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PERSPECTIVE

Enhance the effectiveness of your mediation by exploring potential insurance coverage issues pre-mediation

By Cassandra S. Franklin

It is an all too common mediation scenario. The parties have reached a tentative agreement and are ready to settle. The mediator has done an excellent job of finding a creative solution to the dispute and believes the matter is essentially resolved, except there is one tiny detail that has not been addressed: The defense is expecting the funding of the settlement to come from the insurer. Yet when the defense attorney contacts the insurer by phone, or the mediator steps into the insurer room at the mediation, the attorney or mediator is surprised to hear the insurer raise insurance coverage defenses. Finalization of the settlement grinds to a halt while yet another mediation begins — this time regarding insurance coverage.

Insurance coverage issues are often present in the background of a wide range of disputes. For example, in a breach of contract action that alleges defamation, the insurance carrier may have accepted its duty to defend (on the basis of the defamation allegations) but reserved the right to disclaim coverage for any indemnity obligation on

the breach of contract claim. In connection with a case involving sexual harassment allegations against both an individual and the entity that hired the individual, the carrier may have disclaimed coverage for the individual but agreed to defend the insured entity, again subject to

under the policy, the insurer may not be willing to pay the full amount (or even any portion) of the settlement. If these coverage defenses have not been addressed earlier, they can cause an unexpected hiccup in the mediation process.

For this reason, it makes

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a reservation of rights.

Because the parties to a mediation often expect insurance to fund any settlement, it's particularly important to assess early on whether there are issues that might preclude coverage for some parts of the matter. Yet all too often the coverage issues remain in the background until the parties have tentatively agreed on a resolution, subject to the insurer's funding of the settlement. If the insurer did not reserve rights, then insurance coverage issues are less likely to present a significant hurdle to concluding a settlement. However, if the insurer has reserved rights on the grounds that some claims being settled are not covered

involve significant insurance coverage issues.

Therefore, further inquiry into the presence of insurance is warranted at the inception of just about any mediation. If insurance is involved, even in the periphery, further inquiry into the insurance coverage world is warranted to assess and address coverage issues that may create funding hurdles down the road.

As part of an early pre-mediation call, the mediator and defense counsel should discuss whether insurance is or may potentially be involved in funding the defense or any eventual settlement amount. If the mediator does not inquire, defense counsel should proactively alert the mediator to the presence of insurance. (Defense counsel should also discuss potential insurance coverage with the client to be sure to all potential avenues of coverage have been explored.)

If there is potential insurance coverage for the matter, the mediator and defense counsel should also discuss the types of insurance involved (e.g., commercial general liability, errors and omissions, directors and officers, etc.). Additionally, for each type of coverage, the

sense to assess early on whether there are any coverage issues, so that the mediator and the parties are not caught off guard at the funding phase. So what is the best way to uncover this information? One might start by looking at the case caption. If an insurer is a party, then the case is likely (though not certain) to involve insurance coverage issues. The reverse, however, cannot be assumed. Just as a book should not be judged by its cover, the presence or absence of potential insurance coverage issues should not be assessed solely by reference to the case caption. A matter with no insurance carrier parties may well

mediator and defense counsel should discuss whether the insurer has reserved rights.

If there is a reservation of rights, defense counsel may not be comfortable engaging in further discussion of the reservation of rights or the coverage issues. However, it is worth considering whether additional generic issues may be addressed, either with defense counsel or, if the defendant has coverage counsel, preferably with coverage counsel.

Consider asking the following 10 questions:

1. What are the policy's limits (for each policy involved) and what amount remains on the limits?

2. Does the policy provide for payment of defense expenses? If so, does payment of defense expenses erode policy limits?

3. How many layers of coverage (primary and excess) are there?

4. What coverage defenses (if any) have been raised?

5. Is it possible for the mediator to review copies of the policy(ies) and/ or position letter(s) of each carrier and type of coverage in advance of the mediation?

6. For the primary carrier(s), does it make sense to have a representative of the insurer present at the mediation or is there a concern that the representative's presence will send the wrong message to plaintiffs (i.e., that there is coverage when the carrier is taking the position that there is no coverage)? The same question should be posed to the excess carrier(s).

7. If the defense prefers not to have a carrier representative present at the mediation, should a representative be available by phone during the mediation?

8. Would it be helpful to schedule a pre-mediation call with coverage counsel

and/or with the carrier(s)?

9. Would pre-mediation briefing on (at least the key) coverage issues potentially facilitate the mediation — for the defense and carriers' eyes only (and possibly additional confidential briefing for the mediator's eyes only if desired by either the carrier or defendant)?

10. Are the insurance coverage issues sufficiently significant or complex to warrant engaging a mediator with expertise in insurance coverage to co-mediate the matter?

While discussing these issues will not, alone, solve the coverage issues present in a mediation, exploring them early should highlight the views of both the insurer(s) and the defendant(s) regarding and afford better pre-mediation preparation. If used skillfully, examination of these issues should provide a springboard for

resolution of any coverage issues as part of, or simultaneously with, the scheduled mediation. This, in turn, should avert unexpected roadblocks and enhance the efficiency and effectiveness of the mediation process. ■

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