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Co-Mediation Presents Unique Opportunities for Settlement

Break the impasse of significant insurance issues, including in bankruptcy, with this mediation tool

By **STEVEN GILFORD, ESQ.**

Co-mediation is an important alternative dispute resolution (ADR) tool that is getting increasing attention and consideration. In general, the concept involves the coordinated use of two mediators with different approaches or areas of expertise to facilitate settlement.

One situation that is particularly well suited to co-mediation involves suits where insurance coverage is important to the ability of the parties to settle. Mass tort, employment and securities cases provide good examples. In each case, the inclination of the parties is often to get a mediator with strong expertise in the subject matter of the underlying case. When the mediation starts, however, it often turns out that the ability to settle is substantially controlled by insurance issues, including whether there is coverage at all and, if so, in a significant case, how it should be shared among various insurers.

In some cases, the mediator with tremendous expertise in mass tort, employment or securities cases does not have significant expertise in the insurance issues that are the greatest obstacle to settling

the case. Coordinated use of an additional mediator with insurance expertise may help break the impasse, much like coordinated use of coverage counsel and underlying counsel is often valuable to parties trying to fashion a settlement.

Recent bankruptcies driven by the coronavirus pandemic provide another opportunity where co-mediation is likely to be helpful. The pandemic has driven many companies into bankruptcy. The resultant bankruptcy proceedings may raise complex issues of insurance, especially coverage and loss measurement for business interruption losses asserted to have resulted from COVID-19.

With courts currently closed or restricted to virtual hearings in an effort to limit COVID-19 exposures, mediation has taken on special importance in a wide range of matters. In the bankruptcy context, mediators have been working to help parties achieve economically sensible, value maximizing solutions to the kinds of issues that often separate debtors and creditors. But the pandemic-driven bankruptcies also raise unique challenges that call for the coordinated use of mediators special-



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ized in bankruptcy and mediators trained in insurance.

Before becoming a mediator, I spent years in private practice working on the insurance issues in the Dow Corning bankruptcy that was driven by breast implant claims as well as on several asbestos bankruptcies. In each of these cases, insurance was one of the most important assets at issue, giving rise to numerous insurance coverage issues including the role of insurance in bankruptcy. In each case, the insurance was the subject of extensive negotiation or mediation separate but coordinated with the broader bankruptcy issues.

Co-mediation allows two coordinated mediators to focus on separate groups of parties and issues. The insurers are rarely significant creditors in a bankruptcy in which their policies are at issue, so there is no need for them

to participate in all discussions of technical bankruptcy matters.

Bankruptcy courts may have an ability to value and provide a structure for the resolution of pending and future claims, including tort and insurance claims, that is not typically available outside the bankruptcy context. When the interests of the insurers and other creditors intersect, the two mediators and the relevant parties can be brought together for a joint session to negotiate issues such as the timing and extent to which insurers may cover some or all of a debtor's losses.

A common objection to co-mediation is cost, but the cost of an additional neutral is relatively small in the context of a major commercial case or bankruptcy. Indeed, in the bankruptcy context, these costs will normally be spread among the parties in interest in any event.

Scheduling can also be an issue in co-mediations but the increasing prevalence of virtual mediations – mediations over zoom or other videoconference



platforms—makes scheduling of multiple mediators and party representatives much more efficient and economical. Use of dual mediators can also speed the process by avoiding downtime and allowing multiple issues to be worked on simultaneously.

In the context of the COVID-19 pandemic, insurance may be an important bankruptcy asset and, in some cases, a significant source of value to be distributed to creditors. If a

company facing bankruptcy has insurance for a COVID-19-related business interruption, civil authority or contingent business interruption loss, the valuation and collection of that insurance claim may be central to completing the bankruptcy process.

While most bankruptcy mediators have experience in resolving complex issues among bankruptcy case constituents, they often are not experienced in insurance and reinsur-

ance. Coupling a mediator with expertise in insurance with a mediator skilled in bankruptcy allows both sets of issues to move forward efficiently, with each mediator and the relevant parties focusing on their respective areas of expertise.

The same is true in other areas where insurance is important. Coordinated use of two mediators—one with insurance expertise and one with expertise with the underlying case—pre-

sents a unique opportunity to move all issues forward simultaneously while avoiding the obstacles that a serious insurance dispute can pose to a successful mediation.

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