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## Mediation of Commercial Insurance Disputes

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**This article is based on the author's experience as both a counsel and a mediator of complex commercial insurance disputes. It explores certain features of commercial insurance mediations that are idiosyncratic and different from other types of business disputes. It identifies issues to be resolved early in the mediation process and recommends practices and approaches that will enhance the likelihood of a successful mediation – diffusing claims handling complaints, thorough preparation and command of the material, dispelling negative perceptions based on stereotypes in insurance relationships, and the importance of principled, patient negotiation.**

Mediation of commercial insurance disputes presents a number of interesting challenges, which distinguish them from other types of business conflicts. To resolve a commercial insurance dispute, the parties must analyze and evaluate the case on multiple, interdependent levels. They typically must take into account the factual and legal matrix of the underlying dispute or claim, apply the provisions of the insurance policy to a complex set of circumstances, and factor in defences that often arise from the special nature of the insurance relationship itself.

Commercial insurance mediations are obviously about the payment of money and involve a classic distributive bargaining process. However, because of the nature of the insurance relationship and how claims are typically adjusted, substandard claims handling by the insurer – delay, poor communication and unsupported coverage positions – will directly impact the policyholder's perception of the fairness of the insurer's evaluation of the claim, thereby creating an initial impasse. In those circumstances, a satisfactory resolution at mediation may first require exploring non-monetary approaches, such as an acknowledgment and, in extreme cases, an apology to address the policyholder's complaints about claims handling and get past the first obstacle preventing a reasonable monetary settlement. A skilled mediator will spot this issue at the outset and address it as early as possible in the process, ideally in the joint session, to get the heat out of the room and focus the parties on the actual coverage dispute.

In any mediation, each party must persuade both their opponent and the mediator of the strength of their case and their evaluation of their opponent's case. The most effective way to do this in a commercial insurance mediation is through rigorous preparation, analysis and case evaluation, quality briefs that

clearly set out the underlying facts, relevant policy provisions, any experts' findings on liability and damages, and the applicable law. Investment at this early stage increases the likelihood of a successful mediation. Even if the mediation fails, the parties have a clear path forward and a better understanding of both their own case and the other party's case as well.

Further, it is important not to underestimate the effectiveness of charts, key documents, graphs, excerpts from discovery or cross-examination transcripts and a detailed chronology in assisting the mediator to navigate through the details and zero in on the true areas of controversy. Take advantage of the opportunity to present your case to the mediator, who is often the first impartial person to take a close look at the merits of the dispute. Even where a mediation is solely facilitative and not evaluative, there is no doubt that how the mediator conducts the mediation will be influenced by their initial reaction to the relative strengths of the opposing cases based on their review of the briefs.

Typically, a good mediator will communicate with the parties, individually or jointly, in advance of the mediation to clear up any factual issues arising out of the briefs, request additional documentation, or narrow the issues in dispute. The extent to which the parties cooperate at the pre-mediation stage will directly affect how much time is required in the joint session. It is also critical that the mediator understand exactly what settlement overtures have occurred prior to the mediation and confirm that each side has the same understanding of what has transpired before any negotiations begin.

The commercial insurance mediator will often dispense with opening statements at the initial joint session but may use the time to confirm their understanding about any issues that are unclear from a reading of the briefs. A common understanding of key issues must be developed and confirmed. If there is a claims handling complaint, this issue can be addressed at the outset to diffuse the tension. Personal rapport between the negotiators should also be facilitated by the mediator to eliminate negative stereotypes that affect the parties' perceptions of each other.

The heavy lifting generally occurs during caucusing and the parties often have an interest in moving quickly to that phase in order to maximize what can be achieved within the time constraints. In the caucus phase, the difference in experience between a policyholder, who may be involved in an insurance dispute for the first time, and an insurer, who probably mediates on a regular basis, becomes most apparent. At this stage, the mediator does serious reality testing with the parties and, after conditioning expectations, the first offer is presented and responded to. The mediator should provide guidance about proposals as sometimes the parties' proposals can generate such a negative reaction from the other side, that they can give the kiss of death to any possible resolution.

Often, policyholders need to be coached on how to react to the insurer's proposal, given the relatively conservative approach taken by insurers and the skepticism that insurers bring to claims. Policyholders often become frustrated by what appears to be the minor incremental increase in offers and the need for multiple passes; if both parties provide rationales for their offers, it is possible to educate the

policyholder about how the insurer views the case and, similarly, for the policyholder to cause the insurer to reflect on the strength of its position.

Bottom line, successful commercial insurance mediation often requires diffusing negative perceptions about claims handling and stereotypes, discipline and thorough preparation by everyone involved, and principled patient negotiation.

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