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INSURANCE /REINSURANCE ARBITRATION AND MEDIATION

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INTRODUCTION

At the heart of the insurance business is the resolution of claims. Insurers routinely adjust claims and provide for indemnity and defense. Accordingly, some have said that the business of insurers is litigation. In fact, it is more accurate to say that the business of insurers is dispute resolution: including negotiation, mediation, neutral evaluation, and arbitration, as well as litigation.

Where insurers and reinsurers find themselves consistently involved in matters that are heading towards or involved in litigation, it is no surprise that the industry currently makes extensive use of a variety of dispute resolution processes. In this paper, our focus will be on mediation and arbitration, in handling: (1) insurers with an obligation to defend/indemnify the insured, (2) subrogation matters; (3) insurance coverage disputes between insurer and insured, (4) disputes between insurers, and (5) reinsurance disputes.

As with other areas covered by this series of White Papers, the mediation and arbitration processes offer a wide range of benefits to the insurance industry, providing effective and efficient processes for the resolution of disputes. We will consider both benefits and special uses of alternative dispute resolution processes in these various scenarios. In all areas of insurance it pays to apply the questions of "who, what, when, where, and why": who should or will be attending the dispute resolution process; what process should be selected; the ideal timing of the use of that dispute resolution process; the forum or venue for the procedure – court-annexed or otherwise; and the reasons for selecting one process over another – keeping in mind the players, goals, opportunities and circumstances.

1) Insurance Defense and Indemnity – Third Party Claims

The typical liability policy requires the insurer to defend and indemnify the insured against claims asserted by one or more persons. These are known as "third party claims" because the persons asserting the claim against the insured are not parties to the insurance agreement. By contrast, first party claims are those presented by the insured party to its insurer under policies that cover the insured against risk of harm or loss to its own person or property. In this section, we will focus on the use of

alternative dispute resolution processes for third party claims. Third party coverage is offered in a wide range of areas, including, *inter alia:* automobile, homeowners, commercial general liability, professional liability (also known as Error & Omissions), Directors & Officers, employment practices liability, and products liability insurance.

Arbitration is used in a number of arenas for the resolution of third party claims, including automobile no-fault cases, small claims and civil court matters, and for certain Workers Compensation[1] claims. Arbitration, for these and commercial matters, can be an effective means of obtaining a decision from a neutral without going through a trial. Mediation is frequently used across the board for third party claims, both privately and through court-annexed panels. Mediation vests control in the parties, offering an informal, flexible and inexpensive process, with resolutions tailored for and by the parties. Mediation's popularity is reinforced by the benefit derived from a neutral who can keep parties and counsel engaged in constructive dialogue, and from the fact that there tend to be no pre-dispute arbitration clauses running between third party claimants and the insured.

There has been much discussion on "when" – the ideal timing for holding a mediation. As a general rule, the sooner one mediates the better. This enables the insurer to take funds that would otherwise be used in the defense of a claim and instead contribute them to the settlement pot. The sooner a dispute is resolved, the less parties will harden in their positions, and the less there will be a build up of emotion and resentment (not only by parties but also by counsel). Early resolution lessens the sunk cost phenomenon, in which parties and counsel who have invested time and expense hold out for a better return on investment – making it harder to settle a case. Another consideration that impacts timing is the need to develop information. Parties might feel a need to conduct an Independent Medical Examination, do destructive testing, nail down certain testimony in a deposition, test legal theories with a motion to dismiss or for summary judgment, or obtain an expert's report. At each juncture there is a balancing test of whether the information to be gained will offset the benefit of settling before the outcome is known. Conversely, its pursuit might, hydra-like, simply lead to additional questions, uncertainty, cost, and hardening of positions. Certain parties observe that "the heat of the trial melts the gold," and prefer to wait until they are at the courthouse steps – or even with an appeal pending – before conducting a mediation. Frankly, mediation can be useful at any stage. It is our view, however, that the earlier done, the better. In all instances, good judgment dictates giving serious consideration to the timing question.

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[1] Workers' Compensation insurers may initiate subrogation arbitrations to recover payments of health benefits from third parties if the defendant companies or their insurers and the subrogated insurer are parties to a Special Arbitration Agreement. In addition, persons involved in the administration or determination of Workers' Compensation benefits hearings may also arbitrate their own claims. *See*, NY Workers Compensation Law, Section 20.2.

