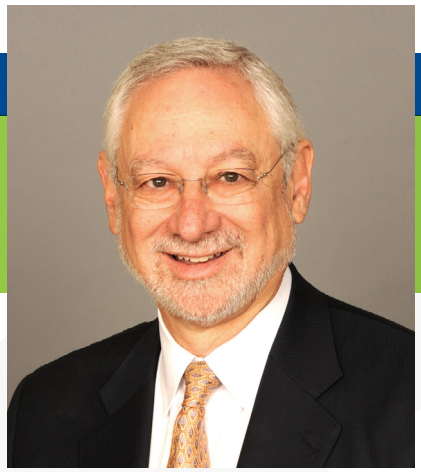

Early Mediation of Insurance Coverage Disputes

By Bruce Friedman, Esq.
March 24, 2016

Mediation of insurance coverage disputes prior to the filing of a lawsuit is becoming more common. In part, this trend is the result of ADR provisions in insurance policies that require that the policyholder and insurer mediate coverage disputes prior to engaging in litigation. Some of these provisions provide that the mediation shall continue until the mediator declares an impasse. Others have a cooling-off period after the mediation that preclude either party from filing suit for a period of time (90 days) from the date of a failed mediation.

While early mediation and resolution of disputes is a laudable goal, saving the parties the time and expense of protracted litigation, the question is whether early mediation can result in a resolution of the dispute. There are a number of things that the parties can and should do prior to the mediation to enhance the possibility of success, which include the following:

1. At least a month before the mediation, counsel for parties should discuss what they need to know in order to enhance the possibility of settlement. This may require an information exchange phase of the mediation. Once you have set up your mediation, the parties can exchange documents and information under the mediation privilege with an agreement to return the documents at the conclusion of the mediation. The information could include the production of the underwriting and claim file if the coverage dispute arises in the third-party liability insurance context; documentation of the extent of the loss; documentation of the financial condition of policyholder if the issue of collectability is raised by the dispute. These examples are only illustrative to spark your thinking on what you may need to see in order to evaluate the risk and value of the case. In some cases, early consultation with experts and an expert report may be very helpful and persuasive.

2. Mediation briefs must be exchanged as early as possible in order for each side to evaluate the positions of the other. It is too late to wait for

This article was originally published by LAW.COM and is reprinted with their permission

the mediation to learn all of the arguments of the other side in order to give the issues the proper consideration. Exchange of briefs also enhances the meditation process by allowing the parties to directly address each other rather than relying on the mediator to be the sole interpreter and communicator of the positions of the parties. It educates the opposing side to the issues raised by the case. Exchange briefs at least a week before the mediation to allow time for counsel to discuss the issues with their clients and to hopefully arrive at some objective evaluation of the prospective lawsuit.

3. Assuming that the parties are serious about the early mediation and want to attempt to settle the matter, then each side needs to come to the mediation with settlement authority. By that I mean taking off your advocacy hat in the preparation for the mediation and analyzing the likelihood of success. I suggest that counsel discuss the issues with a colleague in the office who is not involved in the case who may provide a more objective view. After all, while the mediator is not going to decide the case, a settlement is going to reflect the strengths and weaknesses of each sides positions and an objective evaluation of the issues is crucial to arriving at a settlement. Other factors in early resolution such as the cost of money, the saving of litigation expenses, and business reasons for resolving the dispute are all fair game for discussion and evaluation of the settlement value of the case, but they are not substitutes for objective risk assessment and the money necessary to get the matter resolved.

One more issue that needs to be considered in connection with the early mediation of insurance coverage disputes arising in the third-party liability insurance context is whether the insurance coverage issues can be resolved without the resolution of the underlying lawsuit against the policyholder. If the early mediation addresses the duty to defend the underlying suit, then there is no reason to delay in mediating the issue. However, if the intent of the insurance mediation is to resolve indemnity for loss arising out of the underlying litigation, then it is highly unlikely that the parties will be in a position to resolve the coverage issues without knowing the extent of that loss. Under these circumstances, I strongly suggest that the mediation of both the coverage issues and the underlying case occur simultaneously. The coverage issue may be a tool in the resolution of the underlying case and the cost of the third-party settlement will have a significant effect on the resolution of the coverage dispute. •

Bruce A. Friedman, Esq. is a JAMS neutral, based in Southern California. He is an accomplished dispute resolution professional who has mediated and arbitrated a wide range of disputes, including insurance, class action, professional liability, business, real estate and entertainment and copyright matters. He can be reached at bfriedman@jamsadr.com.

This article was originally published by LAW.COM and is reprinted with their permission