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Fifty Shades of Mediation: Trial vs. Arbitration - How Each Require Differing Approaches for a Successful Mediation

I. Evaluating the Claim for the Venue

Considerations at the Outset of the Claim

One of the most important decisions regarding resolution of claims is the applicable venue. The differences between litigation and trial in state or federal court (jury or bench) is vastly different than resolution in arbitration – each has its advantages and disadvantages. However, the critical decision regarding venue is made at the start of a case – switching from trial court litigation to arbitration during the case is rare and extremely inefficient – if not impossible.

As such, consideration of the following factors is critical to making an informed and educated decision regarding the two general alternatives:

- Overall timing of the case;
- Cost of the resolution;
- Ability to control confidentiality of the proceedings and the associated materials;
- Rules and limitations on the presentation of evidence; and
- The arbitration provider and related contractual terms (appeals, review of decisions, etc.).

To Waive or Not to Waive – that is the Question

While resolution by arbitration may be contractually required, it is generally understood that the parties, by agreement of all parties, can thereafter waive the contractual requirement to arbitrate their dispute. However, there are several

considerations required to evaluate this decision, including later included parties and the potential impact on waiver for them.

The most efficient manner to address the waiver question is to examine it from each of the players' perspective – similar to what the party, counsel and claims professional will undertake at the time of the actual decision. For the party or insured, the time involved, likelihood of success, and potential the protection of confidential or proprietary information are the chief concerns.

However, the insurance carrier may have some of the same and some different considerations. These might typically include costs, the time involved, and its ability to address or determine coverage questions which may be present. These coverage questions may need to be decided at the same time or impact the indemnification dollars available for the resolution of the claim, especially at mediation. And defense counsel may have other considerations to evaluate, including the ability to conduct discovery, the presentation of evidence and what evidence is likely to be admitted, the consideration of that evidence by experts familiar with the subject or a panel of jurors – our peers.

II. During the Process – Shades of How to Get to Resolution

Moving the case toward resolution

Generally speaking each venue presents the ability to conduct written or paper discovery, retain and question experts and conduct various depositions. However, each venue has different limitations on these key elements of the case and could play a role in your ultimate decision on which venue to choose. Additionally, the rules governing each venue will impact the timing of these activities and when a thoughtful, prepared mediation might take place.

Often opposing counsel and the neutral will play a role in the ability to set up and schedule mediation in each venue. Mediation is often the one, true opportunity to resolve the case without determination by the final trier of fact or arbitrator. Additional consideration must be given to your opposing counsel regarding how they posture their case or whether they are good communicators with their clients, etc. Often the reasonableness of the opposing counsel can also dictate the timing of mediation – whether it is the first, second or only mediation. In addition, opposing counsel's level of experience as well as their arbitration may also impact the ability to move the case toward resolution.

Timing for Mediation when case is slated for arbitration versus trial

There are often considerations to be made regarding the institution of mediation. Similarly mediations conducted in arbitration versus those conducted in conjunction with litigation in state or federal court can have different considerations as well. One such issue is the comparable cost and how that costs will be shared by the parties. In some instances the cost of mediation is dictated to one party by contract, which could be an item to consider when scheduling one or multiple mediations.

Other differences with arbitration and trial includes how evidence is obtained, presented, and challenged. Arbitration usually has less stringent rules regarding the presentation of evidence at the final hearing. However, the process of discovery is characteristically more detailed and expansive in litigation than the rules of arbitration typically employ.

For instance if your case requires significant discovery and numerous depositions to provide and prove the facts that support your case then litigation may be the better vehicle for you to travel under. Yet, if the specifics of the loss or defenses are highly technical in nature and would enjoy consideration by those with experience in the field, then arbitration may be the better venue. These differences are also present in the presentation of evidence. Arbitration typically has fewer rules regarding the presentation of evidence while trial courts are more strict. As such, the presentation of arguments at mediation can be more effective in arbitration, knowing that the possibility of the issues raised in argument may be presented at the final hearing.

