Trade Voice: Bila's Dan Brooks on how insureds and insurers should behave when coverage disputes arise

By Dan Brooks

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Dan Brooks, British Insurance Law Association committee member and policyholder coverage lawyer at Wynterhill LLP, asks whether it is time for a pre-action protocol for coverage disputes.

Pre-action protocols are statements of best practice that the parties should follow before commencing a claim in the Courts of England and Wales.

Their purpose is generally to: a) focus the attention of litigants on the desirability of resolving disputes without litigation; b) enable them to obtain the information they reasonably need in order to consider an

appropriate settlement; c) encourage them to make appropriate offers; and d) lay the ground for expeditious conduct of proceedings if a pre-action settlement is not achievable.

There are 17 specific Civil Procedure Rules protocols covering diverse sectors such as construction and engineering, debts, housing disrepair, judicial review, media, professional negligence and travel. Each is tailored to its subject matter. In addition, there is a general "practice direction", which applies to disputes where no specific pre-action protocol exists.

Some perceive unfairness to potential defendants who have no choice but to incur the costs of protocol compliance but have no means to recover such costs if the claimant does not proceed to issue a formal claim.

The benefits of the protocols can be seen in the statistical evidence of the majority of claims being resolved without the need for court proceedings; an improved culture of information exchange and of genuine efforts to narrow the issues at the earliest stage; and the increased use of alternative dispute resolution.

All of these benefits are facets of the so-called "spirit of the protocols". Critics will cite the extent to which costs have increased as a result of the perceived front-loading of claims, some of which would have settled anyway under the old regime, and bemoan the delay involved.

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None of these viewpoints explains why we don't have a protocol specific to insurance coverage disputes.
Are there too few coverage disputes to justify one? Is the insurance market too diverse to permit the creation of a single set of rules? Is

coverage dispute resolution already sufficiently effective that there is no need for such rules? Or is the general practice direction an adequate default set of rules for coverage disputes arise? There may be other objections also.

None of these common objections stand up to scrutiny however in my view. Insurance has a special function in society as a private instrument for transferring risk. When that risk sharing mechanism breaks down, the parties are often left in a procedural vacuum unless the policy specifies a process capable of being triggered quickly, or the insured's complaint can be referred to the Financial Ombudsman (those that fall outside of that jurisdiction cannot).

The need for an insurance protocol reflects the need to protect policyholders who might be facing **business critical situations** or something affecting their families and homes; the need to improve the image of the industry generally following systemic events such as Covid; to create more procedural certainty the cost of which can be predicted more accurately by insurers and their actuaries; and to acknowledge the special fact that the recipient of a claim in this potential protocol (unlike many other protocols) has already assembled most if not all of the relevant facts that prompts the dispute.

The views expressed in this piece are personal to the author and do not represent those of Bila or the Bila Committee generally.
