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ALERT

Insurer Cannot Claim California Mediation Privilege When It Fails to Attend Mediation in Person

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A California court of appeal has reversed summary judgment in favor of an insurer over whether coverage was precluded for a settlement by its insured, a mutual interinsurance exchange for health care professionals, under either an "underwriting" exclusion or a "no voluntary payments" provision in an insurance errors and omissions policy. *Doctors Co. v. Am. Int'l Specialty Lines Ins. Co.*, 2011 WL 493878 (Cal. Ct. App. Feb. 14, 2011). The court also held that California's mediation privilege did not prevent disclosure of certain communications between the insurer and the exchange because the insurer had failed to attend the mediation of the underlying suit in person.

The underlying suit arose out of the exchange's mishandling of a medical malpractice claim against one of its insured health care providers and the exchange's subsequent non-renewal of the health care provider's malpractice policy. A week before trial in the underlying suit, the parties held a mediation. Citing a scheduling conflict, the claims handler maintained that he could not attend the mediation, and instead offered to be available by telephone. During the mediation, the exchange's general counsel called the claims handler and asked the insurer to contribute its $2 million policy limit toward a settlement of $5 million. The insurer refused this request but offered $750,000, allegedly contingent upon the exchange's release of the $1.25 million remaining on the policy limit. The exchange then settled the case for $5 million and filed suit against the insurer.

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On appeal from summary judgment in favor of the insurer, the appellate court held that issues of material fact precluded summary judgment. The court first considered whether the underlying suit was precluded by the underwriting exclusion, which barred coverage for any claim "arising from, based upon, attributable to, or in any way involving the underwriting, marketing or selling of any insurance policy or annuity, or any other insurance or investment product." The insurer argued that coverage was barred because the health care provider's complaint focused solely on the exchange's non-renewal of the underlying policy, a claim that fell within the underwriting exclusion. However, the court observed that as the suit unfolded, the exchange's mishandling of the medical malpractice claim became a central issue. This claim arose not from underwriting, but from the exchange's claim-handling activities. Although the policy did not impose a duty to defend, the court relied on duty to defend principles to conclude that factual disputes remained over whether coverage was available to the extent the claim-handling activities were at issue. The court also held that the insurer was not entitled to summary judgment concerning the "no voluntary payments" provision because issues of fact remained over whether the insurer unreasonably withheld its consent when the exchange sought to settle the underlying suit at the mediation.

Finally, the court held that the insurer was not entitled to summary judgment on the exchange's bad faith claim. In this regard, the court rejected the insurer's argument that California's mediation confidentiality provisions barred admissibility of the insurer's communications with the exchange in connection with the mediation. The court noted that the mediation privilege covered "communications, negotiations, or settlement discussions by and between participants in the course of a mediation," where the term "participant" included not only "parties but also the mediator and other nonparties *attending the mediation* (e.g., . . . an insurance representative . . .)." The court reasoned that, because the insurer's claims handler did not attend the mediation in person, it was not a "participant" that could claim the protection afforded by the privilege.