In order most effectively to utilize the mediation or arbitration process where an insurer is involved, perhaps the most significant of our questions is "*who* is involved and what role should the insurer play?" It is critical to be sure that the proper parties are engaged in deciding to enter mediation, preparing for the mediation, and attending the mediation session. Whether it is an adjuster with responsibility for monitoring the case,[2] or a lawyer or other official of the claims department, the person involved should have a full appreciation of the way mediation or arbitration can be used effectively, full authority to resolve the matter, and sufficient knowledge of the case and the issues to be appropriately involved in the process and make a reasoned decision. This means that the claims department should be actively engaged in evaluating the matter and reassessing reserves, and the person with full authority, ideally, should attend the mediation session. When dealing with a corporate claimant, it also means bringing the person with full settlement authority. If that claimant is an individual, say, with a personal injury claim, it might mean seeing that certain family members are also involved or, at least, on board. It pays for claims adjusters and counsel on both sides to educate themselves well on negotiation strategy and techniques and on the nature and role of the mediator, so that they can take full advantage of the opportunities presented by using the mediation process. In addition to persons with authority, experts or persons familiar with certain facts may be helpful to have present at a mediation. Of course, a mediation is not a hearing, but the presence of these people might aid the parties in coming to a common understanding of the facts and adjust their assessment of the matter. In all instances, the best prepared attendees should be cautioned to maintain an open mind so that they get the full benefit of the mediation process, including the capacity to learn and make adjustments in accordance with reality.

The "what" and "why" of mediation include using a neutral party to help all involved conduct a constructive dialogue, getting past many of the snags that arise with traditional positional bargaining. The mediator can help cut through posturing and can keep people on course. When a large demand or tiny offer threatens to end negotiations, the mediator is the glue keeping people in the process,

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[2] A number of people are ordinarily involved in handling claims presented to an insurer. Chief among them is the insurer's claims department or claims handling unit. This can be a group within the insurer and can also involve outside adjusters or third party administrators. Claims handlers are involved from the moment notice of a claim is received, through initial efforts to assess and possibly adjust a claim, and through all stages of litigation. The claims group triggers the issuance of any letter to the insured accepting the claim, assuming the defense but reserving rights to deny coverage. Claims appoints or approves counsel to handle the defense; sets reserves for the risk; and monitors the defense of a case. Moreover, claims evaluates case strengths and weaknesses, assessing liability and damages, and ultimately determines whether and under what terms to settle the claim. Other key players are counsel who are appointed to defend and must routinely report to the insurer; any counsel separately responsible for coverage questions; and, of course, the insured, who owes a duty of cooperation to the insurer. On the other side of the equation tend to be the claimant and claimant's counsel.

encouraging them to stick with it and reach the goal of resolution. The mediator can help counsel and parties understand legal risks that "advocacy bias" might blind them to, help them develop information that is key to assessing and resolving the matter, and help them as they make their bargaining moves. While some cases involve claims for damages which one party believes can best and most favorably be resolved by a jury and others involve a legal issue which call for a judicial resolution, the vast majority of claims and litigations, particularly involving insured matters, are ultimately resolved by settlement. A mediation can fast forward the camera, truncating procedures and shrinking costs, by bringing about the inevitable settlement much sooner. Claims adjusters, risk managers, and counsel are well advised to consider the myriad benefits of mediation listed in the general introduction – the "why" – at the commencement of a matter, so that they can make an informed choice of process – the "what" – initially and reevaluate process choices throughout the course of handling the claim.

Development of information needed for an informed settlement decision can, in fact, be expedited through the use of mediation in the third party claim context. Rather than awaiting depositions or extensive document production, parties can use mediation to conduct truncated disclosure -- getting the information that is most essential to the resolution decision. Good use and development of information is critical to taking full advantage of mediation in the insurance context. Prior to the mediation session, it is good practice for the insurer's team to assess damages and liability and develop a good sense of the reserve for the case. This can include obtaining expert reports, appraisals, photographs or other key information. Pre-mediation conference calls can facilitate interparty disclosures that will provide parties with information needed to prepare or to conduct a meaningful discussion when they arrive at the mediation session. It is also valuable to help the mediator get current with information in the form of pre-mediation conference calls and written submissions, with exhibits. Further useful disclosures for the benefit of the parties can occur in the confidential mediation session, enabling parties to adjust their views and assessment of damages and liability. Even if the matter does not settle at the first mediation session, information can be further developed thereafter bringing the matter to resolution.

