



# MEDIATION OF INSURANCE COVERAGE CASES

By Bruce A. Friedman, Esq.

Resolving insurance coverage disputes through mediation requires careful assessment of three unique elements: the insurance policy, the rules applicable to the application of the policy and the cases construing the policy. Evaluative mediation provides the best approach for resolving these disputes. It requires parties, counsel and the mediator to evaluate the strength and weaknesses of coverage issues, and it provides for input from the mediator as to possible outcomes of the case. There are also other issues unique to insurance coverage cases that must be addressed in the mediation process.

## Why the Evaluative Approach?

More than any other type of case, the outcome of an insurance coverage dispute relies heavily on precedent. Counsel must educate the mediator regarding both the policy provisions at issue and how court interpretations of those provisions apply to the case at hand. The evaluative approach provides the most appropriate mechanisms for doing just that.

## Choice of Law

Different states' legal precedents can have a significant impact on the interpretation of a policy; therefore, choice of law issues should be addressed in the mediation brief and discussed in the mediation. California, for example, has a rule that requires the insurer to prove that it has been prejudiced by late notice of a claim or suit. Other states may enforce the notice provision of the policy without regard to prejudice to the insurer. Another issue may involve the issue of waiver of coverage defenses. The California Supreme Court has adopted a rule that the insurer does not waive coverage defenses not mentioned in the initial denial or reservation of rights letter. Other states have a more policyholder-friendly rule that provides that coverage defenses are waived if not specifically raised by the insurer at the outset of the claim. Law and precedent regarding other key issues arising in coverage disputes, such as the standard for rescission of an insurance policy or the application of an exclusion for a known loss, also differ significantly from state to state.

## Burden of Proof

There are also different burdens of proof as to the coverage grant in the policy and the exclusions that must be addressed in the mediation. The policyholder generally has the burden of proof to establish that the risk is covered under the coverage grant of the policy. The insurer bears the burden of proof with respect to the applicability of exclusion. This shifting burden of proof may have a significant impact on the coverage analysis in a duty to defend context. Here, if the insurer is relying on an exclusion, it must be able to demonstrate that there is no possibility that the claim may fall outside of the exclusion. If it cannot do so based on a summary judgment standard, the insurer must defend the case.

## The Mediator's Role

It is the mediator's responsibility to independently review the policy, analyze coverage and understand the applicable case law and precedent. The mediator should share findings from this analysis, including opinions regarding the implications for each side's case, with the parties either directly or through counsel.

Ultimately, it is the mediator's job to understand and explain the strengths and weaknesses of the case in order to create reasonable expectations with respect to the outcome of the case. The mediator must work to provide the parties with a rational opportunity to settle their dispute in order to reach the goal of a successful mediation.

## Conclusion

Mediating insurance coverage disputes poses unique challenges for mediators, parties and counsel. An evaluative approach provides the best forum for properly addressing these challenges to ensure a settlement that is agreeable to all stakeholders. ■

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