INTEGRATED MEDIATION TO *RESOLVE AN UNDERLYING CLAIM AND OVERLYING COVERAGE DISPUTE*

Introduction

The term "integrated mediation" is used to define the concurrent mediation of an underlying claim and the related insurance coverage dispute in a single mediation process. Any lawyer who has litigated either insurance coverage or the direct defense of an underlying claim appreciates the relationship between coverage disputes and underlying claims. The ability to settle the underlying claim, and the structure of any settlement, is often impacted by the overhanging coverage dispute. Likewise, the ability to resolve the coverage dispute is influenced significantly by the state of the underlying claim litigation. Any settlement of the underlying claim may require a contribution from the insurer, and the degree of participation by the insurer in any resolution of the underlying claim will be influenced by the relative merits of each party's position in the coverage dispute.

The inter-relationship between settlement of both the coverage dispute and the underlying claim would suggest that concurrent resolutions of both disputes should be very desirable. Without an integrated mediation, the process for obtaining a concurrent resolution will often be inefficient and difficult. There are several reasons for this. First, because the coverage dispute creates a conflict of interest between the insurer and the insured, coverage counsel for the insurer will most likely not be able to talk directly with counsel for the plaintiff in the underlying case about settlement. Such direct contact could be viewed as inconsistent with the obligation of the insurer to provide independent counsel, whether appointed by the insurance company or selected by the insured, when a coverage dispute creates a conflict of interest. Further, defense counsel for the insured in the underlying case may wish to control any settlement discussions with plaintiff's counsel for a variety of reasons. The net result is that the settlement negotiations involving any contribution by the insurer to the resolution of the underlying case will generally be funneled through defense counsel. Since defense counsel's obligation is to represent the best interests of the insured, which are to some degree in conflict with the interests of the insurer, defense counsel's communications relating to settlement, claim exposure and value may be viewed with some degree of skepticism by the insurer. This communication structure contributes significantly to making the resolution of both the coverage and underlying cases more difficult.

The difficulty in obtaining settlement is further magnified when some of the issues relevant to a determination of coverage are also relevant in the underlying case. In those circumstances, most jurisdictions take the position that the declaratory judgment on coverage should not proceed because of the potential prejudice caused the insured in the underlying action. See: *Dial Corp. v. Marine Office of America,* 743 N.E.2d 621, 626 (Ill. App. 2002) ["a declaratory judgment action filed prior to a determination of liability in the underlying claim is only appropriate where issues in the underlying suit are separable from those in the declaratory action"] Accord: *Allianz Ins. Co. v. Gardant Corp.,* 839 N.E.2d 113, 120 (Ill. App. 2005) While the insurer may attempt to use a protective order and confidentiality agreement in the coverage case to obtain discovery on the issues relevant to coverage, the ability to accomplish this is far from certain. As a result, the insurer's factual basis for taking a settlement position will likely be impaired, making settlement more difficult.

Benefits of Integrated Mediation

At a base level, integrated mediation should improve the communication channel and process by which parties receive information relevant to a potential resolution of the underlying and coverage cases. First, mediation provides a forum in which each party can hear the position of each of the other parties. Coverage counsel for the insurer and insured can hear plaintiff and defense counsel summarize their respective positions on the liability and damages in the underlying case. Counsel in the underlying case can hear the position of each side in the coverage dispute. These brief opening statements of position, of course, will involve some degree of posturing by all involved, but they offer a starting point for further discussions aimed at finding areas of compromise and agreement, and hopefully a basis for a global resolution. Unlike a simple conference call between all the parties, the neutral mediator will also be listening with a goal of finding ways to break through the posturing and help the parties identify a solution.

The thoughtful mediator will provide a logical, structured process for working through the issues in an effort to find a solution. If we assume that in most cases the plaintiff's counsel and the claimant's coverage counsel will have an identity of interests,* then we are left with three attorneys (plaintiff, defense and insurer coverage counsel) each of whom will be evaluating at some level both the underlying claim and the coverage case from different perspectives. With respect to the underlying claim there will be general issues of liability, damages and perhaps contribution/allocation to be considered by each of the attorneys as part of advising their respective clients. There will of course be sub-issues of fact and law with respect to the three general issues. Likewise, with respect to the coverage case, there will likely be at least several issues of fact and law.

