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Maximizing Insurance Contributions in Mediated Settlements

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Today's faculty features:

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Mediation and Insurance Coverage Considerations

Maximizing Insurance Contributions in Mediated Settlements

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Sherilyn Pastor is the Practice Leader of McCarter & English's Insurance Coverage Group, and a member of the Firm's Executive Committee. She has secured hundreds of millions of dollars in insurance assets for a broad range of policyholder clients. She also provides advice to clients assessing their potential risks, analyzing new insurance products and considering the adequacy of their existing insurance programs.

Ms. Pastor is the Vice-Chair (Policyholder Side) of the ABA's Insurance Coverage Litigation Committee. She publishes and lectures frequently on a variety of topics including insurance coverage, trial advocacy, pretrial practice and professional responsibility. She serves on the Editorial Boards of the Insurance Coverage Law Bulletin, and Appleman on Insurance. She teaches the National Institute for Trial Advocacy's trial and deposition skills programs. She is a member of the New Jersey Supreme Court's Professional Responsibility Rules Committee.

Ms. Pastor was named one of New Jersey's "2010 Best 50 Women in Business" by NJBIZ, a weekly business journal recognizing women for their outstanding contributions to their industry and community. She is recognized in *The International Who's Who of Insurance & Reinsurance* (2010), and as a *New Jersey Super Lawyer* (2006-2010).

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Kimberly M. Melvin is a partner in the Washington, D.C. law firm of Wiley Rein LLP. Her practice focuses on the representation of professional liability insurers in a broad range of matters. She regularly counsels professional liability carriers on both coverage and liability issues that arise in connection with claims against their insureds, and she frequently serves as the carrier's representative in dealings with insureds, claimants and others. Ms. Melvin also represents professional liability insurers in coverage litigation in federal and state courts across the country. Recently, her practices has focused on advising clients regarding civil litigation, arbitration proceedings and governmental investigations involving directors and officers, financial institutions, mutual funds, investment advisors, Real Estate Investment Trusts (REITs) and rating agencies caught in the global credit crisis and subprime mortgage meltdown.

She has particular expertise regarding bankruptcy and insolvency issues arising in the insurance context and fiduciary liability issues. She speaks and writes frequently on coverage issues under professional liability policies and insurance bankruptcy issues and currently serves as a co-chair of the Bankruptcy & Insolvency Subcommittee of the ABA Section of Litigation's Insurance Coverage Litigation Committee. Ms. Melvin received her B.A. degree, *magna cum laude*, from Mary Washington College and her J.D., *magna cum laude*, from the George Mason University School of Law.

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JOHN L. WATKINS



John L. Watkins is a partner in the Atlanta office of Barnes & Thornburg, LLP. He practices primarily in the areas of insurance coverage, trade secrets, and complex commercial litigation. At Barnes & Thornburg, John represents policyholders. Barnes & Thornburg has for the last three years been listed as one of the top 10 insurance recovery practices in *Business Insurance's* annual rankings of U.S. firms.

At a former firm, John advised carriers regarding large losses, including professional liability claims, commercial liability, environmental, and excess commercial liability claims. These claims typically involved alleged losses of \$5 million to over \$100 million, and working with towers of coverage involving many carriers.

In addition to the perspective of having represented insurers and policyholders in large business claims, John sometimes defends underlying business claims. John has blogged and written about insurance coverage issues, and was recently interviewed by LexisNexis on the "Never Pay" insurance policy. He is also a registered mediator and has a website regarding mediation issues at <http://www.watkinsmediation.com> that features a series of blog posts on insurance issues in mediation.

He has been named to the list of *Georgia Super Lawyers* since 2007, was named to *Georgia Trend's* Legal Elite in 2010, has been rated "AV" by Martindale-Hubbell for many years, and is rated 10.0 by AVVO. He graduated from the University of Georgia School of law *summa cum laude*.

Overview

- Insurance Basics
- The Role of Insurance in Mediation
- Best Practices for Handling Insurance Issues at Mediation

Insurance Basics

Types of Insurance Claims

- Liability Claims (third party claims)
 - 3 key parties: plaintiff, defendant/insured and insurer
 - Auto accident to professional malpractice
 - Insured looks to insurer to indemnify it for losses it, he or she suffers as a result of a claim by a third party

Types of Insurance Claims

- Duty to defend v. advancement policies
 - Duty to defend: insurer provides insured with a defense, meaning insurer chooses and pays defense counsel
 - Advancement: insured selects counsel subject to insurer's consent and insurer advances defense costs to insured on current basis; Insurer has right to associate in the defense

