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Insurance can impact your mediation

Top 10 issues to address to ensure that coverage disputes do not impede settlement

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Alternative Dispute Resolution

Resolving a dispute through mediation is an extremely satisfying experience. Whether a settlement is reached at noon or at midnight, individual parties often experience an almost overwhelming feeling of relief that the long-standing dispute that has been consuming their lives for years is finally a thing of the past; they have their lives back. For a business, it means a return to making money rather than spending it on increasingly expensive litigation. Settlement puts an end to uncertainties regarding the outcome, cost and duration of the dispute that previously impeded business planning.

On the other hand, failing to reach settlement at mediation can be tremendously disappointing. The parties have typically spent considerable time and expense preparing for and attending the mediation in the high hopes of final resolution. Ending the mediation without a settlement can leave parties feeling even more frustrated, antagonistic and entrenched.

Mediations fail for a number of reasons. Many fail unnecessarily because the case involves insurance coverage issues or disputes among multiple insurers that have not been properly developed or addressed by the date of the mediation. While the parties will typically submit mediation briefs that address the liability and damage issues of the underlying case, they often do not address coverage issues or allocation disputes even if they know these issues exist. Too often, the mediator is not advised of an insurance issue until well into the mediation and is then faced with a "mediation within the mediation." At that point, there may be no way to resolve the undeveloped coverage or allocation issues and the mediation fails.

Following is a **recommended checklist** for mediations involving insurance, so parties can minimize the likelihood that insurance issues preclude settlement.

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1. Have all potentially involved carriers been placed on notice? Many claims trigger more than one policy and the defendant should be sure that all potentially exposed carriers are on notice. For example, cases involving continuous, progressively worsening damages may trigger several consecutive policy years. Large cases may potentially expose one or more layers of excess policies. Some claims can trigger different types of coverage — for example, both the defendant's commercial general liability and professional liability policies. If all potentially involved carriers are not on notice and up to speed, the case is far from ready for mediation.

2. Do the defending carriers agree that all potentially involved carriers for their insured are participating? Carriers are increasingly unwilling to "pay and chase," that is, pay the entire settlement themselves and then pursue other carriers for contribution and indemnity. A defending carrier may attend a mediation and be well-informed regarding the case, but refuse to grant settlement authority because another of their insured's carriers is not "at the table." Counsel should not hesitate to get the mediator involved in this early stage before attending the mediation. It is important to reach an agreement with the defending carriers that all parties who should participate are there, or to come to an understanding as to how settlement can be achieved if they do not participate.

3. Have counsel responded to all of the carrier's requests for information? It is important that counsel respond to all requests so that carrier representatives can obtain authority for the appropriate level of settlement contribution. When the carrier does not have this authority, due to lack of information from counsel, it will heighten the parties' frustration. Counsel should review all correspondence from the carrier and make sure that information requests have been addressed, even if the response is to inform the carrier that the information is not available. Well in advance of the mediation, counsel should confirm that the carrier has all of the information it needs to make a decision and that the representative is not waiting for additional information.

4. Have counsel provided the carrier with a liability and damage analysis and a request for settlement authority? In order for a carrier to evaluate settlement, it needs to understand the risks associated with a trial loss, and the potential magnitude. It is easier for the representative to obtain necessary approval from superiors if there is a specific sum being re-

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quested. Claimants should not wait until the day before or day of the mediation to set forth their demands.

5. Has the carrier been provided with sufficient time to work through the process of obtaining settlement authority? In spite of the lore on the subject, there is seldom a "carrier representative with full policy limits authority" who can attend the mediation in person and pull the trigger on a contribution on the spot. And the more settlement authority needed, the longer it will take to get it. For example, getting settlement authority of more than $5 million can often take three or four weeks after the request is made. Counsel need to ascertain how much time the claims representative needs so that the mediation is not scheduled prematurely.

6. Has the mediator been advised of troublesome coverage issues and have those issues been briefed? Defense counsel appointed by carriers is understandably reluctant to get into the merits of coverage issues, but they can at least advise the mediator of the existence of such issues. Coverage issues often involve complicated, untested policy language and are determined by facts that might be in dispute. Often there will be insufficient time to educate the mediator adequately on those issues if they have not already been explained in briefs or correspondence. When defense counsel becomes aware of possible coverage issues that may impede settlement, they should invite the carrier and insured to send separate briefs or correspondence to the mediator outlining those issues. Policies in dispute should also be available. More often, customized policies, or "manuscript" policies, rather than "form" policies are at issue. Involve the mediator as early as possible to devise a procedure that addresses insurance issues in a way that does not impede the "main event."

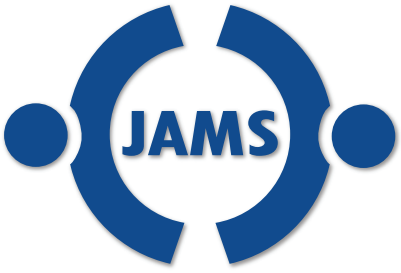
7. Have "allocation disputes" been resolved ahead of the mediation? Check to see if multiple carriers are defending the same insured parties, as they often have disputes over their respective percentages of any settlement contribution. Excess carriers and primary carriers also often have disputes over whether the excess carrier must participate in the settlement. Carriers may even demand that the insured make a contribution, but don't have an agreement with the insured as to the respective shares. These allocation disputes should be resolved or at least narrowed as much as possible prior to the mediation.

8. Will the right carrier representative attend or at least be available by phone? When there are unresolved coverage disputes, a carrier representative and/or coverage counsel should attend. Also, on occasion, the attending claims representative must call his or her supervisor before increasing settlement authority. Counsel should make sure that they have after-hours access to those supervisors, especially when those supervisors are on the East Coast.

9. Have the parties considered a pre-mediation of the coverage or allocation disputes? Mediations for complicated commercial cases often last longer than a day, even when coverage and allocation disputes don't exist. An effort to resolve the coverage issues during the mediation of the main case will often result in inadequate time to resolve the case, which can frustrate already impatient parties. Those parties that are having serious coverage and allocation issues should consider sharing the cost of a pre-mediation before the main mediation. These pre-mediations can streamline the mediation of the main case by resolving the coverage and allocation issues or devising a process for doing so.

10. Has the claimant been made aware of coverage limitations that will limit available funds for settlement? As early as possible in the case, the plaintiff or claimant should understand possible coverage limitations. It is harmful for a client to get excited about a $10 million claim against an insolvent defendant when that defendant has only $1 million in available limits. Similarly, even a policy with a $10 million limit does not necessarily provide $10 million in coverage. Advising the plaintiff's counsel early about limitations in available insurance proceeds will assist them in managing their client's expectations about possible recoveries.

It is the shared responsibility of the parties and the mediator to prepare participants for maximum success of the mediation process. Managing the insurance issues through some of the above suggestions, however, will greatly enhance chances of success for all.



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