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Claims Interest Group

Volume 30 • Number 1 • May 2012

Claims Quorum

Message from the Chair

by Barbara Wolf Levine, CPCU, J.D.

Barbara Wolf Levine, CPCU, J.D., is CEO of Exam Coordinators Network, which provides nationwide medical evaluation services. She has held this position since 1999. Levine earned her CPCU in 1996. She previously worked as a claims attorney at State Farm from 1987 to 1998. She earned her B.S. in political science from Tufts University and her law degree from the University of Florida Levin College of Law. She is a practicing attorney licensed by the state of Florida and a member of the Florida Bar Association.

Having just returned from the CPCU Society Leadership Summit in Miami, Florida, I am filled with excitement about leading the Claims Interest Group throughout 2012 and beyond. I have the great fortune to be working with **James Beckley** as "Incoming Chair."

The summit was held in Miami, Florida, on April 26-28, 2012, at the beautiful Doral Resort and Spa. It was the first meeting since the affiliation between The Institutes and the Society. I was curious about the role interest groups would play subsequent to the merger. I was happy to learn that The Institutes consider the interest groups experts in their subject matters. The interest groups will continue to be responsible for developing educational content for the CPCU Society Annual Meetings and Seminars, as well as for providing content and ideas for ongoing webinars.

The Claims Interest Group Committee accomplished a lot during the three hours in which we met. We discussed and finalized many of the details for the Annual Meeting and Seminars, which are scheduled to occur on September 8-11, 2012, in Washington, D.C., at the Marriott Wardman Park. The Claims Interest Group seminar is going to be held on Sunday, September 9, 2012, from 2:45 p.m.–4:45 p.m. The seminar is called "Social Media in Claims Adjusting," and it will be moderated by **Kimberly Riordin, CPCU.** Panel members include our past chairman, **Tony Nix,** as well as two prominent attorneys in the field—**Matthew J. Smith** of Smith, Rolfes & Skavdahl in Cincinnati Ohio, and **Ron Kurzman,** partner and litigation consultant at Magna Legal Services in New York. Registration for the meeting has recently opened.

Our Claims Interest Group luncheon will also take place on September 9, 2012, from 11:30 a.m.–1:00 p.m. Traditionally, this event has been heavily attended. The Claims Interest Group is known for providing outstanding door prizes, including iPads, and sponsoring up to five students to attend the luncheon in order to find out what claims are all about. The generous funding of Insurance Services Office, Inc. (ISO) has allowed us to provide consistently outstanding programs, and this year is no exception. We are pleased to present "Building a Weather Ready Nation" with **Dr. Edward R. Johnson.** We hope you will join us there.

For those of you considering national service, now is an excellent time to submit your applications. We are going to have several openings on our committee, and we are looking for some outstanding professionals to join us. For more information, please contact James Beckley at jbeckley@aaic.com or me at blevine@ecnime.com.

I wish everyone a wonderful and safe summer! I look forward to seeing you all in September. ■

What's in This Issue

Arbitration: The "I'm Not Dead Yet" Alternative Dispute Resolution Program

by Matthew J. Smith, Esq.

Matthew J. Smith is the president of Smith, Rolfes & Skavdahl, a law firm which assists major insurance carriers in the investigation of property and medical insurance fraud. Smith is admitted to practice in Ohio, Florida, Kentucky, and Michigan. Since graduating from law school, Smith's employment has been exclusively in the fields of insurance law and insurance investigations. Smith earned a juris doctorate degree from the Salmon P. Chase College of Law at Northern Kentucky University.

The hit Monty Python Broadway musical *Spamalot* contained the humorous song "I'm Not Dead Yet." For those of us who have worked in insurance claims for more than just the past decade or two, the same may well be said of arbitration. What was the "hot property" of alternative dispute resolution (ADR) in the 1980's has become nearly forgotten in the new millennium. For the right claim, however, arbitration remains a very viable alternative to litigation or to other types of ADR, such as mediation.

