Mediation of Insurance and Insurance Coverage Disputes

By: Hon. John A. Barone and Daniel J. Watts, Esq.

At the outset the writers acknowledge their indebtedness to Simeon Baum, Esq., and Stephen Hochman, Esq., two experienced and able practitioners who conduct a seminar on commercial mediation techniques and practice in conjunction with the New York State Bar Association. Their lectures and those of their guest speakers are uniformly excellent. The course provides an ideal introduction to the field of mediation for attorneys whose practice includes representing clients in mediation.

As the costs and time delays of litigation continue to grow Alternative Dispute Resolution has become an increasingly important part of the civil attorneys' practice. Of course, the attorneys in all fields are by nature negotiators and many cases are settled by the attorneys themselves in direct negotiations, often assisted by judges and court personnel.

Excluding the disfavored methods of dispute resolution, trial by combat, intimidation and fleeing the jurisdiction, there remains a selection of options in dispute resolution based on the degree of coercion involved. The most common options are: 1) litigation 2) arbitration 3) neutral evaluation and 4) mediation.

Within each of the above categories there are various subsets. The subject of this article will be mediation, specifically in the context of insurance coverage disputes. The approach taken will first focus on the mediation process itself. Second, the article will take into account the most common types of commercial litigation and insurance coverage disputes. Finally, the article will discuss the advantages of the mediation process in dealing with these disputes.

I. Mediation. The goals and techniques of the mediator and the attorney in the mediation process.

Mediation may be defined as the voluntary, confidential, and informed dispute resolution process in which a neutral third person helps disputing parties reach an agreement. The mediator has no power to impose a resolution on the parties. The goal is to reach a consensus.[1]

If the parties to a dispute are willing to enter a mediation, the process presents many advantages. Voluntariness is a key ingredient to any mediation even if the mediator is mandatory or if it is conducted under the auspices of the court. The mediation ultimately depends in all circumstances on the good will of the parties.

The spirit of cooperation among the parties can be encouraged by emphasizing the advantages of mediation. The properly conducted mediation process offers a number of benefits to litigants. Parties can avoid years of delay attendant to the litigation process; it frees the parties from a lengthy contest that may end up costing thousands or even millions of dollars. Mediation may also help the parties preserve long standing business relationships.[2]

To encourage this process one of the techniques of a successful mediator is to create a climate in which the parties, early on, view the effort as a joint one. A major goal of problem solving is to reach a solution valued by all.

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[1] Dispute Resolution Commercial Mediation Training Manual, New York State Bar Association (N.Y. 2016)

[2] Jansenson Alternative Dispute Resolution: An Overview, Law Department Management Advisor, Business Law, Inc. Issue No. 129 (December, 1994)

To encourage the atmosphere of joint effort the mediator must employ certain techniques and approaches. He or she must help the parties to understand the strengths and weakness of their respective positions. The mediator should assist the parties to define the subject matter of the mediation in terms of the underlying interests. This in turn will make it easier to develop and choose their own solutions, not one imposed by a judge, a jury or an arbitrator.

An ideal mediated negotiation involves the identification of interests of each party and a search for options that offer the best chance to satisfy those interests. All alternative solutions must be evaluated in light of those interests.[3] The mediator should emphasize the confidentiality of the mediation process. Most but not all mediators employ single party caucuses during the negotiation. If this is done the mediator should emphasize the private nature of the caucus. Nothing discussed in a caucus will be disclosed to the other side or to anyone else without the permission of the party making the disclosure.[4]

To facilitate the negotiations, the mediator should be able to reframe the issues to emphasize the parties' common interests. Each party should be represented by an executive or other person authorized to settle the dispute. In person presence is most desirable. If that is not possible telephone or other means of communication should be arranged.[5]

When defining the interests of the parties the mediator should take a broad rather than a narrow view. Business interests are always important. Often, however, such interests include maintaining or creating a good working relationship between the parties. Legal interests include the costs and risks of litigation. We will further explore this question below.