Additional points to keep in mind include the potential for conflicts or different interests or priorities between the insured and the primary and excess carriers and reinsurers. Also, insurance policies historically placed the burden of a complete defense on the primary carrier regardless of limits. While this is still the case in an automobile policy or an occurrence-based commercial general liability policy, a variety of claims made and specialized policies may provide for defense costs to be deducted from and be subject to the limits of coverage. Additionally, the claim may exceed the limits of primary coverage and impact excess coverage and/or the primary coverage may be typically reinsured in whole or in part. These may be important practical factors to keep in mind in evaluating the "who, what, when, where and why" of mediations and arbitrations in insured matters.

In sum, the insurer, parties, and counsel should be proactive in addressing our journalist's questions – and in developing, exchanging, and analyzing information – so that a mediation can be held at an

appropriately early stage – and indeed, if not initially resolved, in pursuing further mediation as the case evolves.

Box Insert-Case Study: The Multi-Party Subrogation Claim

Have you ever participated in a negotiation or mediation involving multiple defendants, each pointing the finger at another? In the third party insurance world, this is a frequent occurrence. Often, counsel or claims adjusters will enter a negotiation with a predetermined percentage which they believe their company should bear relative to the other defendants. Moreover, they have set views on the percentage responsibility the other parties should bear as well – particularly party X, whom they deem to be the chief target, or party Y, who was in a position similar to their own insured's. The latter scenario can generate feelings among professionals not unlike sibling rivalry.

In one case involving a construction site with twelve defendants, the mediator used an approach he calls the *consensus based risk allocation model*. This approach was undertaken with the recognition that, sometimes, shifting from percentages to hard dollars, and getting people to focus on their own pot rather than the other defendants', is a good way to move from stalemate to progress. First the mediator conducted an initial joint session and one or more caucuses (private, confidential meetings with fewer than all parties) in which he got a good sense of what the Plaintiff would need to settle the case. Then he held some caucuses with the entire group of defendants and subgroups of defendants in which the mutual finger pointing became apparent. To address this problem, the mediator held a series of caucuses with each of the defendants. In each caucus he asked the same set of questions: do you think plaintiff will win at trial, and, if so, how much? What percentage liability do you think will be allocated to each defendant? How much will it cost to try this case? Answers to these questions were recorded on an Excel spreadsheet, with a line for each defendant's answer, including columns for each defendant discussed.

When the interviews were completed, the mediator created different economic scenarios: (1) the average of the amount the plaintiff was predicted to win, with and without applying predicted defense costs, (2) the amount the mediator guessed the plaintiff would need to settle the case (the realism of which was assessed in light of the first set of numbers), and (3) amounts smaller than the projected settlement number which might serve as initial pots in making proposals to the plaintiff. The mediator then applied the average of all defendants' views of each defendant's relative liability to these economic scenarios. The result was a listing of dollar numbers allocated to each defendant for each economic scenario. The mediator then held a joint conference call with all defense counsel. He explained what he had done and inquired whether they would like to hear the outcome of this experiment. Not

surprisingly, all asked to hear the outcome and agreed to share with one another this information that had been derived from their private, confidential caucuses.

Essentially, the mediator presented to the defendants three packages for presentation to the plaintiff – an initial, a subsequent, and a final pot – identifying, by dollar figure only, each defendant's contribution to each of these three pots. As a result, a doable settlement path appeared in place of what had been a field of warring soldiers. Defendants got their approvals to each pot – one pot at a time – and the case settled. This is just one way mediation can help create productive order out of multi-party bargaining sessions in third party liability cases.

Subrogation

Another area that has lately benefited from the use of mediation is subrogation. In subrogation matters, an insurer that has already paid a first party claim for a loss suffered by its insured stands in the shoes of that insured and seeks recovery of damages for that loss from third parties who caused the loss. Over the last decade or two, subrogation has risen in the insurance industry's regard as one of the three chief ways in which insurers gain funds, along with premiums and return on investments.