Black's Law Dictionary defines arbitration as, "The reference of a dispute to an impartial third person" or, "Abiding by the judgment of a selected person in a disputed matter to avoid delay, expense and ordinary litigation."

The theoretical purpose of arbitration is to avoid or limit litigation, provide the parties with an expedited resolution process, and while doing so, decrease court docket backlogs and create a less adversarial method of resolving the dispute. As with most forms of ADR, arbitration is normally not governed by specific laws, statutes, or rules of procedure, and it affords parties more freedom in determining the method of arbitration most appropriate to the issues at hand.

This is not to say arbitration is without regulation. The Uniform Arbitration Act was originally adopted by the National Conference of Commissioners on Uniform State Laws in 1955, and subsequently amended in 1956 and 2000. Many local courts, both at the state and federal level, have also adopted arbitration proceedings as part of their ADR programs, and many professions, including architects, stockbrokers, and bankers, have now incorporated arbitration proceedings into contractual agreements.

Additionally, the American Arbitration Association (AAA) operates both nationally and internationally, providing a framework for arbitrations. AAA offers set rules and guidelines for arbitration proceedings, will provide listings of skilled and competent arbitrators, and may provide office facilities specifically geared for conducting arbitration hearings in major cities.

The reason arbitration has historically been so popular is that it affords a much more flexible format than traditional litigation, summary jury trials, or even mediation. Although contractual terms must be reviewed in most situations and especially when a lawsuit is pending, the parties may define their own terms for arbitration, including whether the decision is binding or merely advisory, whether the matter is submitted to one arbitrator or a panel, and whether all issues or specific issues (such as determining liability or the amount of damages) are subject to arbitration,.

Frequently, parties may decide, within the arbitration format, how the actual hearing will be conducted. Matters such as opening statements, closing arguments, the type of exhibits to be utilized, and whether witnesses will appear and give personal testimony may be subject to negotiation and agreement between the parties.

Too often, even experienced attorneys and claims professionals overlook alternatives within the arbitration format of ADR. A traditional arbitration involves one or more arbitrators issuing a decision, similar to a judge or jury, based upon the issues presented. The use of arbitration as an ADR format, however, allows you to be creative and consider some important alternatives, which may actually be more appropriate for resolving the disputed issue. Some examples are discussed here:

Baseball Style—Owing to its use in major league baseball, this form of arbitration forces both sides to very realistically evaluate their case and damages. Normally, these arbitrations are conducted with one arbitrator, and the parties agree several days in advance to submit sealed envelopes to each other, and to the arbitrator, on behalf of their respective clients. It is agreed the arbitrator will not open the envelopes until he or she reaches a decision. In advance of the arbitration, however, the parties open respective envelopes containing the plaintiff's demand for settlement and the defendant's highest offer of settlement. Typically, the parties will agree if the figures overlap (which is unlikely), or reach a compromise if the figures are within a relatively close range, and the arbitration will be cancelled. However, if the parties cannot reach an agreement, the arbitrator hears the evidence and reaches his or her own independent decision.

This is an example of what happens next: An arbitrator returns a verdict of $75,000.00. The arbitrator then opens the two envelopes. If the plaintiff's demand was $200,000.00 and the defendant's offer was $50,000.00, the amount awarded to the plaintiff is $50,000.00, not the

$75,000.00 awarded by the arbitrator. The number closest to the arbitrator's verdict is the figure that is ultimately paid on the claim. This is why baseball-style arbitration forces both parties to *very* realistically evaluate their cases in order to try to get as close as possible to the arbitrator's fair and impartial decision.

High-Low Agreements—The parties may also submit a matter to arbitration with the understanding that the arbitrator's verdict will set the final amount of the claim, but with a guaranteed capped low or high, as agreed to by the parties. This assures the plaintiff of a minimum amount of recovery and makes certain, even in arbitration, there is not a "runaway" verdict, which is unacceptable to the defendant or their insurer.

