

## Successfully Mediating Disability Claims

By Robert Kaplan, Esq.

### Should you consider using mediation in a disability claim dispute?

Disability bad faith lawsuits are a unique breed of cases. They all involve highly detailed factual issues juxtaposed with multifaceted legal and medical issues. Furthermore, even in claims that are not based upon a psychiatric disability, there is almost always a complex psychological component – because most claimants are professionals who have **so much** tied into their professional identity; and, going from being *the much adored wonderful Dr. Smith* or *the highly respected prominent Attorney Jones* to the *Totally Disabled e x-Dr. Smith/ex- Attorney Jones* – is a very tough pill to swallow and carries with it, a whole host of psychological issues.

I am keenly aware of all the above. Before I retired from law practice, I developed a sub-specialty in representing doctors, lawyers, dentists and others in these type of cases. After nearly 2 decades of being a Plaintiffs' bad faith attorney I decided to step off of the litigation treadmill for several years and do some soul searching. I ultimately decided that I wanted to focus my energies on being a peacemaker instead of a warrior.

In March 1997, Provident acquired Paul Revere. Then, in 1999 (during my sabbatical) Provident merged with Unum, resulting in UnumProvident becoming the major player in the Disability insurance market nationwide. In the Fall of 2001, I contacted UnumProvident for the purpose of discussing a number of alternative dispute resolution ideas, which I believed would be a win/win for all. Over the next 6 months or so, I had a number of exploratory discussions and several meetings with people from UnumProvident's home office legal department. Things were moving in a positive direction (albeit very slowly) until the summer of 2002, when the *McSharry* matter hit the fan. Then came the *Dateline* and *60 Minutes* exposés.

Over the last year, I've had the privilege of mediating a number of extremely challenging UnumProvident cases. In addition to being aware of some lesser publicized verdicts against UnumProvident and its predecessor companies, I am familiar with *McKendry* (\$17 million in Arizona, March 2001), *Tedesco*

(\$36.7 million in Florida, June 2001), *Hangarter* (\$7.7 million in California, February 2002), *Chapman* (\$31.8 million in California, February 2003) and *Ceimo* (\$84.4 million in Arizona, April 2, 2003); and, I've seen the October 2002 *Dateline* broadcast and the November 2002 *60 Minutes* broadcast referenced earlier. I am also very familiar with the U.S. Supreme Court *Campbell* case (decided on April 7, 2003 - literally, just days after the last of the above listed string of multimillion dollar verdicts).

On the other side of the coin, although many policyholders and their attorneys are not aware of the 3-5 cases per month in which UnumProvident disability policyholders are convicted of insurance fraud, I am also familiar with *Burroughs* (the Texas dentist found guilty in 2001 of defrauding the company out of 9 years of benefits), *Pritt* (the West Virginia chiropractor convicted last year of criminal fraud and ordered to pay UnumProvident nearly \$1million restitution) and *Krouner* (the New York attorney who, last year, plead guilty to defrauding UnumProvident out of nearly \$100,000).

With all of the above in mind, the primary purpose of this article is to share the insights I have gained from the Mediator's perspective insofar as the mediation of these cases is concerned.

## **The Earlier the Better**

It is my belief that in most of these cases, it is better for both the policyholder and the company to attempt to resolve their dispute as early as possible. There are a number of reasons for this belief. First and foremost, the most important thing for the policyholder is closure. These cases often become the sole focus of the policyholder's life, frequently inhibiting the physical recovery from illness or injury. Many policyholders are constantly looking over their shoulder while the litigation is pending. They have the ever present concern, that they may be videoed doing something that could potentially be misconstrued and undermine their case. There is so much riding on the case, that most are paralyzed from getting on with their lives until the litigation is over. From their standpoint, the sooner that happens, the better.

From the company's standpoint, the most significant consideration is dollars and cents. If they can settle on day 30 for X (with minimal defense fees, minimal home office involvement and virtually no litigation costs) vs. on day 250 for X or even X+Y (however, by then they've incurred significant defense fees, significant home office involvement and significant litigation costs) - it's to the company's benefit to get their file closed on day 30.

