Don't Let Coverage Issue Delay Settlement

By Craig Meredith, Esq.
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There are a number of steps in-house counsel can take to increase the likelihood of mediation while working with outside counsel on cases defended by carriers.

Some mediations directly involve insurance, such as those involving cases between carriers or among insureds and carriers. In these cases the insurance issues are fully addressed in the pre-mediation statement provided to the mediator.

Other mediations, however, do not directly involve insurance coverage issues; although those issues may determine whether the mediation succeeds or fails. These are cases where the underlying case is a non-insurance case where one or more defendants are defended by carriers and those defendants are seeking carrier funding for their settlement amount contribution. In those cases, the underlying factual and legal issues are well-briefed for the mediator by the plaintiff and defendants, but the mediator may find at the mediation that there are significant coverage disputes that will delay or even prevent settlement. Because the mediator was unaware of the nature of those disputes, they may not be able to assist in their resolution and thus the mediation could fail, leading to frustration among all the parties.

To diminish the likelihood of this happening, the following steps are recommended:

Alert the Mediator

Alert the mediator to coverage disputes in advance of the mediation. If the dispute is routine, a phone call or letter will do, but if it is complex, brief both sides of the issue. Remember that some mediators have only a general understanding of coverage issues and they may need to study the briefs and read the relevant cases.

Discuss the Facts that Drive the Coverage Issues

On a related note, remember that the facts addressed by plaintiff and defense counsel in briefing the underlying action may not be the ones that determine the coverage issues. Make sure that the mediator is made aware of these "extraneous" facts and alert them to any disputes regarding these facts.

Help the Carrier Representative Be Ready

Make sure that defense counsel has sent a detailed liability and damage analysis to the carrier well in advance of the mediation, especially if the amount of the requested settlement authority is significant. Remember that most carriers have standard procedures for obtaining settlement authority and the larger the sum, the greater the number of supervisors who have to approve it. Numerous mediations have failed

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because the carrier representative did not receive the necessary information and analysis in time to allow for this process.

Resolve Allocation Disputes

If multiple carriers are defending a party, do they have an agreement in place as to their respective shares of any settlement contribution? Too often the mediator must spend the majority of the first day of the mediation assisting with these "allocation fights" at the expense of mediating the underlying action. If the parties know that these fights are looming, consider a pre-mediation coverage mediation so that these issues can be largely resolved by the date of the actual mediation. Remember that a party with multiple carriers cannot make a funded offer at the mediation if its carriers have unresolved allocation issues.

Have Access to the Necessary Carrier Representative

Will the necessary carrier representative be at the mediation? If that person will need to call a supervisor to obtain additional authority, will they have access to that person, including after business hours or during commutes? It is very disappointing to be very close to settlement late in the evening only to find that the deal can't close "because my boss has gone home and I don't have their cell phone number."

Help the Claimant Set Appropriate Expectations

This is an essential point that requires action well in advance of the mediation. In many cases, the "target" defendant may be an entity that is out of business and may even be in a bankruptcy action. In that case, the only funding that may be available for settlement are its carriers insurance contributions.

In most states, defendants are required to make disclosures of their available insurance. The plaintiff's counsel may then learn that the target defendant is being defended by three consecutive carriers, each with $10 million in limits. He may then joyfully report this to his clients with the message that there is plenty of insurance to cover their losses. Remember two important points. First, the duty to defend is broader than the duty to indemnify in most states, so a carrier often must defend a case even if it contends that there is no coverage. Second, policy limits are not the same thing as available coverage! Using this example, the carriers might be contending that only 10% of the alleged damage is covered such that there is only $3 million in available coverage, not $30 million. If this is the situation, plaintiff's counsel must be advised immediately so that the client's expectations can be properly managed. If they only find out about the limited coverage on the day of the mediation, settlement will be unlikely.

Succeed in Settling!

Mediation can be challenging, and it is even more challenging when the mediator and the parties must simultaneously negotiate the underlying factual and legal issues and a difficult coverage dispute. Following these suggestions will greatly enhance your chances of successfully resolving both disputes. ●

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