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When the Tail Wags the Dog – Why Coverage and Risk Transfer Must be Resolved Before the Underlying Claim can Settle

I. Introduction

An axiom of mediation is that insurance coverage, duty to defend, additional insured and other insurance related issues of frequently the catalyst of settlement. The reality is that insurance often controls the settlement dynamic, and the insurance issues are repeatedly the ultimate word in the timing and amount of settlement at mediation.

Therefore, it is of utmost importance that the issues regarding coverage and risk transfer must be addressed – and ultimately resolved – if the underlying claim has any opportunity to settle at mediation. We will address why handling these issues will give parties a more likely chance at ultimate settlement, and how to ensure these issues are properly treated during the settlement process.

The Scope of Mediation

Coverage

One of the first issues an attorney must face before any attempt to resolve complex litigation is how coverage will affect any resolution. In many case, coverage is ignored or minimized as the parties attempt to determine apportionment of fault and damages. However, as we will discuss, the coverage issues can frequently be the difference between a successful resolution, and continued litigation.

A determination must be made whether an initial mediation, or informal settlement conference should be held to discuss the various coverage issues, such as additional insured status, covered vs. non-covered claims, and even issues between insurers covering the same risk for a co-insured. Often these are items that will create disagreement, either at the beginning, or worse, at the end of the mediation. Not discussing these issues early and often can prevent even the easily resolvable case from hitting a resolution roadblock.

Liability

Clearly, determination of liability both a simple "is there or isn't there" for each party and an apportionment between multiple defendants is a necessity for resolution at mediation or other alternative dispute resolution. Additionally, there frequently exists contractual indemnity issues that must be agreed upon for there to be a full and final settlement. Determining whether the first (and hopefully last) mediation should only deal with liability may be preferable in certain matters. Often, answers to liability questions drive answers to coverage questions, so a discussion amongst the parties as to liability positions may be required to even get to the coverage matters.

Both

Given the nature of the connections between liability and coverage issues in complex, multi-party matters, it is often preferable to mediate both coverage and liability in a combined session. Getting coverage and defense lawyers together, with a mediator (as discussed further, below) who understands the myriad issues can be the most efficient way to move towards a positive resolution of the complex matters.

This dual session allows all of the issues to be addressed at one time, and to intertwine the issues, as they naturally do, to come to the most effective, efficient, economical resolution for all parties. While Plaintiffs are often just looking for the money, more sophisticated firms understand that without the coverage piece, the money for settlement can hit a logjam.

II. The Reality of Two Disputes

These complex cases have a spider web of matters that often prevent resolution. There are really two disputes: whether there is coverage (for certain damages and for additional insured/indemnity issues) and liability (how do we split the baby?).

Coverage – Liability – Risk Transfer

The delicacy with which counsel handles the two disputes can be the difference between a go/no go on settlement. Counsel must advocate coverage matters while simultaneously exploring the underlying settlement. The discussions cannot simply be about money, and this complicates the ability to have full communication about finalizing a settlement.

On the liability side, the assessment of exposure from each party is a driver of whether there will be enough money in the bucket to engender settlement. Often, the parties assessment of each other's responsibility is light years apart, and frank discussions between the mediator and parties is necessary to get everyone on the same page. Lock step offers can ensue which limit the ability to get a true value of the overall risk that will allow settlement. The parties must be willing to make a reasonable assessment of apportionment relative to a global damage amount to allow for full negotiation.

Since apportionment must be addressed to facilitate a global resolution, the parties should have discussions well in advance of mediation. This could include frank communication

between counsel as to parties' various positions on liability; discussion between and among claims professionals to work through disputes regarding liability in advance of mediation and outside the presence of Plaintiffs; and a separate, "pre-mediation" session only between defendants and their insurers.

Obviously, decisions in this regard need to be made with ample time to report back, discuss internally, and determine resolution strategy for mediation. While complex cases often require multiple mediation sessions, making these determinations and having the difficult conversations, whether with the insured, internally, or between parties in a time frame that allows for additional decisions to be made is extremely beneficial in assisting in, at a minimum, making the initial session productive in moving the process towards resolution.

In many complex contractual disputes, the determination of whether additional insured status exists, whether the parties have picked up additional insured coverage, and how that coverage will be divided amongst many parties will be a major portion of the final settlement. The theory that tenders should be made "early and often" can benefit resolution by having the issue at the fore at the very start of negotiations. Providing reasonable pre-mediation additional insured demands will further the likelihood of final resolution.

Another part of the equation in complex matters are multiple insurers for the same insured. Insureds frequently change carriers for price or other reasons and when the risk is spread between multiple carriers, the discussions concerning time-on-risk and apportionment between the insurers can hold up settlement talks.