Types of Insurance Claims

- Direct claims against the insurer (first party)
 - 2 key parties: insured and insurer
 - Insured looks to insurer to pay for damages to insured's own losses, such as property or business interruption losses

Identifying Available Insurance

- What coverage is out there
 - Coverage may be available under multiple lines of insurance
 - Canvass all policies and analyze where coverage might be found
- Involve the broker as necessary in finding policies and potential coverage
 - Do not let the broker dictate where and how to search for coverage

Putting the Carrier on Notice

- Policies require timely notice of a loss, claim, occurrence or suit
 - Review your policy and develop systematic process
 - Different policies have different requirements, and might be governed by different law
 - Occurrence v. Claims-Made
 - Notice-prejudice rules
- The best answer is to provide timely notice!

Insurer's Response – Reservation of Rights Letter

- Letter from carrier advising that will provide a defense subject to reservations of the right to deny coverage
 - Quotes policy at length
 - Sometimes a carrier agrees to provide a defense while denying coverage for any settlement or judgment
 - Will address defense arrangements

Insurer's Response – Denial or Declination Letter

- Letter setting forth the basis for the carrier's coverage denial
 - Quotes relevant policy provisions
 - Says carrier will not be providing a defense or responding to a loss
 - Often invites the insured to provide additional information and seek reconsideration

Duties of the Insured

- Cooperation clause
 - A policy condition requiring insured to cooperate with and assist the insurer and do nothing to increase the insurer's liability
 - Are the requests reasonable?
 - Has the carrier accepted its coverage obligations?
- Subrogation Clause
 - A policy condition that requires the insured to take all reasonable steps to preserve the insurer's potential subrogation rights

Duties of the Insured

- Settlement duties
 - Know provisions of policy: Who controls settlement and what are consent rights
 - Insureds should beware of hammer clauses
- Consequence of breach of insured's duties: loss of coverage

Duties of the Insurer

- Duty to defend
 - Insurer must provide competent counsel who represents insured
 - Defense counsel/insurer must communicate with insured to permit him to associate in defense and settlement of claims

Duties of the Insurer

- Duty to settle
 - Varies from state to state but overriding consideration: insurers may not put its interest ahead of those of the insured
 - Demand within limits may be prerequisite
 - Insurer may be obligated to affirmatively pursue settlement
- Consequence of insurer's breach: extra-contractual exposure (*i.e.*, bad faith claim)

Potential Insurer Bad Faith Liability

- Insurers that fail to give equal consideration to the insured's interests may be liable for extra-contractual liability
 - Can sometimes extend beyond unreasonable failure to settle
 - *E.g.*, failure to conduct a reasonable investigation or other failure to protect the insured's interests
- Exposure varies among states and on different bases:
 - Statutory liability
 - Implied covenant of good faith and fair dealing
 - Tort
 - Potential damages also vary widely

Resolving Coverage Disputes

- Informal efforts
 - Exchange correspondence on coverage issues
 - Calls and meetings between insured and insurer
 - Mediation
- Formal efforts
 - Litigation/Arbitration
 - Declaratory judgment action – initiated by insured or insurer
 - Breach of contract action – initiated by insured
 - Bad faith action – initiated by insured

The Role of Insurance in Mediation

Mediation Logistics

- Consult all parties in advance – including carriers – regarding scheduling and logistics
- Who is going to attend - this can be tougher than you might think
 - Number of attendees might create scheduling difficulties
 - Too many insurers may send the wrong message to plaintiff
 - Insurers might have different ideas about who should attend
 - Mediation goes more smoothly if key decision makers present
 - Document your requests for insurer attendance
- Number of days – mediation fills the time you allot for it

Choose the Right Mediator

- When selecting the mediator, do not overestimate or underestimate the affect insurance coverage issues might have on a mediated resolution
- Consult the carrier in advance – carriers are repeat players
- Know the mediator's experience with insurance coverage issues

Choose the Right Mediator

- Will the mediator be comfortable and conversant with the coverage issues
- Will the mediator understand and be equipped for the shuttle diplomacy necessary when a mediation involves multiple named parties, and multiple insurance companies
- Beware of insurance issues hijacking the mediator and the mediation

Choose the Right Mediator

- Would you choose the mediator if you were only mediating the coverage issues
- If not, consider
 - Specifically delineating what the mediator should and should not be mediating
 - If that is too difficult, consider choosing a different mediator

