



By  
Alan Rutkin



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When I was chair of the American Bar Association's Insurance Coverage Litigation Committee, I received many proposals for speeches and studies concerning the same issue: Why are insurance coverage claims so difficult to settle?

I didn't like these proposals because I disagreed with the premise. Insurance cases are not particularly difficult to settle. Some lawyers—both insurance company lawyers and policyholder lawyers—enjoy great success in reaching settlements. The issue is not the nature of insurance, but the

• **Second**, focus on interests, not positions. When both sides focus on positions, settlement can only be achieved if one side surrenders. But if the focus is on interests, a solution can often be found that satisfies both parties. Focusing on interests facilitates settlement.

• **Third**, develop additional options. When lawyers view the negotiation as dividing a fixed pie, one side's gain is the other side's loss. Again, settlement can only be achieved if one side surrenders. Rather than dividing a fixed pie, expand it. Sports lawyers are the leaders here. For example, if a

player and an owner disagree about how many innings the player will pitch, the contract can be written with incentives tied to innings.

Insurance disputes can also be resolved by identifying variables and tying a final settlement to the ultimate value of these variables.

• **Fourth**, insist upon recognized principles. You're not going to resolve a dispute based upon your personal view of fair, reasonable or valuable. Nor should you accept an adversary's subjective assessment. Look to recognized principles.

• **Finally**, remember: Getting to yes is not about capitulation. You settle if you can develop a win-win solution; you don't capitulate to settle. Your ultimate benchmark is your BATNA—Best Alternative to a Negotiated Agreement. If the other side's final offer is worse than your BATNA, walk away.

People who believe that insurance claims are particularly difficult to settle need to review *Getting to Yes*. If you've never read it, do so soon. And if it's been a few years, dig it out and read it again. Armed with the advice from this book, you'll find that insurance disputes are no more difficult than other commercial disputes.

# Without Question, The Answer Is Yes

Many attorneys want fair settlements but think negotiating means surrendering.

nature of the lawyers' approach.

Lawyers who consistently find settlements follow, in one form or another, Fisher & Ury's classic principles from their bestseller, *Getting to Yes*:

• **First**, separate people from the problem. Too many lawyers focus on the other lawyer, instead of the problem. I know a lawyer who immediately looks up the other lawyer and categorizes the adversary either as someone not worthy of respect or someone whose respect is sought. We all know lawyers who demonize every adversary. They're always litigating against "the world's biggest jerk." We all run into someone now and again who seems unreasonable. But if everyone seems unreasonable, maybe it's you. More importantly, it's not about the other lawyer. Focus on the problem.

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Get to yes by utilizing five principles that lead to mutual agreement.