The same considerations that apply to the mediation of all third party claims apply here. Unique features include that plaintiff is a professional insurer, and, typically, insurers are involved on the defense side, as well. As a consequence, some of the emotional issues that might be generated by parties seeking recovery of damage or loss to their own personal or property are diminished. Negotiations can proceed on a steady course. Yet, special challenges also arise when professionals engage in strategic bargaining. *See*, for example, the multi-party finger pointing discussed in the inset above. Some certainty on the size and nature of the loss is gained where the claim has already been adjusted by the subrogated insurer, but other issues take center stage: if the insurer paid replacement value, should the defendants' exposure instead be limited to actual, depreciated value of the property? Were payments made for improvements, rather than losses? And, of course, questions on liability, causation and allocation among multiple parties remain. Mediators can be quite helpful in organizing these discussions, developing information, assisting in assessments of exposure, and helping multiple parties stay on track to reach a conclusion. Sometimes, the mediator's phone follow up after a first mediation session is the key to keeping the attention of multiple parties, with many other distracting obligations, focused on the settlement ball.

2) Insurance Coverage Disputes Between Insurer and Insured

Disputes can arise between the insurer and the insured in either the first party (e.g., property) or third party (*e.g.*, liability) context. Such disputes can be particularly complicated in the third party context where the insurer owes a duty to defend if there is any possibility of coverage for one or more claims

even if the carrier has potential unresolved coverage defenses. In all events, the carrier owes a duty of good faith and fair dealing to the insured and may have to consider settlement offers within policy limits in third party claims even if coverage issues are unresolved. Similarly, in the first party context, although the defense obligation may not be present, the carrier does have an obligation to process claims in a fair and efficient manner.

Notwithstanding these complications and obligations, the carrier does have the right to deny coverage if it believes that the policy does not cover or excludes a claim, or the carrier may defend under a reservation of rights if it believes there is a possibility of coverage, especially if that possibility is dependent on the outcome of the underlying claim, *e.g.*, was the conduct that gave rise to the claim intentional (not covered) or negligent (covered).

A typical way of raising and resolving insurer/insured coverage disputes (after the carrier sets forth its initial coverage position generally by letter) is by a declaratory judgment action. Such an action may be brought by the insurer or the insured. In some states, *e.g.*, New Hampshire, a declaratory judgment action is required as a condition of denying coverage or requesting a denial.

As with all other disputes, insurance coverage disputes can be effectively resolved by mediation or arbitration (whether provided for in certain complex sophisticated insurance policies or voluntarily).

Mediation or arbitration is especially attractive in the first party context where the question of timing and amount of payment, if any, may turn on a prompt and efficient resolution of the insurance coverage dispute. While at first blush, it might appear that the insurer has an advantage or disincentive in this regard to the extent it could benefit from a delay in payments, there have been significant developments throughout the country, including in New York (in the *Bi-Economy* and *Panasia* cases, 10 N.Y.3d 187,200 (NY 2008)), adopting a tort of first part bad faith or other analysis or remedies which protect the insured in first party insurance coverage disputes and give the insurer an incentive to resolve such disputes.

In the third party claim context, the timing and coordination of any insurance coverage dispute and the resolution thereof is particularly sensitive. Simply put, if the underlying case is resolved by settlement or otherwise before the coverage dispute is resolved, the opportunity to resolve the coverage dispute in an effective fashion may be lost to the carrier or the insured. The parties may, therefore, have a genuine interest in resolving the coverage issues in coordination with the underlying claims in one way or the other. Mediation, or arbitration, involving some or all parties and some or all claims may be effective in this regard.

[Box Insert – Mediating the Dream within the Dream

In one mediation of a multi-party third party property damage case, one of the defendants had a coverage issue arise between its primary and excess insurer. The mediator called a "time out" and conducted a separate, abbreviated mediation of that coverage dispute by phone caucuses. The coverage issue was resolved and the parties then moved on to resolve the original third party claim.]

Apart from these complexities, the same who, what, when, and why consideration noted above apply. In endeavoring to coordinate an underlying claim proceeding with an insurance coverage dispute, the when of any mediation and the who is involved amongst the parties and their representatives becomes critical. On the insurer side for example, there is typically and appropriately, a separation between the adjusters or claims representatives handling the defense of the underlying litigation, and those responsible for the coverage dispute. This is where they need to coordinate. The why includes the potential benefit of resolving the coverage issue which may impede resolution of the underlying claim and/or resolving the underlying claim which may be impacting the resolution of the coverage dispute. The what may involve a mechanism to bring together in a single forum, e.g., before a mediator, parties involved in different proceedings or aspects thereof.