Insurer's Role at Mediation

- Insurer and insured not always adversaries
 - If no threshold coverage issues, the insurer often partners with the insured to reach an appropriate settlement
 - Insurer is usually the sole source of funding for a settlement and therefore often acts as an advocate for the defense
 - Coverage issues often can be leveraged to achieve a lower settlement especially if insurance is main motivation for plaintiff's claim

Mediation and Coverage Issues

- Know the coverage issues
 - Whether coverage issues “hijack” the mediation or not, insurance issues will come up
 - Coverage issues dictate whether insurer is the only funding mechanism for a resolution
- When significant coverage issues exist, insureds should consider having separate coverage counsel attend
 - Coverage counsel can focus on coverage issues
 - Helps to compartmentalize (and might avoid conflicts)
 - Insurers typically will have coverage or monitoring counsel attend

Mediation and Coverage Issues

- Advance coordination is key
 - Make sure insurers have necessary information well in advance of mediation (if possible)
 - Status updates during life of case ensures insured and insurer are coordinating well in advance of mediation – more is often better, especially as the mediation gets closer
 - Schedule calls/meetings to ensure all parties and counsel on the defense side – including insurers – are on the same page going into mediation

Reservation of Rights

- Beware potential conflict where action against insured alleges covered and uncovered claims (e.g., negligent and intentional conduct)
 - Many states require informing insured it may retain separate counsel to protect interests on potentially uncovered claims
- Different obligations regarding cooperation and consent-to-settle provisions for covered and uncovered claims

Effect of Covered and Uncovered Claims in Mediation

- Insured should have its own counsel
- Basically a negotiation between insurer and insured about allocation
- Plaintiff is usually just concerned about “how much,” not “who pays” unless insured lacks ability to pay

Dealing with Multiple Insurers

- Possible scenarios
 - One insured with a tower of insurance with several layers issued by multiple insurers
 - One insured with multiple types of insurance policies triggered by a claim
 - Multiple defendants each with their own insurer(s)

Dealing with Multiple Insurers

- The more insurers are involved, the more coordination is required and greater chance they will disagree with each other
- Layer-by-layer disagreement
 - Does the excess follow form?
 - Are the coverage positions consistent?
 - Are there exhaustion issues if only some carriers willing to cut a deal?

Dealing with Multiple Insurers

- Additional insureds and priority of coverage
- Subrogation considerations
- Disagreement among carriers providing different types of coverage
 - Manage finger-pointing
 - Know applicable allocation rules
- Understand admissions and confidentiality
 - A position taken with one carrier could prejudice coverage with another carrier

Dealing with Insurers in Mediation

- If possible, agreed position *before* mediation
- If not, representatives *with authority* for all layers
 - The “chain of command” problem with insurers
 - But remember message you are sending to plaintiff
- Carriers unlikely to disclose settlement authority

Confidentiality Concerns

- Information shared with carriers might not be confidential vis-à-vis the opposing party in the underlying matter
- Information shared with carriers might not be confidential vis-à-vis the other carriers
 - Joint defense and common interest agreements
 - Is there a common interest where a carrier has reserved its rights?

Confidentiality and Cooperation

- If a carrier reserves its rights, there may be no common interest privilege – case law varies
- BUT, the cooperation clause might still require information be turned over to the carrier
- Possible options
 - Enter into joint defense agreement with insurer
 - Ask mediator to agree that pre-mediation communications are cloaked in settlement communication privilege

Confidentiality in Duty to Settle Context

- How can insureds and insurers prove positions in bad faith case for failing to settle in light of mediation privilege?
- Assuming the mediation is confidential, is bad faith committed at or in connection with the mediation actionable?
 - Was the bad faith solely limited to the mediation
 - Were there pre-mediation communications /actions that could support a bad faith claim
 - Insurers may want to rely on statements/decisions made during the mediation to defend its actions



Best Practices for Handling Insurance Issues at Mediation



Best Practices For Policyholders

- Be prepared to negotiate, including with your own insurers
- Have authority on behalf of your client and from the carriers
- Timely apprise the carriers of their potential exposure in a timely manner
 - If there is a reservation of rights, assume such a communication will be discoverable
 - Oral v. written assessments

Best Practices For Insurers

- Duty to defend context
 - Keep insured apprise of all settlement overtures and demands
- Advancement context
 - Make a record early and often of your requests for information
 - Attempt to establish good rapport with insured and defense counsel early
- Be prepared to address defense issues at mediation

Best Practices for Mediators

- Develop full understanding of coverage issues before the mediation
- Make sure representatives with authority will be present
- Understand needs of insurers
 - Proof that the settlement is reasonable
 - Avoiding *ex gratia* payments
 - Documenting a file