The mediator can offer an effective and efficient means of handling the multiple issues among the three separate interests. The mediator can first help identify the various issues, and then through private caucuses with each of the attorneys identify those issues on which there is something approaching a consensus and those issues which are both important to arriving at a settlement and on which there appears to be some material differences of opinion ("key dividers"). Once the "key dividers" are identified, the mediator can work with the parties, first, to see if the differences in perspective can be narrowed and, second, to see how a settlement might be structured to reflect an acceptable compromise on unresolved differences on key dividers.

Direct settlement negotiations of multi-party or complex cases, which would include negotiations on related coverage and an underlying cases, is often hampered by the difficulty in moving beyond the broad general issues and identifying and focusing on addressing the key dividers. The mediator provides a means of addressing this challenge. While the ultimate goal of the mediation will almost surely be the

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* While there is an identity of interests in terms of maximizing the plaintiff's monetary recovery, plaintiff's coverage counsel still has an important role to play in helping plaintiff's counsel for the underlying claim properly assess coverage for settlement purposes. Plaintiff's coverage counsel may also play an important role in negotiating with the insurer's coverage counsel to try to obtain a larger contribution from the insurer towards the settlement of the underlying claim

final resolution of both the underlying and coverage claims, identifying and focusing on key dividers brings value to the parties. If litigation is not resolved in the mediation, the identification of key dividers will give the parties a better understanding of where to focus additional discovery, as well as having a better place to pick up negotiations at a later date.

As noted, when the issues in the coverage and underlying claim are not separable, the insurer may be blocked from proceeding on the coverage action because findings in the coverage action might prejudice the insured's position in the underlying case. As a result, neither the defendant nor its insurer may feel comfortable in agreeing on an acceptable contribution, if any, from the insurer to the settlement of the underlying claim even if there is general agreement on the value of the underlying claim. This, of course, makes it more difficult to settle both the underlying and coverage claims. The general process of mediation can address this challenge by helping all parties better understand and evaluate the coverage issues.

To briefly mention the obvious, costs to the parties are increased when there are both a coverage and an underlying claim in litigation. The longer both continue unresolved, the higher the costs. Costs are a factor to be considered not only in valuing a settlement but also in deciding how to attempt to resolve the matters. By improving the channels of communications and providing a logical, structured process for identifying and addressing issues, mediation should make the settlement process more efficient and reduce overall costs. Further, mediation can help parties address settlement at an earlier stage than might otherwise occur without the participation of a neutral, and the sooner a claim can be resolved the lower the costs.

Addressing the Challenges of Integrated Mediation

To better understand the challenges of successfully conducting an integrated mediation, this writer created and circulated a short survey to a large cohort of insurance coverage attorneys using two groups on Linked-In: the Armadillo Club and the Insurance Coverage Group. The survey sought input from attorneys both with and without actual experience with integrated mediations. Only 14 attorneys responded, but the respondents appear to be highly experienced coverage attorneys with significant experience with integrated mediations. Nine of the fourteen had participated in six or more integrated mediations and four had participated in between two and five. Thus, the survey reflects experience with at least 58 integrated mediations. The fact that only a limited number of attorneys responded suggests that many attorneys do not have experience with integrated mediations.

The major challenge to a successful integrated mediation identified in the survey was, not surprisingly, the complexity of mediating multiple issues. Several survey participants identified the conflict between insurer and insured and the lack of adequate facts regarding coverage as the major challenges. The group of experienced attorneys responding to the survey indicated that making an integrated mediation successful generally requires three things: (a) experienced attorneys (b) preparation and understanding of the issues on the part of all participants and (c) a mediator who understands coverage and is capable of managing the complexity of mediating multiple issues.

The mediator obviously cannot do anything about the level of experience of the attorneys. However, the mediator can take positive steps to address the other two issues. With a complex integrated mediation, the traditional exchange of pre-hearing briefs and statements of position would not by itself be adequate preparation for either the mediator or the parties. Unlike the judicial setting, there is no prohibition against ex-parte communications between the mediator and the attorneys, although discretion must obviously be exercised in terms of what is discussed.

Pre-hearing discussions between the mediator and each attorney should have three primary objectives. First, the mediator should use the discussions to make sure he really understands the position of each party. The briefs may be well written and thorough, but the mediator who has not "lived the case" is still likely to have questions or need clarification on certain points. The time for the mediator address questions he may have is before the mediation begins.