Often times, the parties will encounter the "holdout", a company or insurer that takes an unreasonable "no-pay" position. In multi-party mediation, taking that position can be rewarded if the other parties feel compelled to resolve the case even without the recalcitrant party's participation. If such an obstinate insurer is involved, it is vital to advise the outlier insurer of the potential consequences. This could include agreeing with the Plaintiff to settle around the party leaving them alone to continue the battle.

Dealing With the Two Disputes

Mediate coverage separately before the liability mediation if there is a significant dispute with the insured or there are multiple carriers for one insured who can't agree on apportionment according to the language of the policy and need the assistance of a neutral.

In Florida, you can send out statutory insurance disclosure requests (the statute has no teeth and the requests are frequently ignored) or send Non-Party Subpoenas to the carriers directly for the policies. If you're defense counsel and you receive them, send them to your insurer contact and the insured and/or its coverage counsel.

Do your state rules allow you to compel the insurer and insured's representatives to appear no person? If not, ask the court anyway. Request multiple carriers for the same insured to talk in advance to address the method of contributing to a settlement negotiation on behalf of the insured: equal shares? Time on risk? On an excess basis? If they haven't spoken in advance, take the first hour or two to address coverage amongst yourselves. If there's a

significant dispute, take advantage of the mediator and address the particular coverage issue with the mediator when it's your insured group's time to speak with the mediator.

On the liability side, get tenders and demands out as far in advance of the mediation session as possible to allow the defendants and their insurers time to address the facts in light of the demands, resources and available coverage under the applicable policies. Don't wait until the night before mediation to allocate liability and amount (by dollar or percentage) for each potentially responsible party. Provide as much advance information as possible – expert reports, expert presentations, liability evaluations, salient facts – with time to address follow up questions prior to the mediation.

(Not) The End

Mediation is not necessarily a failure if a settlement isn't reached. Were you able to move the case forward? Did something get worked out? Did you get more carriers involved? Did you identify the coverage issues in the room? Were you able to address risk transfer? Why not? What do you need to do to further negotiations?

Fast-forward. You have a trial date, you've used all of the tools available in your jurisdiction to get everyone to the table with everything they need. You've mediated several times and the court is sending you back to do it again. The case needs to resolve or be tried. The plaintiff is unreasonable, too many insurers are denying indemnity, and your client/insured has no assets.

Now what tools does your jurisdiction give you to impress upon the parties and their representatives that resolution through settlement is a better choice than trying the case (if settlement is in fact a better choice and possible)?

- Did insurers or parties fail to appear to negotiate in good faith? *Casaccio v. Curtiss,* 718 S.E.2d 506 (W.Va. 2011)(finding sanctions for failing to attend inappropriate); *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.,* 163 Cal. App. 4th 566 (Cal. Ct. App. 2008)(finding sanctions against the excess insurer for failing to attend mediation inappropriate whether the excess insurer had no notice of mediation); *Aubain v. Kazi Food of the Virgin Islands*, *Inc.,* 2014 V.I. LEXIS 93 (V.I. 2014)(Imposing sanctions when the insurer's representative failed to appear at mediation because the credibility of the insured's allegations and value the insured assigned to the claim were not "good cause" for failing to appear at a court-ordered mediation).
- Is the problem an insurer who defended but refuses to contribute to indemnity? Is the insurer's position correct? Is the insured willing to assign its rights under the policy? Can it? *Perera v. U.S. Fid. & Guar. Ins. Co.,* 35 So. 3d 893, 903 (Fla. 2010)(In order to enforce such an agreement, the insured must prove that the damages are covered by the policy, the insurer wrongfully refused to defend, and the settlement is reasonable and made in good faith).
- Is the assignment reasonable and not collusive? *Abbey/Land v. Glacier Construction Partners, LLC,* 394 Mont. 135 (Mont. 2019)(Finding the $12M consent judgment to be "contrived to inflate plaintiff's recovery to the detriment of an

insurer beyond what should have been a reasonable liability exposure for its insured" and the product of collusion);

Solutions

None. Seriously, there are none but there are things that can be done to put a dispute – both disputes – in the best possible position to resolve at the next mediation session (whether that's the first session or the 17th session). While there are no solutions, and each case is different, there are different tools available in each jurisdiction to assist in placing you and your client in the best possible negotiating position, even if a settlement can't be reached on that particular day.

III. The Benefits of Determining Liability

Contracts

Multi-party disputes often include contracts with less than detailed scopes of work or distribution of responsibility. In these matters, communication regarding allocation of the work as relative to damage demands can be a successful negotiation tool to push resolution. Detailed analysis of the contractual provisions allows for frank talk of who owes what based on Plaintiff's damages, and can be used to drive settlement.

