

BLOGS
Policyholder

ALI's Insurance Law Project

UPDATE on May 23, 2018: Yesterday, ALI voted to approve these rules and many more contained in a 488-page document containing guidelines intended to aid courts in resolving coverage complex disputes. It remains to be seen how and whether courts across the country actually follow these guidelines. Lathrop Gage will be following the effect of this project on the law over the next several years and will keep you updated.

The American Law Institute (ALI) is voting tomorrow on new guidelines that may affect the complex rules adopted and applied by courts in insurance coverage disputes. Here are three of the hotly debated rules:

1) Use of extrinsic evidence in coverage disputes. Under ALI's current approach referred to as the "Corbin rule" or "contextual approach," courts may interpret policy terms in light of "all the circumstances surrounding the drafting, negotiation and performance of the insurance policy." The proposed rule advances a "plain meaning" rule to policy interpretation. Under that rule, courts must construe an insurance policy term on the basis of its plain meaning, if it has one. Extrinsic evidence regarding an insurer's negotiations and course of dealing with a policyholder "may be considered only if the court first makes the threshold determination that the insurance policy term is ambiguous when applied to the facts of the claim at issue," the restatement says. This rule may ultimately be unfavorable to policyholders because courts today almost uniformly construe ambiguous terms against the insurers.

2) Insurer's right to recoup defense costs. One issue that is often litigated is an insurer's right to recoup defense costs if a claim is ultimately determined not to be covered. The restatement establishes a "default rule" that defense costs cannot be recouped absent explicit policy language or recoupment has been "otherwise agreed to" by the policyholder. This rule is decidedly favorable to policyholders.

3) Policyholder's right to settle without consent. If an insurer is defending under a "reservation of rights," may a policyholder settle the underlying case without the insurer's consent? The new rules say yes. A policyholder may unilaterally settle an action without violating its "duty to cooperate" or other policy restrictions if the insurer has a "reasonable opportunity" to participate in

Related People

Alexander (Alex) T. Brown

Partner

Kansas City

816.460.5629

alexander.brown@lathropgpm.com



the settlement process and "reasonable effort" is made to obtain the insurer's consent. This rule is decidedly favorable to policyholders.

We will keep you updated as the vote progresses.

**Article released by the Policyholder team.*