The second objective is to seek to identify any questions or confusion an attorney may have regarding the position of another party. Depending on the timing and circumstances, the mediator may be able to take steps prior to the mediation session to get clarification to each attorney on questions that she may have. If the circumstances do not allow the mediator to seek to answer attorney questions on the position of other parties prior to the mediation session, the mediator should be prepared to get the clarifications to each attorney's questions during the early stages of the mediation. This will help keep the mediation from losing focus.

The third objective would be to identify, if possible, the relevant importance of the various points raised by a party to that party's ultimate position. As an advocate, the attorney will take a strong stand on each point and likely treat each issue as critical. The attorney may also raise numerous issues in her brief on the theory that the number of hurdles put in place strengthens the party's ultimate position. Because the truly critical issues in a multi-party integrated mediation are likely to make the process sufficiently complex, the mediator needs to try to winnow the tangential and secondary issues so that the parties can focus on the most critical issues. The mediator should have a strategy for attempting to do this before the mediation session begins and the pre-hearing discussions offer the opportunity for the mediator to judge the relative importance of various issues.

Experienced attorneys responding to the survey identified as very important that the mediator both understand coverage and also be capable of managing the complexity of multiple issues. Understanding insurance coverage really has two components. The first is a broad and extensive background on insurance coverage matters that provides the basis for understanding the principles that impact coverage interpretations and decisions. The mediator's background on coverage matters is also likely to be important in establishing the credibility of the mediator. The second aspect of understanding coverage relates to the specific coverage points at issue in the specific case. Regardless of the extent of mediator's coverage experience, the mediator should not assume that he understands the specific coverage issues as well as the experienced attorney who is handling the case. The mediator should use the pre-hearing discussions to answer his own questions and improve his understanding of the coverage issues.

In terms of ability of the mediator to manage the complexity of multiple issues in a single, integrated mediation, it is probably fair to say that some mediators have the capability and some simply do not. For those mediators that have the capability, preparation and organization become key. For the various reasons noted in the prior paragraphs, pre-hearing discussions with each of the attorneys with specific objectives for the discussions is an important element of preparation.

The second element for managing the complexity of mediating multiple issues is having a strategy for conducting the mediation session itself. Again, the pre-hearing discussions with the attorneys will be important to devising a preliminary strategy for the conduct of the mediation. Of course, the strategy will have to be flexible and adapt to how the mediation between the parties unfolds, but it is Important to at least have a strategy with which to begin the process. Some mediators have a structure they apply in every mediation, which may be fine for a basic broken leg case but is not appropriate for a complex, integrated mediation.

While the comments above have been directed at the coverage aspects of the integrated mediation, the same process and principles apply to the underlying claim. The mediator needs to engage in pre-hearing discussions with the attorneys handling the underlying claim with the same objectives of improving understanding of the parties and the mediator, identifying the relevant importance of multiple issues, and developing a specific strategy with which to begin the mediation process.

Some Factors Affecting Dynamics of the Integrated Mediation

The dynamics of all mediations will vary depending on the issues, emotional aspects of any issue, and the nature and personalities of the lawyers and clients involved. However, there are some basic factors that will likely influence the dynamics of an integrated mediation, and these factors may influence how the mediator structures the process. The first factor is whether the coverage claim is considered separable from the underlying claim because the determinative facts in the coverage case are not overlapping with those in the underlying claim. If it is considered that that the determinative facts in the coverage and underlying claims may be overlapping, the claims are considered related. The second factor is whether the insured realistically has significant assets that could be used to satisfy any judgment to the extent insurance is not available.

In the situation where the claims are considered to be unrelated there is more likely to be a fuller knowledge of the relevant facts relating to the coverage case and coverage positions may be based on either different interpretations of the law, the lack of clear legal precedent causing lawyers to predict the legal standard that will be applied, or differing interpretations of facts and their legal significance. While the sides obviously disagree on the coverage issues, the basis for the disagreement should be more readily apparent to both sides and each side should be better able to assess the chances of winning or losing. Having an opinion of neutral provided on the coverage issues, by either the mediator or another neutral party who sole role is to provide the evaluation, may be helpful. Of course, the parties should agree that such a neutral opinion should be offered.