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[3] S. Baum, Negotiation Skills (Fall Meeting) NYSBA Dispute Resolution Section (10/3/2009)
[4] Scanlon Mediators Deskbook, CPR International Institute for Dispute Resolution (1999)
[5] Scanlon, supra.

Personal and professional interests also come into play. Even in the most hard-headed economic interest mediation, the mediator should always be attuned to the desire of the parties to feel that they are being treated respectfully and fairly. Finally, many times community interests come into play. The need to keep a positive image within the business or general community is often very important to the litigants.[6]

In considering what we termed as litigation issues a useful concept was developed by professors Fisher and Ury in their highly-regarded book on negotiation. Getting to Yes.[7] They developed the concepts of BATNA, WATNA and MLANTA. The acronyms stand for the Best, Worst and Most Likely Alternative to a negotiated settlement. The idea is to try and determine what other agreement could be made which would leave the parties better or worse off than simply leaving the table with issues unresolved. In addition consideration must be given to what the most likely alternative to negotiated agreement would be. Ideal negotiation involves the identification of interests of each party, a search for options that will satisfy those standards and consideration of alternatives to any proposed deal in light of those interests.

Obviously, such calculations may be quite complex but a simple example in the context of a commercial dispute might run as follows. Assume that a litigant has a 50-50 chance of obtaining a $1,000,000 verdict in a case. The case would then be valued at $500,000. Further assume that likely litigation costs would be $250,000. It would then be reasonable to offer a $250,000.00 settlement.[8]

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[6] Riskin, Understanding Mediators' Orientation, Strategies and Techniques A Grid for the Perplexed 1 Harv. Negot. L. Rev (1996)

[7] Fisher, Ury and Patton (2nd Ed. 1991) Getting to Yes – Negotiating Agreement Without Giving In Penguin Books

[8] Baum, Negotiation Skills, supra.

This is a brief consideration of the commercial mediator. The balance of the article will consider the nature of commercial litigation and insurance coverage disputes and the role that a mediator can play in resolving them.

II. Types of Coverage Disputes

A. Insurance Defense and Indemnity – Third Party Claims

Cases involving third party claims are among the most frequently seen by the commercial litigator. A typical insurance liability agreement imposes a duty on the insurer to defend and indemnify the insured against claims made by a person who is not a party to the liability agreement or "third party" within the scope of the agreement.[9] Examples of commercial (non-tort) third-party claims include inter alia – commercial liability, professional liability or "errors and omissions", Directors, Officers and employment practices liability.[10]

Mediation of third-party claims is advantageous for several reasons. First, it allows claimants, often times aggrieved individuals, to air their grievances in a controlled, civil and courteous environment. This is particularly constructive in the employment practices setting. Furthermore, it allows the claimant to speak to the mediator privately to develop creative non-monetary solutions, for example, relocating the disgruntled employee to a different department.[11]

Second, in the case of multiple defendants with indemnification and subrogation claims, a unique opportunity is afforded for the defendants to collectively work together in order to

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[9] See generally In re Sept. 11th Liability Ins. Cov. Cases 333 F. Supp.2d 104, 116 (S.D.N.Y 2006)
[10] B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes Fourteenth Ed. (Aspen 2008)
[11] C. Plato, P. Scarpato & S. Baum Insurance/Reinsurance Arbitration and Mediation PLI Item #42816 (Jan. 2013)

resolve the matter with the help of a skilled mediator rather than as finger pointing adversaries.[12]

Third, and perhaps most obvious, is mediation allows both sides to avoid the cost of litigation and risk of trial. Mediating at an early stage is advantageous to both parties in that it avoids the "sunk cost" phenomenon where litigants feel obligated to "stay the course" of litigation because their clients have already invested so much time effort and money into the litigation.[13]

