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Whose party is it anyway? the role of the insured in the mediation process

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The insured in mediation

Whose party is it anyway? The role of the insured in the mediation process

Kylie Burns

Popular wisdom suggests that very few litigated liability cases do *not* involve an insurer.

These cases range from a compulsory third party insurer in a motor vehicle or workplace personal injury case,[1] to a private liability insurer defending a claim against a client insured, to an insurer subrogated to the rights of its insured seeking to recover from a third party. In a time of increasing cost of litigation, it is often only the presence of an insurer that makes a claim worth pursuing.

As alternative methods of dispute resolution increase in popularity, and increasingly are made compulsory as part of the litigation process,[2] insurers will become the predominant participants in the mediation process. As a party 'directly affected by the dispute and its settlement'[3] an insurer will be an important party in a matter that involves mediation. It is the insurer, in most circumstances, who will meet any financial settlement to a third party claimant, or has already paid a financial settlement to its own insured.

What of the *insured* party, however? Where the insured maintains a direct interest in a matter, or exercises continuing control of a claim,[4] its presence at any mediation of the dispute will obviously be crucial, given no settlement can usually be reached without its consent. But what of the situation where the insurer has assumed complete control of the relevant dispute on behalf of the insured? Is there any benefit to be gained from the attendance of the insured at a mediation of the dispute?

Presence of the insured

Although it seems not to be usual practice,[5] a number of benefits may flow from the presence of the insured at a mediation:

- The insured has full knowledge of the relevant issues and circumstances of the claim. The presence of the insured may assist in the construction of an 'agreed' account of the relevant facts. The insurer may often only have a second hand account of the relevant event gained from its own investigations. The insured may also be able to clarify new matters that arise during the mediation.
- The insured may be able to offer non-legal or non-financial options for resolution. This could include in a relevant case, for example, the supply of particular services, discounts on future supply of goods, deductions in accounts owing, agreement to desist in the practice of an occupation or profession, agreement to ➢

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➢ undertake a training course, or agreement to withdraw the supply of, or cease to manufacture, a particular product. The range of options that may be available are open to the imagination. The flexibility of mediation may allow those options to be canvassed if an insured is present. Although a financial settlement may be the primary 'option' to resolve the dispute, that will not always be the case. The ability of the insured to offer other options may minimise or reduce the financial component of the resolution to the benefit of the insurer.

- The presence of the insured may be crucial where the insured and the other party to the mediation must have, or wish to have, a future relationship (such as employer and employee, contractor and sub-contractor, shareholder and director, manufacturer and supplier). The insurer alone cannot respond to the 'dynamics' this may produce in a mediation as it does not represent an insured in this personal sense. It is only in the presence of an insured that any relationship building or healing can be explored in the mediation.
- Resolution of the dispute may be assisted if a claimant feels able to confront an insured directly with the consequences of the insured's wrongful actions. The insured may assist by expressing sympathy, providing an apology or by acceptance of responsibility.[6] Once again, this can only realistically be explored if an insured is present — the ability of an insurer to offer any personal apology to a claimant, or to accept moral responsibility for wrongful actions is limited.[7] The absence of an insured may lead to this potentially powerful benefit of mediation being closed off.
- As a matter of fairness, the other party to the litigation should have the opportunity to test the credibility of the insured, in the same manner that the insurer tests the credibility of the other party during mediation.[8] This may assist in resolution when it becomes obvious that the credibility of either party stands up (or falls) upon close examination. This also benefits the insurer who is able to assess the credibility of its own insured when faced with the other party. A poor performance by the insured may give the insurer the opportunity to settle earlier to reduce the risk of loss at trial.[9] This would clearly work in the insurer's favour.

Mediating without the insured party

There may, on the other hand, be a number of reasons why insurers resist the presence of the insured at mediation:

- The insured may be reluctant to or disinterested in attending; they may simply not wish to be involved any further in the dispute and expect the insurer to 'take care of it'. The insurer may make an assessment that the presence of such a disinterested or disagreeable insured would be counterproductive. However, insurers should not close off the possibility automatically. Most policy wordings have provisions that require an insured to co-operate fully in any claim, and this could be relied upon to compel an insured to attend where it was thought appropriate or potentially helpful.[10]
- There may be practical difficulties in getting an insured to attend mediation. This could occur, for example, where the mediation takes place many years after an incident and the insured cannot be located or is incapacitated.
- There may be a fear that the insured will interfere or meddle with the insurer's management of the claim during the mediation. An insurer may simply not wish an insured to be present to complicate the issues involved, or to compromise the insurer's determination of tactics to be adopted.
- The insured may be sympathetic or aligned to the other party in the mediation.[11] An insurer may wish to avoid any advantage to the other party by the sympathetic or supportive presence of the insured.
- The insurer may fear that the involvement of the insured will unnecessarily complicate the resolution of the ➢