Normally, the baseball-style and high-low agreements are only successful if the arbitration is agreed to in advance by all parties to be fully binding.

Formal or Casual—No, I am not referring to what you wear to the hearing. Arbitrations can be conducted with the same level of formality and dignity as a courtroom proceeding or may be extremely informal, conducted around a conference table, with no one under oath, and the parties simply sharing information and submitting documents to the arbitrator(s). Many arbitrations are similar to mediations, with the exception that a mediator has no final authority. The arbitrator does have final authority on either an advisory basis or a binding basis, depending on the parties' agreement. Careful consideration should be given to what format best meets the needs of the parties and the issues at hand. There are occasions when litigants need to feel they have had their "day in court" and a more trial-like arbitration may fulfill those needs. In other situations, for example, when a spouse or child has died, a more relaxed and understanding discussion format with less "pressure" may be more conducive to resolving the dispute.

Arbitration Without Attorneys—Heaven Forbid!" Yes, it is possible for the parties or their representatives to arbitrate a case without attorneys even being present. There are clearly advantages to having attorneys present because, presumably, they possess advocacy skills and can help guide the parties in the arbitration hearing. However, there is no formal requirement that an attorney present a case at arbitration, and often it may be advisable to consider whether nonattorneys are a better choice on an arbitration panel. In complicated construction matters or business income loss claims, it may be appropriate to have a panel of arbitrators but to include one attorney, a professional engineer, and a forensic accountant. Again, arbitration affords the flexibility and adaptability to make certain the parties feel they have been treated fairly and their case has been heard by those who are most competent to judge and decide the issues at hand.

In its best use, arbitration is prompter, more efficient, more amicable, and less costly than a jury trial; and it avoids the always feared aberrant jury decision.

However, there are risks associated with arbitration. If the arbitration decision is based on a serious error of fact or law and the arbitration is binding, there is no appeal process to correct the error. If the parties do not resort to arbitration early on, and if the attorneys do not wisely control the cost, an arbitration may be nonbinding and more costly than a trial. Also, if the arbitration is nonbinding, the opposing counsel and party may now know the best evidence and will have used the arbitration to secure a "trial run" to improve their case before it actually goes before the judge or jury.

Taking care early on to address key factors will help to avoid many, if not all, issues. First, decide sooner rather than later if the case is suitable for arbitration. If it is, structure the case and discovery for arbitration, especially if it is binding in nature. Experience has shown that arbitration is best when it is binding; otherwise, you may well be wasting your client's or your company's time and money. Also, do not be afraid to be innovative. Design the arbitration in a style that works best for the facts and circumstances of the dispute or claim at issue.

Once you have agreed to arbitration, play an active role in the selection of the arbitrator or arbitration panel. Do not simply rely on published lists, retired judges, or recommendations from counsel. Interview the arbitrators and have a pre-arbitration meeting with all counsel and the arbitrator(s) in advance to set the ground rules, expectations, timing, and other issues. This will ensure the arbitration goes smoothly and everyone is entering the arbitration with the same expectations.

It is also important to inform the nonattorney or claims-professional parties to the arbitration of what to expect. Do not assume they understand what the arbitration process entails or what will occur at the arbitration hearing. Discuss this with them in advance and secure their agreement regarding the format, time, and goals of the arbitration.

Finally, learn from the process. Whether you win or lose, speak to the members of the arbitration panel or the arbitrator. Find out from them what worked, what did not, and what factors were crucial to making their decision. Seek specific guidance from them regarding matters such as the style and length of the arbitration, the manner and format in which the evidence and witnesses were presented, and what specific information the arbitrators may not have received, but would like to have considered before making their final decision.

In the final analysis, do not give up or assume arbitration is dead. Consider arbitration a valuable tool in the ADR process, and at all times, learn, adapt, and improve your claims handling or legal representation skills through the use of effective ADR. ■