Finally, a word about the need for subject matter expertise in mediators or arbitrators. In arbitration, expertise is what is often sought in a decision maker, although some have argued that non-experts might approach a case with a more open mind. In mediation, maintaining an open mind is essential in the mediator; and process skills are of paramount importance. Nevertheless, users of these processes in insurance coverage matters, find it helpful if their mediators or arbitrators are conversant with insurance policy interpretation and implementation.

3) Insurer v. Insurer Disputes

Another area where mediation or arbitration may be particularly effective is in insurer v. insurer disputes.

Because of the complexity of the world we live in, it is not uncommon to encounter situations where multiple carriers and policies may respond to one or more potentially covered claims. This may give rise to disputes among carriers under “other” insurance clauses which seek to prioritize coverage obligations between carriers, or pursuant to subrogation rights, or where primary and excess carriers are involved, or there are additional insured claims, etc.

Disputes between insurers present a perfect opportunity for mediation or arbitration. One reason for this is that since insurers will often find themselves on one side of an issue in one case and on the opposite side of that issue in another case, or even on both sides of an issue in the same case, e.g., with affiliated carriers or the same carrier involved for different insureds, there are multiple situations where it would be in the carriers’ interest to have an efficient effective resolution of the particular case without setting a precedent for one position or an another.

Beyond the potential for setting unwarranted precedent in litigations between carriers, arbitration or mediation is simply an unusually effective mechanism for resolving disputes between entities which are in the business of resolving and paying for disputes. No entity is better equipped and has more interest in efficient effective resolution of claims and the coverage therefore than an insurance company – and insurers would prefer to avoid battling with each other, although the nature of today's' massive insured litigation is such that more often than not carriers will find themselves on opposite sides of the table from their colleagues in the industry and have difficult problems between themselves that need to be resolved. Once again the who, when, what and why become important. It is often important that insurance executives at the appropriate level recognize the significance of the issue to be resolved in the broader sense of the business rather than just the dollars and cents of a particular case. When is important in the evolution of the underlying matter and the issues between the carriers. The what is to identify an appropriate forum and mechanism and the why is because particularly with carriers it becomes a question of the best and most effective way to run their business.

4) Reinsurance:

"Reinsurance" is basically the industry practice where one insurer insures all or a portion of another insurer's liabilities. Virtually all reinsurance agreements are in writing, and most contain either arbitration clauses or the occasional mediation clause. Thus, the first and best benefit of this ADR mechanism in reinsurance is that it is contractual, i.e. automatic and nonnegotiable. Unless the very efficacy of the arbitration or mediation clause is challenged, the parties cannot litigate.

Arbitration: By design, reinsurance arbitrations are meant to be faster, less expensive and more industry-focused than the usual litigation model. The typical panel consists of three individuals, two quasi-partisan arbitrators[3], one selected by each party, and a third, neutral umpire, technically chosen by the two arbitrators, who manages the proceedings. The arbitrators are quasi-partisan because parties interview them in advance to ensure, based on the pre-discovery facts as described, that they generally support the party's position. Also, in some cases, the parties and their arbitrators continue to have ex parte conversations throughout most of the case, usually terminating with the parties' filing of their initial, pre-hearing briefs. Ultimately, arbitrators "vote with the evidence" in final deliberations. The neutral umpire has no ex parte communications at all with either side. While the contracts technically permit the arbitrators to select the neutral alone, most do so with outside counsel and party

[3] This characteristic of arbitrators depends upon the rules under which the arbitration is conducted. For example, under Rule 17, Disqualification of Arbitrator, of the Commercial Arbitration Rules of the American Arbitration Association: "(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law

input. Since decisions require a panel majority, the neutral umpire casts the swing vote, if necessary, throughout the case.

Another important benefit of the reinsurance arbitration model is that all three panelists are experts in the industry customs and usages of the particular lines of business, claims and practices in dispute. This is one of the quintessential aspects of arbitration that differentiates it from litigation. The people reviewing and weighing the evidence, assessing the parties' conduct and witnesses' credibility, and interpreting the agreements have been involved in the very business in dispute for years, enabling them to make informed judgments. While arbitrators are not permitted to discuss evidence outside the record in deliberations, they may apply their knowledge of industry customs and practices to judge the facts, assess witness credibility and understand contract language.