➢ dispute and widen the issues beyond financial settlement. An insurer may characterise the matter as a one issue dispute (such as the amount of compensation) and may not want to risk moving the dispute into other areas over which it has less control. Such an approach tends to ignore the reality that the majority of disputes cannot be characterised as simple legal problems which are totally resolved through payment of money.

Each situation will need to be considered on its own facts to determine the appropriateness of the attendance and participation of the insured at the mediation. However, the option should not automatically be closed off. There are advantages to the presence and involvement of an insured at mediation. It has the potential to assist meaningful resolution to the financial benefit of an insurer. The willingness of the insurer to allow the insured to participate in the mediation may also improve the relationship between insured and insurer.

Participation by the insured may result in the insured's satisfaction at part-ownership or control of the resolution of its own problem, and an open appreciation of how the claim has been handled, the dynamics of the case and the reasons for settlement.

Ground rules for participation?

If an insured does participate in a mediation, it is important for the insurer and insured to consider the ground rules for participation and control prior to the mediation so that neither parties' interests are compromised. In addition, there may be a need for separate meetings or caucus between the insured and insurer during the mediation to resolve any issues that may arise. If any issues relating to the insured's policy coverage for the claim, or any substantial disagreement as to the management of the claim are likely to arise during the mediation, the attendance of a separate independent legal representative for the insured should be carefully considered.[12]

Involvement of insured parties in mediation, where this is carefully considered and controlled, has the potential to enhance the mediation process. It may also lead to a more realistic resolution (rather than financial settlement) of disputes, a more consumer focused process[13] and enhancement of the relationships of all the relevant parties. ●

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Endnotes

1. Where common law claims are still available.

2. For example, see the discussion of court-annexed schemes operating in Queensland in B Rogers and B McCafferty, *Dispute Resolution for the Queensland Legal Profession*, Queensland Law Society Inc, Brisbane, 1997, Ch 3 and 4.

3. L Boulle, *Mediation: Principles, Process, Practice*, Butterworths, North Ryde, 1996, p 139.

4. For example because there is a large excess or deductible in the insurance policy, inadequate or incomplete coverage of the claim, or separate uncovered claims arising out of the same circumstances as the insured's claim.

5. Anecdotal evidence tends to suggest that in many cases the insured is represented at mediation by a representative of the insurance company (such as a claims officer) and the legal representative appointed by the insurance company to conduct the defence. See L Boulle, note 2, p 146.

6. See the discussion of the role of apology, and the mediation process as a healing one in P Rehm and D Beatty, 'Legal Consequences of Apologising' (1996) 1 *Journal of Dispute Resolution* 115; G R Williams, 'Negotiation as a Healing Process', (1996) 1 *Journal of Dispute Resolution* 1.

7. Although it may assist if the insurer and the insurer's legal representative express genuine regret, and conduct the mediation in a non-adversarial fashion. See North and Wilson, 'Some Practical Considerations in the Conduct of Mediations in Personal Injury Disputes' (1995) 7 *Queensland ADR Review* 2 at 3.

8. L Boulle, note 2, p 146.

9. The representative of the insurer may have never actually observed its own insured in person, with all previous direct contact with the insured regarding the claim being with loss assessors, insurance brokers or lawyers.

10. See Derrington and Ashton, *The Law of Liability Insurance*, Butterworths, North Ryde, 1990, p 405 for an example of a standard liability policy assistance clause.

11. For example, where an insured is related to, or friendly with, a plaintiff claimant in a compulsory third party matter.

12. To ensure that the insurer and insured are both adequately protected from the possibility of a breach of the duty of utmost good faith which underlies the insurance relationship. See s 13 *Insurance Contracts Act 1984* (Cth).

13. See M Robertson, 'Is ADR part of a movement towards consumer-orientated legal services in Australia?' (1998) 1 *ADR Bulletin* 1.

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