



# THE ART OF NEGOTIATING WITH INSURERS

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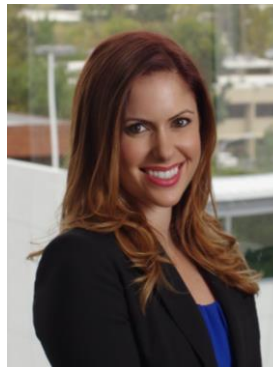
## TODAY'S SPEAKERS



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## ABOUT PASICH LLP

- California's premier insurance recovery boutique law firm
- Offices in Los Angeles, Manhattan Beach, and New York
- Insurance coverage litigation throughout the country
- Deep international arbitration experience
- Recent landmark decisions in California, Delaware, New York and Vermont, among others
- Firm's attorneys have helped clients recover more than \$10 billion in insurance benefits



## NEGOTIATING WITH INSURERS: AN OVERVIEW

- Different than other commercial negotiations
- Regulatory and reserve requirements
- Understanding the insurer's negotiation mindset
- Maximizing insurance recovery often requires deliberate, strategic thinking and months (or years) of groundwork
- Complex insurance claims can lead to a series of negotiations

## THIRD-PARTY CLAIMS: THE SELECTION OF DEFENSE COUNSEL

- Insurers and insureds are not always aligned on the “right” defense counsel to handle a matter
- Keys to Negotiations
  - Stressing the business case for preferred defense firms
  - Communicating unhappiness to insurers
  - Understanding how your policies address the selection of defense counsel
  - Evaluating the right to independent defense counsel (*Cumis*)
  - Considering the impact of an insurer’s wrongful denial

## THIRD-PARTY CLAIMS: HOURLY RATES OF DEFENSE COUNSEL AND ALLOCATION ISSUES

- When the insured succeeds in having preferred defense counsel appointed, disputes can develop regarding the scope of the insurer's duty to pay for the defense
- Pros and cons to early negotiations and interim agreements regarding hourly rates and allocation
- When appropriate, hold insurers to their burden by invoking Civil Code section 2860
- Generally, all rights are reserved even if no agreement is reached
- Danger in setting precedent

## THIRD-PARTY CLAIMS: THE PAYMENT OF UNDERLYING SETTLEMENTS

- Understanding the insurer's duty of good faith and fair dealing and the interplay with the duty to settle
- Positioning a matter for successful resolution
  - Defense counsel's analysis
  - The adequacy of reserves
  - Considerations regarding timing and the cost of defense
  - Selecting the right mediator to help navigate purported "coverage" issues
  - Mediated vs. non-mediated settlement negotiations
  - Utilizing the bad faith "hammer"

# NEGOTIATIONS REGARDING DISPUTED CLAIMS AND LOSSES

- Far too many insureds take “no” for an answer
- Determining how, when, and whether to initiate settlement discussions with insurers
- Keys to generating value out of denied and disputed insurance claims
  - Exploring all reasonable coverage arguments
  - Retaining experts and consultants as needed
  - Effective use of case law and other authority
  - Emphasizing insurer risks and downside
  - Considering litigation, arbitration, and coverage mediations as options



## THE ROLE OF INSURANCE BROKERS IN NEGOTIATIONS

- Can be a helpful advocate, particularly if broker has deep ties and strong business relationship with adverse insurer
- May have visibility into how insurers have handled similar claims
- Not always well-versed in case law, and may miss more nuanced coverage arguments
- Role depends on size and nature of claim
- Tend to be more successful in early stages of dispute
- Potential pitfalls in broker-led negotiations

## THE ROLE OF COVERAGE COUNSEL

- Some negotiations, particularly on smaller and less complicated claims, can be handled by in-house counsel or insurance brokers
- Determining when and whether to engage coverage counsel is key decision
- Coverage counsel can be advisor without needing to be directly involved in claims communications or negotiations
- How best to leverage coverage counsel's involvement
- The risk of escalating disputes and being “jumped” by insurers
- Determining whether, when, and where to initiate coverage litigation or arbitration proceedings

# STRATEGIC CONSIDERATIONS REGARDING COVERAGE MEDIATIONS

- Many negotiations with insurers tend to take place in mediations
- Insurer comfort in confidential setting
- Understanding the impact of the mediation privilege
- Timing of mediations is a key consideration for insureds
- The “right” mediator is one who has the insurer’s confidence and respect, and who is willing to push the insurer
- Understanding and combating insurer negotiation techniques
- Understanding the insurer’s settlement authority and the potential need for post-mediation negotiations
- When to end settlement negotiations

## KEY TAKEAWAYS

- Important to lay groundwork for successful negotiations with insurers with deliberate and pointed communications
- Advancing right arguments and points critical to success
- Strategic reliance on consultants, experts, brokers, and coverage counsel can increase likelihood of favorable outcome
- Not all negotiations with insurers result in agreements, so insureds must take necessary steps to document their positions, remain focused on long-term objectives, and preserve their rights

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QUESTIONS?