Typically, most arbitration clauses contained a broadly worded "Honorable Engagements" clause, for example: "The arbitrators shall interpret this Contract as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. " This clause, combined with their non-codified yet recognized authority, provides arbitration panels with broad discretion to apply industry standards and equity, not necessarily strict legal rulings, to resolve all manner of procedural and substantive disputes, to manage the proceedings before them, and ultimately to render a fair and just award based upon the totality of the circumstances.

This discretion is particularly beneficial to parties because it affords panels the ability to mold and streamline the proceedings to the particular facts, issues, and amounts in dispute. For example, to prevent the occasional overly zealous counsel from "over litigating," the dispute, panels may limit the availability and scope of discovery, the number and length of depositions, the amount and necessity of hearing witnesses, and many other procedural aspects of the case, especially since most arbitration clauses do not require the application of Federal or State rules of evidence or procedure. Like judges, arbitrators have authority to issue sanctions, draw adverse inferences and, where necessary, dismiss elements of an offending party's case, to maintain control of the process.

If properly molded and limited to the particular necessities of the given case, the arbitration process is designed to proceed to hearing and award much faster and less expensively than litigation. Following the hearing, most arbitration panels promptly issue "non-reasoned" awards - essentially a few lines stating who won and the amount of damages awarded. The trend in more recent arbitrations and newer arbitration clauses is for parties to specifically request the issuance of a "reasoned award." Even in that instance, panels usually issue awards much faster than courts, since the acceptable form of reasoned award requires a brief statement of factual findings, followed by the panel's ruling on each contested issue - much less than the typical length and scope of a court opinion.

The benefits of a reasoned award are obvious. First, it provides the parties insight into the panel's reasoning process and rationale for their decisions, particularly important if aspects of the panel's ruling differ from either party's requests. Second, allowing the losing party to understand how and why the panel ruled against them reduces the possibility that the award will be challenged as "arbitrary,

capricious or unreasonable." And third, since many parties have business relationships, governed by the very contract(s) involved in the dispute, that continue post arbitration, a reasoned award reveals how the parties should construe the challenged terms and conditions in the future, avoiding repetitive, expensive and wasteful arbitrations over identical issues.

Mediation: The mediation model employs an impartial, trusted facilitator to help parties explore, respect and react to objective, subjective and psychological factors creating conflict between them, helping them to perceive and communicate positions leading to an inexpensive, voluntary resolution of the dispute on their own terms. Though a mediator with reinsurance industry background is preferred, the technical aspects of the specific factual and legal issues in dispute are not the most important elements of the process. In joint meetings and private caucuses, an experienced, professional mediator with no formal power to issue rulings works with the parties, using an informal, confidential process designed to suspend judgment and promote candor, to identify and understand each side's interests and goals underlying the actual dispute. To the trained and experienced mediator, disputes present an opportunity to empower parties to structure a resolution that best meets their respective short and long term needs.

Currently in the US, disputants have been slow to select mediation to resolve reinsurance disputes. But mediation, by its very nature, fits well within the reinsurance model for many reasons. First, contractual reinsurance relationships, whether from active underwriting or run-off business, typically last longer than one underwriting year. Mediators can harness the positive power of this beneficial, continued relationship to facilitate the parties' negotiations. Second, as a facilitated negotiation, mediation is symbiotic with the usual background and experience of reinsurance professionals – industry savvy business people accustomed to arms-length negotiations, but occasionally stuck within their own positions, unable to objectively assess their adversary's views. Finally, since the aggravation, expense and time required to arbitrate or litigate is on the rise, the reinsurance industry is searching for alternatives and beginning to choose mediation, either by contract or ad hoc agreement. Compared to arbitration or litigation, mediation is a **less** aggressive, less costly, less damaging and less divisive alternative.

The reinsurance mediation process offers participants many benefits:

Given the complexity and overlapping nature of reinsurance contractual relationships and resultant business/factual/legal issues, sufficient time and care must be given to pre-mediation preparation. Before the actual mediation session, the parties submit mediation statements containing salient documents and information supporting their positions on specific issues in dispute. Both before and after these are filed, the mediator works with the parties jointly and individually by phone or in person to uncover the underlying interests to be addressed, some of which may transcend the narrow issues briefed in their mediation statements. For example, in the usual ceding company/reinsurer relationship, the cedant and/or its broker may possess documents and information that the reinsurer has requested and/or needs to fully evaluate its current position, requiring the mediation to be "staged" to accommodate such production. Proper pre-mediation planning is critical. If handled correctly, parties,

counsel and the mediator arrive at the mediation room better prepared to address their true underlying needs and interests.