Under the category of unrelated or separable claims, there are two basic sub-categories to consider: 1) insured has significant assets that could be subject to a judgment or 2) insured lacks assets that could satisfy a judgment. In the second category where there is a lack of significant assets, the plaintiff's recovery will hinge on both succeeding in the underlying case and prevailing on the coverage matter. The focus of final negotiations will likely be between the plaintiff's lawyer in the underlying case and coverage counsel for the insurer. Defense counsel will provide input to both of these parties, emphasizing the weakness of plaintiff's case to plaintiff's counsel while trying to coax money from the insurance company by emphasizing to coverage counsel the downside risk. Defense counsel becomes, to some extent, a de facto mediator, and the actual mediator needs to account for this in how he or she proceeds.

In the circumstance where the insured has assets that could realistically be at risk, such as with a corporate defendant, the defense counsel is likely to be much more aggressive in challenging the insurer on its coverage position. While the plaintiff and defendant will assuredly disagree on the ultimate value of the underlying case, more of the focus of the mediation will be on getting agreement between defense counsel and the insurer's coverage counsel on the value of the underlying case and what might be respective contributions to any settlement. If defense counsel and insurer's coverage counsel cannot reach some agreement on a joint position to present to plaintiff's counsel, the fact that the insured has assets realistically at risk increases the chance that defense counsel will more aggressively pursue an agreement with the plaintiff's attorney that will mitigate the risks to the insured's personal assets, such as an assignment of the insured's claim against the insurance company combined with a stipulated judgment and potentially a guaranteed minimum payment by the insured. If the goal of the mediation is a complete settlement, the mediator needs to manage the mediation process so it does not end prematurely with some form of agreement between the plaintiff and the insured's defense counsel that leaves the coverage issue unresolved.

As noted, when the coverage and underlying claim are considered to be related because of a potential overlap of determinative facts, discovery may be limited in connection with the coverage case. As a result, both the insurer and the insured may have fewer facts on which to base a reasoned position on settling the coverage case, which can impede the prospects for settlement. A mediator can assist in addressing this knowledge gap in several ways. First, the mediator can get the parties to identify the missing facts that each party considers important to its coverage decision. Second, the mediator can work with all the parties to determine what evidence may exist with respect to the key missing facts. If permitted by the disclosing party, the mediator may share the evidence with the relevant coverage counsel. Since the disclosure would be made as part of settlement negotiations in the mediation setting, it would not have the legally binding or potentially prejudicial effect on the underlying case as would a judicial finding or statement under oath taken in the coverage case. If viewed as credible, the disclosure of what the evidence would show with respect to determinative facts would give the attorneys in the coverage case a better basis for assessing the case than they would have had without any disclosure.

The party making the disclosures may not want the mediator to divulge to the coverage counsel the exact nature of the evidence. In this circumstance, the mediator may wish to probe the disclosing party on the relevant evidence and seek permission to at least inform the coverage attorney how the relevant

evidence would impact the coverage case, in the mediator's judgment, if verified and fully developed through eventual discovery in the coverage case. Of course, the mediator will have to take into account that the attorney making the disclosures is doing so in his or her role as an advocate. The mediator will need to probe the disclosures, not just accept them. Again, the information that is obtained and conveyed to coverage counsel will be less than would likely be obtained after full discovery, but the information should be better than would otherwise be available without the assistance of a knowledgeable mediator. If the goal is to find a way to reach a reasonable settlement before incurring the time and expense of full discovery or obtaining a judicial ruling, then the parties will have to accept that their decisions will be made on less than absolutely complete and fully verified facts.

Conclusion

When an insurance coverage dispute overhangs an underlying claim, the settlement of one is often either influenced or determined by the ability to settle the other. It makes sense to try to settle the coverage and underlying case at the same time, if possible. Mediation offers a more efficient communication structure to facilitate simultaneous settlements, as well as a means of addressing impediments to concurrent settlements. The survey responses received from attorneys experienced in integrated mediations indicate that integrated mediation can be a useful and positive process. It is recognized that this brief note has not addressed all of the issues that may influence the success of an integrated mediation, but hopefully the reader will motivated to consider integrated mediation of coverage and underlying claims. As always, comments are invited.

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