

AAPA:

**Port Operations, Safety &
Information Technology Seminar
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**Risk Management 360 Degrees:
How To Evaluate and Settle
an Insurance Claim**

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The Intent

“The primary duty of the [insurance company] claim representative is to deliver the promise to pay. Therefore, the [insurance company] claim representative’s chief task is to seek and find coverage, not to seek and find coverage controversies or to deny or dispute claims.”

James J. Markham et al., *The Claims Environment*, 13 (1st ed. 1993).

Quite a Business Model:

- Policyholder pays up front
- Insurance Company benefits from that up front payment
- Loss occurs
 - Policyholder expects to be paid for losses
 - Insurance company hits the breaks

AVOIDING PAYMENT

- DELAY: The time value of money

Simply put, float is money we hold that is not ours, but which we get to invest.”

(Warren Buffett, billionaire CEO of Berkshire Hathaway, Inc., explaining one of the benefits of “float” in a 2007 letter to shareholders of Berkshire Hathaway)

AVOIDING PAYMENT*

- Pressure on the Policyholder
 - Incurring legal expenses to fight for coverage
 - Mounting business pressure to settle before trial
- The “Invisible Seven Digit Exclusion”

*[more to come]

Frustration, distrust, acrimony: I want my day in court!



The Ultimate Goal:

- Get your claim paid

OR

- Box in the insurance company and set yourself up for trial

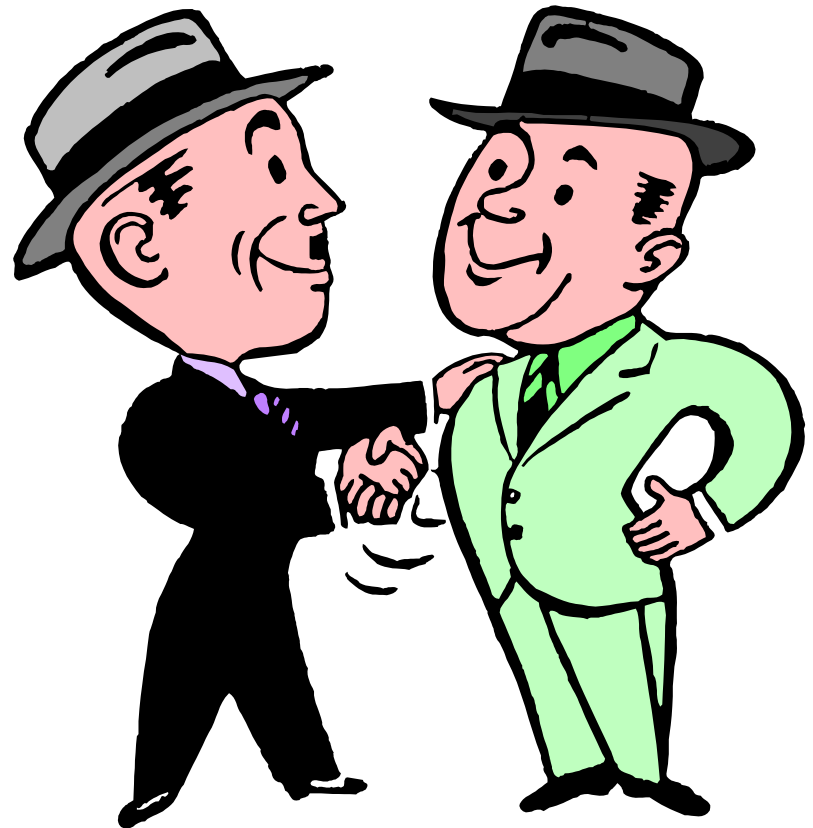


Beginning Guidelines:

1. Give Notice!
2. Control the lawyers (Principal to Principal contact)
3. Beware open-ended stand-still agreements
4. Mind your manners

Cooperation Clause

- Policy may contain: “Duty to Cooperate” clause.
 - investigation
 - defense
 - settlement
 - authorize insurance company to obtain records



Tower of Babel

- Insurance companies speak what language?
- Gulf in understanding and communication
- Bridge this gap
 - Ask for clarification
 - Document communications

Document Everything!

- Communications
 - Requesting information
 - Requesting clarification and reasons
 - Providing information
- Actions
 - What the insurance company is or is not doing
 - What you are doing
- Evidence

Let's Get to Work

- Preparation
- Preparation
- Preparation



Let's Get to Work

- Quantifying the Loss
- Valuing the Insurance Asset
- Performing Legal/Policy Analysis
- Setting Settlement Demands & Targets
- Negotiating the Claim
- Documenting Settlement

Quantifying the Loss

- Assemble the Right Team
 - Company Management
 - Risk Management
 - Technical/Specialist (brokers, adjusters, accountants, engineers, actuaries)
 - Legal

Quantifying the Loss

- Identifying amounts spent on loss/liabilities
 - Defense costs (liability matter)
- Past, present and future loss amounts
- Consider all possible contingencies

Valuing the Insurance Asset

- Locate all potentially applicable policies
 - Insurance archeologists
- Don't forget the endorsements
- Policy limits
- Costs shifted to policyholders
 - Deductibles
 - Self-insured retentions

Valuing the Insurance Asset

- Possible limitations to coverage
 - Coverage exclusions
 - Exceptions to exclusions
- Viability of each insurance company in the short and long term
 - Reliance
 - Home

Legal/Policy Analysis

- Analyze the loss valuation against the insurance coverage available
 - Can be relatively straightforward or extraordinarily complex
 - Perform analysis for each insurance company involved
- Identify priority claims or claims that represent most of the damages

Legal/Policy Analysis

- Forum sensitivity – applicable law
 - Likely defenses, e.g., Notice
- History with insurance companies
 - Use their words and actions against them
 - Inconsistent positions?
- To sue or not to sue

Setting Demands and Targets

- What do you want to achieve?
- Insurance company's motivation
- Settlement and release issues
 - Cash today? Coverage in the future?
 - Room to maneuver?
 - Scope of release

Scope of Release: A Few Thoughts

- Great friction: draw up term sheet ASAP
- Desire to close out historic policies
- Policy release vs. claim release
- Concerns about unknown risks
- Insurance company must pay for what they are seeking

Negotiating the Claim

- Be realistic about the claim
- Prepare demand and presentation
- Present and defend claim to the insurance company

Negotiating the Claim

- Negotiate with one insurance company at a time
- Respond to reasonable requests for information
- Accommodate reinsurance companies

Negotiating the Claim

- Talk to the right people
- Have settlement authority
- Avoid delay; be relentless

Document Settlement



1. Avoid “buybacks”
2. Watch the carve-outs
3. Net Settlement
4. Allocation
5. Indemnification of insurance company
6. Confidentiality provisions

Settling the Underlying Case: A Few Thoughts

- Information flow among tripartite parties
- Privilege
- Exposure in excess of limits/Bad Faith
- Consent to settle/“hammer” clauses

Bad Faith and Abuse of Process: A Few Thoughts

[* continued from above]

- Conduct counts
 - Harassment
 - Draining resources
 - Delaying payment
 - Delaying litigation
- Perversions of the legal process

THANK YOU!

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