

CIVIL JUSTICE RESPONSE

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Plaintiffs' lawyers use the Reptile theory as a line of attack in mediation. A federal court recently proposed amending a local rule to incorporate that approach, which would have systematically disadvantaged insurers in mediation. In response to comments from the IADC and others, the court backed away from the extreme proposal. But the threat remains.

Reptile Mediation? Washington Federal Court Considers, Then Rejects, Proposal to Disadvantage Insurers in Mediation

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

The Civil Justice Response Committee works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. If prompt, concerted action is taken. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

We are now all very aware of the *Reptile* attack. But are you aware of its implications in mediation?

David Ball and Don Keenan's *Reptile* theory of trial strategy has become a regular aspect of seminars, conferences, and training programs for plaintiffs' lawyers. Their 2009 manual for plaintiffs' lawyers focuses on fostering fear and anger in jurors, encouraging them to lash out at defendants. The manual also includes advice about how to put defendants and their insurers at a disadvantage in mediation.

One of the tips suggested by Ball and Keenan to stack the deck in favor of plaintiffs at mediation is to require that "the person attending the mediation will have – without the need to ask anyone up the ladder – the power to settle for the amount" specified by plaintiff's counsel. The manual advises plaintiffs' counsel to "[m]ake clear you are not requiring that amount as an offer, nor saying the case will settle for that amount." By guaranteeing that the person attending has "full authority" to settle for the amount of the plaintiff's demand, that person becomes the "focus of the pressure." Plaintiffs' counsel are told that if the person attending "believes he'll face job consequences in the event of a large verdict, you can apply effective Reptilian pressure." To ramp up the pressure, the manual instructs plaintiffs' counsel to "remind [the person attending] that there will be consequences for a bad decision," and tells plaintiffs' lawyers to drive the point home by

mentioning "well-known adjusters who lost jobs over even one major misassessment of verdict size." (Ball & Keenan, 2009, at 175).

In 2015, this *Reptile* tactic found its way into a local rule proposed by the U.S. District Court for the Eastern District of Washington. In response to comments filed by the IADC and others, the court ultimately declined to adopt the rule as proposed and approved a more balanced approach. Defense attorneys should be prepared to counter similar *Reptile* proposals in other courts.

The Proposed Amendment

In July of 2015, the U.S. District Court for the Eastern District of Washington proposed amendments to Local Rule (LR) 16.2(e) regarding mediations.

The rule in place at the time required the attorney who was primarily responsible for each party's case to "personally attend" mediation conferences and to be prepared to discuss "in detail and in good faith" the "position of his/her client relative to settlement." If counsel needed authority from an insurer to settle a case, counsel could contact the insurer by phone or email. If the insurer's direct participation was needed in a particular case, that person could participate by phone or choose to appear.

In contrast, proposed LR 16.2(e) provided:

Unless previously excused by the mediator for good cause, the parties shall personally attend. Any insurance carrier providing a defense for any party shall attend with authority for settlement up to the amount last demanded by the plaintiff if within the insurance policy limits.

The language proposed in LR 16.2(e) would have set in stone the tilted approach promoted by Ball and Keenan.

The court accepted comments on the proposed local rule until August 15, 2015.

Defense Lawyers and Insurers Oppose Proposed Local Rule Change

Several defense-oriented groups, including the IADC, filed comments opposing proposed LR 16.2(e).

IADC noted that insurers do not use plaintiff demands as a basis to value a case or authorize settlements, and that plaintiff demands often greatly exceed the actual value of a case. Fiduciary duty issues could arise if insurers are forced to settle for excessive amounts. Furthermore, obtaining authority for a demand that far exceeds the value of the case could require changes in reserves that are not supported by the facts.

The IADC also commented that the proposed change could hinder settlement negotiations, contrary to the apparent

purpose of the provision. Since a plaintiff would know that the carrier's representative has authority to settle for the full amount the plaintiff has sought, the carrier's representative would no longer be able to declare, "this is my final offer, as it is the extent of my authority" - which often gets cases resolved.

Additionally, IADC noted that the proposal would require an insurer to appear at mediation with authority up to the last demand (within policy limits), even if the plaintiff's demand is unreasonable, plaintiff's counsel is recalcitrant, and possibly even if the insurer's obligation is in dispute. The proposal would give plaintiffs' lawyers leverage to obtain inflated settlements and may incentivize the filing of weak or meritless claims. Moreover, while the proposal would allow parties to be excused from attending for good cause, there was no similar provision for an insurance carrier.

The Washington Defense Trial Lawyers (WDTL) said that requiring insurers to attend mediation in person would be unduly burdensome. Many carriers are located on the east coast, far from Washington State, and some are located overseas. Moreover, authority to settle some claims may reside with the insurer's Director of Claims or Vice President, rather than the adjuster assigned to the file. For some insurers, WDTL said, "settlement authority does not rest with a single individual, but rather with an executive committee, a roundtable discussion, or a director's level meeting."

Failed mediations, WDTL observed, could be used as evidence of bad faith in a subsequent lawsuit against the insurer.

The American Insurance Association (AIA) expressed concern that “by inexplicably shifting to the plaintiff’s last demand, instead of the insurer’s own analysis, this proposal unfairly and completely shifts the balance of settlement negotiations to the claimant before the mediation has even begun.” AIA also noted that compelling insurers to attend mediation regardless of the facts unfairly imposes costs on insurers “when having an insurer available telephonically ought to suffice.”

The Coalition for Litigation Justice, Inc., Property Casualty Insurers Association of America, and National Association of Mutual Insurance Companies commented that the “show up or else” provision could lead to more motions being filed with the court, and increase litigation costs, as plaintiffs’ lawyers would try to force insurers into the choice of showing up at mediations that may be a waste of resources (due to an unreasonable demand) or face sanctions. The groups said that a “valid reason to not appear at mediation because of the unreasonableness of a plaintiff’s demand should not be sanctionable.”

Lawyers for Civil Justice (LCJ), a national coalition of defense trial lawyer organizations, law firms, and corporations, pointed out the imbalance in the proposed rule. LCJ wrote that “forcing insurers . . . to provide authority up to the policy limits

considerably skews the negotiation because the plaintiff typically is not required to attend with the expectation that he or she has to be prepared to accept zero in settlement.” By encouraging unreasonable demands, the rule would lead to fewer settlements, LCJ wrote.

Outcome

Following the negative comments on the proposed rule, the court issued a new proposed LR 16.2(e) on October 26, 2015. The revised proposal addressed the concerns expressed by the defense community and insurers. The new rule no longer mandates that insurers attend the settlement conference with authority up to the plaintiff’s last demand. Instead, the new rule appears to continue to allow insurers to authorize settlement up to the amount the insurer has valued the case. There is also an opportunity for attendance to be excused at the mediator’s discretion. Specifically, revised proposed LR 16.2(e) provides:

Attendance by a party and its representative with full settlement authority at the mediation is mandatory, unless the mediator permits otherwise.

On December 7, 2015, the court adopted the revised version of LR 16.2(e) (General Order No. 15-34-2), effective immediately.



Conclusion

Plaintiffs' lawyers may seek advantages at mediation similar to the initial proposed local rule in the Eastern District of Washington. Defense counsel should be on alert. If such proposals emerge, defense counsel should inform the IADC Civil Justice Response Committee. The Eastern District of Washington experience demonstrates that unsound proposals can be defeated if the IADC and others educate the court about the problems raised by such proposals.



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