B. First Party Insurance Claims

Unlike third party claims, first party insurance claims involve a dispute between the insurer and it's insured and involves the insurer denying or disclaiming coverage of its insured. Most commonly, the first party dispute arises out of a third-party claim the central question in such disputes is whether the insurer has an obligation to indemnify and defend its insured pursuant to the insurance policy they contracted to.[14]

In other instances, the carrier may defend under a reservation of rights if it believes that there is a possibility of coverage depending on what emerges from discovery. A common example of this is where the insured may be using the property outside of the scope of the insurance policy. More specifically, the insured is provided a homeowner's policy but there is evidence that the property is being used for commercial purposes. The carrier will defend

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[12] Id.

[13] Id.

[14] See,e.g., RJC Holding Corp. v. Republic Franklin Ins. Co., 2 N.Y.3d 158, 777 N.Y.S.2d 4 (2004) (In RJC, the insurer of a health spa was denied coverage for an action in which a customer of the spa alleged a sexual assault by a masseur. The policyholder in RJC sought insurance coverage for claims by the customer against the spa including, inter alia, negligent hiring, supervision and retention of the masseuse.)

under reservation of rights and decline to cover if it is revealed that the manner in which the property was used was outside the terms of the policy.[15]

Other reasons an insurer may deny or disclaim coverage are the alleged failure of the insured to timely notify the carrier of a claim, also known as the "notice requirement"[16] or non-payment of premiums.

Most first party insurance claims are resolved through the courts by way of declaratory judgment. Mediation presents an attractive alternative to a declaratory judgment. First, it reduces the time and expense of protracted motion practice and appeals. Second, the parties are not relegated to a judge selected at random who may not be familiar with the law concerning insurance coverage. Instead the parties can select a mediator with expertise in the field. Lastly, the mediator may be able to recommend viable commercial solutions not available to a judge who has to adhere to strictures of the law.[17]

C. Insurer v. Insurer Disputes

It is increasingly common to see multiple insurers and policies respond to one or more claim or claims. A classic example is when the damages of a third-party action exceed the coverage of the primary insurance policy thus necessitating the involvement of an excess carrier.[18]

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[15] See, e.g., 206-208 Main Street Associates, Inc. v. Arch Insurance Company, 106 A.D.3d 403, 965 N.Y.S.2d 31 (1st Dep't 2013)

[16] For policies "issued or delivered" in New York on or after January 17, 2009, a disclaimer of coverage based on late notice will only be upheld when the insurer has been prejudiced. New York courts, however, continue to apply the "no prejudice" rule to policies issued or delivered prior to this date. See, Charter Oak Fire Ins. Co. v. Fleet Bldg. Maint., Inc. 707 F. Supp. 2d 329, (E.D.N.Y. 2009); Rockland Exposition, Inc. v. Great Am. Assur. Co., 2010 U.S. Dist LEXIS 103267 (S.D.N.Y Sept. 29, 2010).

[17] C. Plato et al. supra.

[18] Ostranger & Newman, supra.

Other examples of insurer v. insurer disputes are "other insurance" clauses which seek to prioritize coverage and subrogation claims.[19]

The benefits of mediation which apply to first party insurance disputes apply equally to disputes between insurance carriers with respect to avoiding costs, opportunity to select an expert mediator and flexibility in crafting remedies not afforded to a judge. Additionally, preserving business relationships, as alluded to in the first part of this article, is an added benefit in the insurer v. insurer context because insurance carriers in the same market are guaranteed to see each other in future disputes thus cooperation and trust can be very beneficial over the long run.[20]

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[19] See e.g. Hartford Underwriters Ins. Co. v. Hanover Ins. Co., 2016 U.S. App. LEXIS 12146 (2d Cir. June 29, 2016), the United States Court of Appeals for the Second Circuit, applying New York law, had occasion to consider priority of coverage involving two primary policies with competing excess other insurance clauses.
[20] C. Plato, et al., supra.