Reinsurance professionals are no more immune to psychological negotiation roadblocks than anyone else. In the opening joint session, the mediator first asks parties and counsel to actively listen to, understand and acknowledge their business partner's arguments, even repeating them back to one another, as a sign of their appreciation and respect for such views. This often overlooked but incredibly powerful step builds trust, breaks down barriers and actually makes the other side less defensive and more candid, producing valuable information to use in the mediation process; information which helps define the proper depth and scope of issues the participants must address and resolve.

Especially with reinsurance experts, often negotiators themselves, who well understand the merits of both parties' positions, the real work of an industry savvy mediator occurs in private caucuses. There, the mediator meets separately with and encourages each side to suspend judgment and comfortably and critically evaluate their positions, creatively explore options to resolve their disputes and, with the mediator's help, develop proposals designed to get what they need, not what they want, from a mutually-acceptable settlement. Once the mediator garners the respect and trust of both sides, s/he can deftly help parties develop, discuss and respond to successive financial and non-financial proposals, supported by an articulated rationale, designed to satisfy the offering party's needs and the responding party's interests. The very heart of the process, this unscripted, evolving and changing dynamic requires a perceptive, inventive and focused mediator, patient, calm and committed parties, and an open exchange of ever-broadening proposals that accentuate agreement and eliminate disagreement.

The true value of any mediator reveals itself at negotiation impasse. In reinsurance, internal, corporate and/or financial pressures often impact one party's ability or willingness to settle on negotiated terms, leaving a gap between the last demand and last offer. Maintaining a positive, trusting environment, the mediator should continue moving the parties to propose alternatives and reframe the problem, remaining focused on re-evaluating barriers between them and brainstorming ways to eliminate them. A mediator who has worked in the reinsurance business can knowledgeably help the parties explore "value-generating" alternatives that lead to acceptable compromises and settlement.

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- Peter A. Scarpato is President of Conflict Resolved, LLC, and President and Vice Chair of the Board of Directors of The Re/Insurance Mediation Institute, Inc. ("ReMedi"). An independent ADR professional who has served in hundreds of cases as either arbitrator or mediator, Peter's current practice includes civil, commercial, contract, construction and insurance disputes, with a specific expertise in property/casualty reinsurance, run-off business, securities and surety. He is a member of several arbitration and mediation associations, including ARIAS-US. (Certified Umpire and Arbitrator), ReMedi, Case Closure, LLC, Construction Dispute Resolution Services, Inc., FINRA Dispute Resolution and the ADR programs of the New Jersey and New York State and Federal Courts. Peter is a licensed attorney in New Jersey and New York, serves on the Board of Directors of the NJSBA Dispute Resolution Section, and on the ADR committees of the NYSBA and New York City Bar. He is a frequent lecturer and publisher of articles on ADR, insurance and reinsurance issues and serves as the Publication Committee Vice Chair and Editor-in-Chief of AIRROC Matters, AIRROC's newsletter covering run-off company issues.

- Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com; www.disupteResolve.com), was the founding Chair of the New York State Bar Association's Dispute Resolution Section. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in over 900 matters, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2011 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and has been selected "Lawyer of the Year" for ADR in the 2011 New York Best Lawyers list. His litigation and mediation background includes work in the insurance (first party and third party claims) and reinsurance areas. Mr. Baum has served on a wide range of court-annexed, agency, SRO, industry and private ADR panels. Mr. Baum has shared his enthusiasm for ADR through teaching, training, extensive writing, public speaking, and assuming positions of leadership in various Bar organizations and Court advisory groups. He has taught ADR at NYU's School of Continuing and Professional Development, and he teaches Negotiation, and Processes of Dispute Resolution (focusing on Negotiation, Mediation and Arbitration) at the Benjamin N. Cardozo School of Law. He developed and conducts 3-day programs training mediators for the Commercial Division, Supreme Court, New York, Queens, and Westchester Counties. He has

been a panelist, presenter and facilitator for numerous programs on mediation, arbitration, and ADR for Judges, attorneys, and other professionals.

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