



When Insurance Coverage Issues Get In The Way of Settlement

As a litigator turned mediator, I believe it is crucial (both for myself and the parties for whom I mediate), that I stay current on relevant legal issues and practices. With that in mind, I recently attended a seminar on mediation and arbitration of [insurance coverage disputes](#) in the Lloyd's of London insurance market. While this subject is a fairly esoteric one usually reserved for coverage geeks like myself, the seminar did remind me of many coverage disputes that may have a profound impact on the settlement of all kinds of lawsuits; including employment, professional liability, products liability, construction defect, securities class actions and long term exposure bodily injury cases (such as asbestosis).

These coverage disputes include those between primary and excess insurers, trigger of coverage under successive policies, between underwriters of a subscription policy issued by Lloyd's, exhaustion of policies on a vertical or horizontal basis.

It is not unusual for there to be a dispute between a primary and excess insurer as to the value of the underlying claim. The primary insurer may not want to exhaust its limits in settlement of the case while an excess insurer wants the case settled within the primary limits. Here, the excess insurer may be an ally of the policyholder in pressuring the primary insurer to settle. Although rare, there are instances when an excess insurer may drop down to within the primary insurer's limit in order to settle a case that presents excess exposure or share an excess of primary settlement with other excess insurers in higher layers of coverage.

Long term exposures such as product liability, construction defect, pollution, asbestosis or cancer claims, present issues of the trigger of coverage, the application of successive policies, both primary and excess, and exhaustion of policies on a horizontal or vertical basis. Each state has different law applicable to these issues and there may be significant choice of law issues as to which state's law applies to the loss.

In terms of subscription policies like those issued by Lloyd's of London where each underwriter subscribes to a percentage of the limits, depending on the date of loss, the consent of all underwriters may be required in order to access a policy for settlement and all of the underwriters may not agree or the top two underwriters may not agree

under more recent rules that require both of their consent to access the policy.

I highlight these complex coverage issues because they may stand in the way of settling the underlying case and may require the assistance of coverage counsel for the policyholder and insurer, as well as an [experienced mediator](#) who understands insurance and can assist in resolving them in order to settle a high exposure case.

-- Bruce A. Friedman