1. In nearly every case against UnumProvident, there are the following four (4) *givens* :

- There is a threshold coverage dispute. For example:
  - In this case, the threshold coverage issue that needs to be resolved is whether the policyholder [is or is not] [continues to be or is no longer] “Totally Disabled”;
  - ... is whether the policyholder [is] [continues to be] “Residually Disabled”, but [is not] [no longer continues to be] “Totally Disabled”;
  - ... is whether the policyholder is neither [no longer] “Totally Disabled” nor “Residually Disabled”;
  - ... is whether the policyholder’s “Total Disability” is due to “Accident” or “Sickness”;
  - ... is whether the Company is entitled to rescind the subject policy(ies); and so on .
2. The policyholder’s attorney will want to use the “pattern and practice” evidence that has been accumulated in connection with the above referenced multimillion dollar verdicts against UnumProvident to gain whatever benefit or advantage he or she can in connection with his or her client’s case.
  3. If the case does not settle relatively early, UnumProvident will, without question, attempt to knock out the bad faith and punitive damage claims via a Motion for Partial Summary Judgment based on the Genuine Dispute doctrine; and, will also likely attempt to have the threshold coverage issue resolved via summary judgment as well.
  4. If the policyholder survives the summary judgment motions and motions in limine; and, if the policyholder prevails on the coverage issue at trial and if he or she obtains a bad faith and punitive damages verdict - UnumProvident will, without question, appeal.

From the plaintiff’s perspective much, if not all, of the pattern and practice evidence can now easily be obtained from other plaintiff attorneys and/or consumer organizations, such as United Policyholders. However, as all of the attorneys representing policyholders in these type of cases know - just as in Monopoly, one does not collect \$200 unless she passes Go; likewise, one does not get to the bad faith and punitive damage issues unless he gets over the threshold coverage dispute.

Although nearly all websites, by definition, are self-serving, UnumProvident’s site does contain the following statements (in which the proffered statistics are presumably accurate):

“Of the approximately 421,000 new disability claims filed with the company in 2002, approximately 90% were paid.

Of the remainder, while some were not covered or not eligible and some were no longer claiming benefits at the end of their elimination period, less than 2% were determined **not** to be disabled.

(emphasis in original).

“Our business requires a determination of whether someone is disabled. While in most cases that determination is clear, in some cases it is not, and even reasonable people may disagree. Our claim decisions are made within the context of a sound, fair process that we have worked hard to build. Still, we can and do make mistakes. And, when we become aware of an error on our part, we work urgently to correct the situation.”

An early mediation can, and should, initially focus on whether the coverage decision was correct and whether the company arguably overlooked anything or made any mistakes. These type of mediations tend to almost always be heavily “evaluative” and require a mastery of the facts. The mediator should, among other things, be prepared to point out specifically why he/she believes that the policyholder is/is not going to prevail on the pivotal threshold coverage issue.

To the extent that the plaintiff’s attorney feels that they need certain key discovery in order to engage in a meaningful early mediation, I have found that UnumProvident is usually willing to informally accommodate reasonable requests (and that they will ordinarily defer to the mediator to iron out/resolve any wrinkles, problems or issues that surround any such request).

## **The Policyholder Needs an Opportunity to Vent**

of the greatest benefits of any mediation (irrespective of the type of case and when it occurs) is that the parties are in total control of choosing the mediator, dictating the process, and agreeing to any resolution that is reached. Although it is rarely (if ever) productive for a policyholder to use a company lawyer or representative as a punching bag – for a mediation of a disability dispute to be successful, in addition to reaching a mutually agreeable financial resolution, the policyholder has to be given the opportunity to vent. This can, and should be done, in private caucus with the mediator. To obtain full closure, the catharsis component of disability mediations should not be underestimated; and, certainly should not be overlooked.

## Plain Vanilla is Not the Only Flavor for Resolution

Most lawsuits end up getting resolved for a negotiated lump sum payment. Although disability cases often get resolved pursuant to that type of traditional plain vanilla settlement, there is always “more than 1 way to skin a cat”. I have found UnumProvident to be receptive to creative ways to resolve a dispute, such as modifying one or more policies and/or agreeing to “put their money where their mouth is” pursuant to some kind of a binding summary judgment or subsequent non-traditional arbitration (with a pre agreed upon floor and ceiling) predicated on the outcome of one or more pivotal issue(s).

### Conclusion

There are obviously exceptions to every rule. Sometimes, it is in the policyholder’s or the company’s interest to do more extensive discovery or to test certain positions via summary judgment before agreeing to go to mediation. And, psychological issues and amount spent in litigation costs aside, there are certainly cases in which the policyholder may get a higher settlement in a mediation just before trial. And, although I have yet to see one, I’m sure that sometimes – from either the policyholder’s standpoint or from the company’s standpoint – there are cases *that just gotta be tried*.

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