Insurance Policies

A steadfast rule in complex insurance matters is "RTP" ("Read the Policy"). Understanding of the defense and indemnity obligations of the insurers not only to their insureds, but potentially to other parties is essential in the complete analysis of the complex claim. Ultimately, determining liability through the contracts and policies can allow for more diverse coverage discussions, thereby facilitating progress in moving the parties closer to an agreement.

Interests of Multiple Stakeholders

Liability determinations are often colored by the fact that there are multiple stakeholders. The insurer needs to assess the liability picture through the prism of the policy. The insured often has strong feelings concerning liability and takes a position that can be detrimental to ultimate resolution. Negotiating the often diverse interests of the stakeholder is essential in any matter to keep everyone in the game and pushing in the same direction towards completion of the negotiations.

IV. Mediating the Issues

Scope of Coverage or Risk Transfer Dispute

So we finally come to the actual mediation, the negotiation of the claim to try to make this the best of claims files – a closed claim file.

Many issues need to be assessed to give the mediation or other dispute resolution vehicle the best chance of success. First, a critical factor is the timing of the mediation – when to mediate. Mediating too early can offer defendants an opportunity to give the "we don't' have enough information" defense to anteing up and making a reasonable assessment of exposure that could lead to resolution.

A second potential issue is who should participate. As noted above, a determination of whether we want to mediate coverage, liability, or both is an initial determination. Then, if a coverage mediation only, whether we want just adjusters, coverage counsel and adjusters, or even having defense counsel involved is wanted or necessary. In a liability mediation, it is often extremely beneficial to have coverage counsel attend, or at minimum readily available to discuss the issues that will inevitably arise regarding coverage.

Third, what discovery is necessary to ensure the parties are in the best position to fully analyze all of the issues, coverage, liability and otherwise, to make a fruitful mediation. Have initial damage demands been made? Has Plaintiff provided its expert discovery to allow the defendants experts' to assess liability and damages more fully? Communication between the parties and the mediator in advance of mediation to ensure everyone has what they think they need can make the difference in success vs. failure.

The parties should be willing to exchange all documentation necessary to allow for full evaluation. Holding back information, when these matters rarely are tried, does not warrant discussion if the parties truly wish to resolve the case.

Mediator Selection

Any mediation, but most especially the complex matter involving coverage, the selection of the mediator is possibly the most important decision. The mediator must be respected. It is almost impossible in a multi-party complex matter to get a mediator that everyone likes, but if there is at least respect for the mediator, it can enable a more productive session.

The mediator must be knowledgeable on the issues being mediated. Coverage issues are not the bailiwick of many mediators, and therefore, consideration must be given to retaining the right person for the job. Having a mediator that needs to be taught the issues will not grease the skids for creative ideas to assist in final settlement.

Another consideration, taking into account the personalities of the various parties and the type of claim, is whether a "facilitative" or "evaluative" mediator is best suited for the claim. In other words, do the claims and parties need a therapist, or an arm-twister? This consideration is essential in many cases to whether progress will be made throughout the day.

Finally, should consideration be given to co-mediators? If there are mediators with different strengths that are respected and knowledgeable, it may be beneficial to have a mediator for the coverage issues and another for the liability issues. This could allow for parallel mediations that address all issues simultaneously and could be beneficial to minimizing the overall time spent in attempting to resolve the case.

Preparation of Mediator

Ultimately, a mediator can only be as good as the information provided, so pre-mediation preparation of the mediator can be a useful tool in minimizing the time spent on matters other that getting a deal done.

The parties' pre-mediation submissions should be thorough, detailed, and objective. A pre-mediation submission for the mediator's eyes only should not be overly zealous in its advocacy, rather it should provide the mediator with a full and balanced account of the case to allow for frank discussions during the session. Photos, plans, contract language, and other details can be provided to allow the mediator to enter the session ready to get to work, rather than wasting time getting the mediator up to speed.

Another extremely useful mechanism are pre-mediation discussions with the mediators. Having the mediator speak frankly with each party, or with subsets of parties, in advance of the actual mediation session allows for an exchange of information and preliminary positions that should make the mediation more successful. This also allows the mediator to ask questions, before mediation that may push the parties closer to a reasonable settlement position.

At the end of the day, complex cases always involve coverage issues. These coverage issues sometime prevent a resolution. Therefore, it is imperative that as part of the preparation for mediation, counsel and claims professionals consider how they may affect the settlement, discuss the issues, and try to resolve some disputes before mediating. This can ultimately define whether the mediation is successful, and whether a claim may be resolved.