sighted attempt to keep their costs low. Instead, the insurer will wait until a lawsuit is filed against your company. This may not happen for a year or more after the accident. By that time, much or all of the physical evidence that might be used to defend your company is gone, memories have faded, the opportunity for photos has passed, and the claim is much harder to defend. Ask your insurer if they have a policy of immediately sending an attorney, an expert, or even a claims representative to an accident site. Hopefully the answer will be yes, at least for claims that appear to be serious.

Your duties

When an accident occurs, you have a duty to quickly inform the insurer. While you may initially inform them by phone, always follow up with a written communication. From that point forward, you have a duty to cooperate with your insurer—it probably actually says that in your insurance policy. Respond quickly to your insurer's reasonable requests for information regarding the condition of the crane, the training of the operator, your company's safety record, and yours and your operator's knowledge of the facts of the accident. Remember, if you have

picked your insurer carefully, have gotten to know them over time, and did not simply pick the lowest cost option, you should feel that your insurer is your partner in investigating an accident and defending claims where liability is in dispute.

If a covered claim cannot be settled, and the claimant files a lawsuit, you will begin to work with your insurance-appointed attorney (if you haven't already). Though the insurer is paying that attorney's fees, he or she is unquestionably your attorney, with all the duties and responsibilities of any attorney to his or her client. You should treat that attorney as your attorney, just as you would if you were paying the fees directly. Be honest, straightforward, and do not withhold anything from the attorney. Though it will certainly be inconvenient and will take time away from what you really want to be doing—running your company—respond to your attorney's requests for information as quickly and thoroughly as possible. Attorneys live by information, whether it is good or bad for you—they need it to properly defend you and your operators.

Your attorney's duties

Your attorney's duty is to vigorously defend the case against you, while at the same time carefully evaluating your potential liability, the risks of the claim, and keeping you and the insurer informed of those risks. The attorney should also be providing you and the insurer with his or her recommendations, both in the short term—such as recommending more information be obtained regarding the plaintiff's claimed injuries—and in the long term— such as whether the case should be settled for a certain amount or should be taken to trial. Your attorney should listen carefully to your wishes, especially with respect to whether you would like to settle or fight to the very end.

Here, however, your relationship with your insurance-appointed attorney becomes different from what you may be used to. In your insurance policy, there is almost certainly a provision that gives the insurer the sole right to decide to settle the case or take the case to trial. If you think about it, this makes sense, as it is the insurance company's money that is at risk.

Insurers will often try to settle claims within policy limits. In some states, an insurer acts in bad faith by refusing to settle a claim within policy limits, especially if the claim then goes to trial and results in a judgment that is in excess of the policy limits. If you believe your insurer is exposing you to liability above and beyond the insurance coverage by going to trial when it could settle a claim within your policy limits, you should consult your own private attorney.

Your insurer's duties

Your insurer's first duty is to investigate your claim thoroughly and quickly. It should determine as expeditiously as possible if the claim is one that appears to fall within your coverage or not. If it does not, the insurer should inform you as to the basis in writing, but only after a very thorough investigation. Insurers sometimes agree to defend their insured subject to a reservation of rights. A reservation of rights letter from your insurer is a notice that even though they are moving forward to process your claim, all or certain portions of your claim may not fall within the policy coverage. The insurer, through the reservation of rights letter, is reserving its right to later deny all or part of your claim despite the fact that it is currently processing the claim. Though they are not always easy to understand, you should carefully read the reservation of rights letter. If you have retained an insurance coverage attorney, you should immediately give that letter to him or her.

"Though the attorney is paid by the insurer, he or she is unquestionably YOUR attorney, with all the duties and responsibilities all attorneys have for their clients."

If the claim is a covered one, or appears to be, then your insurer's representatives should work quickly to preserve any evidence necessary to defend your company. As discussed above, some insurers will only acknowledge your claim and then wait for the lawsuit. Stay away from these insurers. Ask your insurer how they will respond in the hour or two after you inform them of a claim.

If a lawsuit is filed, and your insurer has not already appointed an attorney to defend you, then it should do so immediately. The insurer will normally appoint an attorney it has previously approved to work on its matters; however, you can request a specific attorney. Sometimes the insurer will honor that request, but unless you have a provision in your policy allowing you to specifically name the attorney (most policies do not have such a provision), the insurer does not have to agree to your request. You should ask questions of any attorney appointed by your insurer—has that attorney ever handled a crane accident claim before? What knowledge of cranes does that attorney have? Does the attorney know the statutes, regulations, and standards governing the crane industry?

If the insurer and your attorney find that liability against you is clear, the insurer has a duty to promptly and fully pay the claim within the policy limits. In the scenario above, however, the company's liability is at least questionable. In that case, the insurer and your attorney should vigorously defend the claim.

As the lawsuit moves through the system, your insurer should work closely with your attorney to determine if the case is one that should or could be settled, or if it is one that should be tried. Your insurer should listen to your desires, but ultimately, it is your insurer's decision whether to settle the case or not. Your insurer should carefully assess your best interests in this particular lawsuit weighed against its own policies and procedures with respect to certain types of claims. There are insurers who work very hard nationwide to make certain that plaintiff's attorneys know they will not easily "roll over." These insurers try to develop a reputation as being very tough and not being afraid to try a case because they want to dissuade frivolous claims. That is just fine so long as in the course of fulfilling that goal they do not put their insured in harm's way through unreasonable exposure to a judgment in excess of policy limits.

If you believe that your insurer has not met its duties of defense or indemnity, there are attorneys specializing in insurance coverage that can examine this issue and potentially argue with an insurer that a particular claim falls within the policy coverage. Be very careful, however, and obtain counsel only from an attorney specializing in insurance coverage, as this is a complicated area of law.

When each party to the tripartite relationship carefully fulfills its respective duties, the relationship can be a highly effective one, comprised of teamwork and trust. Hopefully this article helps you understand this relationship better so you can make certain it operates smoothly in the event you have to rely upon it.