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Insurance surgery: What lies ahead?

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Peter Causton explores the future of alternative dispute resolution in insurance claims

What is the future for alternative dispute resolution (ADR) in insurance claims? Lord Justice Briggs is currently undertaking a Civil Courts Structure Review and will be submitting his interim report by the end of 2015. Consideration is being given to creating an online court for lower value disputes. It would be conducted online rather than on paper, designed primarily for use by litigants in person, investigatory rather than purely adversarial, with conciliation (including mediation and ENE (early neutral evaluation)) as a mainstream rather than only alternative form of resolution and face-to-face hearings for resolution only if documentary, telephone or video alternatives are unsuitable. Following the Autumn Statement, when £700m investment in IT was confirmed funded by court closures, this does look like it is a step closer to reality. Indeed, the Lord Chief Justice has issued a statement saying that the alternative was "precipitous decline."

Also, on 17 November 2015 an All Parliamentary Group on ADR was formed, which will receive reports on ADR, hear evidence and make recommendations which may in turn affect government policy.

Proposals for reform

What is proposed, following the Civil Justice Council's report on low value claims up to £25,000, is a two-tier system with a court officer managing the case and deciding the appropriate form of dispute resolution. In a little noticed rule change recently, the courts were given powers to conduct an ENE hearing (CPR 3.1 (2) (m)). ENE was something referred to in Briggs LJ's report on Chancery modernisation, which suggested importing ENE from the family courts. Issuing a claim would probably not lead directly to a court hearing, with the court having doors to different ADR solutions such as ENE, arbitration and last but not least, mediation. At his annual press conference,

the Lord Chief Justice commented that the reforms "will also enable us to provide in-court mediation in the process of deciding a case" which sounds very much like ENE. In a recent speech, however, he said that the task for reformers will be to work out "how far we can properly create a multi-door Ccourthouse that both promotes appropriate dispute resolution whilst ensuring that the court's adjudicatory function is enhanced rather than undermined" so he clearly does not want to throw the judicial baby out with the bathwater.

For insurance lawyers, we can guess that changes will involve some form of system like the claims portal (the pre-action protocol for low value personal injury claims). The portal's scope was widened to deal with employment law and public liability claims up to £25,000 in value.

It could be expanded to deal with higher value claims or to include other types of claim. The new system might even involve an opt-out procedure whereby parties have to certify they have taken reasonable steps to undertake ADR prior to issue, or before filing a defence. Of course, the portal does not currently deal with small claims and so if the limit is increased to £5,000 and whiplash claims are outlawed altogether, there will be fewer cases settling through the portal and possibly more litigants in person pursuing their own claims, although there may just be fewer claims.

Most will agree the current system of imposing costs penalties at the end of the case for failure to mediate is unpredictable and unsatisfactory. It is entirely in the judge's discretion to decide how to interpret the parties' engagement with ADR and whether to impose any penalties. The whole emphasis is to save costs and direct people away from the courts in the first place; hence increasing court fees and closing court buildings. The message to insurers and other litigants is that society cannot afford a Rolls Royce justice system for all levels of claim, which means more ADR paid for by the parties, not the state.

Consultation on Mediation Directive

There is a consultation (until 11 December 2015) on the Mediation Directive and its efficacy in EU member states which may lead to the same result if the consensus is that mediation is underused. In 2014 the European Parliament's Committee on Legal Affairs requested a study assessing the limited impact of implementation of the Mediation Directive, proposing measures to increase mediation numbers including introducing an "opt out" system.

The Mediation Directive's objective is to facilitate access to ADR and promote amicable settlement of disputes, by encouraging use of mediation and a balanced relationship between mediation and judicial proceedings. It applies in cross-border disputes to civil and commercial matters.

The risks

Mediation and ADR are not universal panaceas and there is a need for judicial decisions and the development of the common law, without which there would have been no *Donoghue v Stevenson*. More mediation does not

necessarily mean more settlements. Anecdotal evidence and a survey undertaken by the Forum of Insurance Lawyers (FOIL) show that insurers and insurance lawyers are fully aware of the risks of costs sanctions for failure to mediate or other ADR, but consider that it has drawbacks compared to a joint settlement meeting, such as expense, and may even hamper settlement as parties are reluctant to make offers before a mediation. Parties also report that the element of compulsion makes them less likely to settle at mediation, or prepare fully for it, because they are going through the motions and information gathering rather than genuinely wanting to mediate. In the rush to cut court costs, this concern is likely to be overlooked

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