Preparing for Mediation

Another consideration is what information is needed to effectively mediate? And as indicated above, the discovery process is generally limited in arbitration – which limits the amount of information you can obtain before mediation. However, discovery in traditional litigation can become expensive, as courts generally apply an unrestricted standard to the requests and depositions. Additionally, the use of experts can be predicted by the venue – as trial courts typically allow only one expert per discipline, while arbitrations are less stringent.

Another consideration is what each player needs to actually proceed to mediation. This is often different for each representative – the insured, the defense counsel, and the coverage counsel. What is required for an effective mediation in trial may be different from what is required in an arbitration. In these instances it is more imperative that the claims professional work closely with the defense counsel and coverage counsel to determine what information is actually needed to effectively seek settlement through mediation and to work to develop a plan and strategy to obtain the necessary information.

Frank discussions should be had regarding coverage counsel's role at mediation, especially if there are multiple mediations or pending coverage questions. The presence of coverage counsel can be interpreted in a variety of ways at mediation and clear communication is necessary to prevent false hopes from opposing counsel. There may also be opportunities to utilize coverage counsel's participation in mediation to effectively move the case toward resolution.

Finally, efforts need to be undertaken with respect to preparation of the client for mediation. The client needs to have an understanding of the process and an expectation of what may happen, including whether or not resolution is possible or likely.

III. Making the Most of Your Mediation

The importance of selecting the right mediator.

The selection of the mediator is critical to the potential success of the mediation. Even though sometimes overlooked for comfort or belief that a mediator is strong or will push the other party, the ultimate trier of fact should influence who you select to mediate the dispute.

This discussion should occur between the players – claims professional, defense counsel, and even coverage counsel – to ensure the mediator is knowledgeable of the subject matter and can support the complex coverage issues, as well. Evaluation of the trier of fact, especially in arbitration, is also critical to understand what may or may not impress them in their deliberation and ultimate decision. And this bias should be used to evaluate the claims and the mediation strategy employed.

Knowing the evidence and evidentiary standard and being prepared to discuss in mediation and to address claims of what "will get in."

Simply speaking – what is admissible at arbitration may not be at trial. As such, the use and reliance on less than substantiated arguments should be given serious consideration at mediation. This difference in evidence standard allows for more creative arguments and stronger positions than what might be attempted at a mediation subject to trial. This plays into strategy, especially if the parties have or intend to engage in more than one mediation.

To use this difference to your advantage you want to evaluate the evidentiary standards early in the process – potentially before selecting the venue – to utilize the less stringent rules if favorable to your argument or defense.

Using the Venue to Press for Resolution at Mediation

The timing of mediation is also a critical issue that requires early evaluation and strategic consideration. Mediations can be used to discover information about the claims as opposed to a real opportunity to negotiate and resolve the case. This is especially true in arbitration which does not always allow significant discovery. However attending mediation too early in the cycle of the litigation may result in a wasted opportunity to resolve the case because the opposing counsel is not educated with the facts enough to properly evaluate the claim and/or the claims professional does not yet accurately appreciate the claim and its related exposure. Timing of the mediation is critical.

Know your ultimate end goal from the beginning information gathering or resolution – if you are going to try to settle the case, you need enough information without expending too much on costs. But if the intention is to simply gather information and discover new facts, then a different approach is in order. In any event, this delicate balance requires acceptance from the claims professional, insured, coverage counsel, and defense counsel.

Conclusion

Often the venue for a dispute is not considered as part of the overall case strategy, but seen more as a "given." However, when looking at overall claim management and case handling strategy, the venue of a case is very important and I tis even more important when working to determine how to reach a settlement of the claim through mediation. If your matter is heading to arbitration or to trial for its ultimate decision, you will need to approach your mediation differently in nearly all aspects, including timing of the mediation, selection of a mediator, what discovery is needed, preparation for mediation, and presentation of your settlement arguments. Taking these issues into consideration will result in more effective results and hopefully greater success in settlement of claims.