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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How To Mediate High-Limit Disability Insurance

By **Adrienne Publicover, JAMS**

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Adrienne Publicover

Movies like Concussion and media accounts of professional athletes suffering potential career-altering injuries have thrust the issue of disability coverage into the spotlight. In particular, high limit disability policies generally are issued to protect the income of top earners, including athletes, entertainers, physicians and other professionals. When claims are denied, stakes can be high, and litigation often ensues. The cases involving these claims present interesting and somewhat unique issues. However, with some planning and preparation, early mediation can help the parties successfully resolve their disputes.

Understand the Benefits at Issue

Mediation is not the time to be doing high level math tricks. Indeed, a fundamental understanding of the amount of benefits potentially available under the contract is necessary to a successful mediation. Agreement between the parties is even better!

Claims under high limit disability policies often involve significant sums of money. According to Forbes, NFL players on average earn $1.9 million per year. Accordingly, benefits under these polices may be upwards of $20 million. Coverage limits often depend on the nature of the claim. For athletes, the issue may concern a career-ending injury vs. circumstances that would lead to a player falling from his projected draft spot. For professionals, the issue may be a complete inability to perform a specific occupation, as opposed to a residual claim for benefits.

Some common areas of disagreement include the following: do the benefit limitations or definitions change at a certain point in time; is there a mortality issue; are past due benefits a concern and, if so, is interest to be applied to those benefits?

Offsets also must be considered. These may include income earned, other income replacement benefits received and/or those governed by various contractual provisions.

Finally, there is a time value associated with any settlement. In other words, what is the net present value of the potential stream of benefits available under the subject contract?

While the parties may not reach consensus on every point, all of these issues should at least be discussed in advance of the mediation. Try to reach agreement as to the possible range of contractual

benefits. If that does not work, consider performing several different calculations based on the variables at play.

Is the Policy Governed by ERISA?

It also is important to understand whether or not the policy at issue is governed by The Employee Retirement Income Security Act of 1973 (ERISA). With several notable exceptions, ERISA generally applies (1) to a plan, fund or program; (2) established or maintained; (3) by an employer or an employee organization; (4) for the purpose of providing certain benefits; (5) to participants or beneficiaries.

These claims are heard in federal court, with a streamlined litigation process. Only limited discovery is available. The cases are decided by a judge, who relies on the paper record developed while the insurer was deciding the claim.

State law remedies are preempted. In other words, punitive and other extracontractual damages are not available. In certain circumstances, equitable remedies may be recoverable, along with attorneys' fees.

In the context of professional athletes, coverage under group benefit plans administered by athletic associations such as the NFL likely are governed by ERISA. Similarly, a policy purchased as part of a group plan offered through a professional society or organization, also may be governed by ERISA. Unfortunately, the issue of whether ERISA governs is not always clear cut. In those instances, mediation strategies require extra creativity. The use of high/low agreements, which turn on the outcome of a preliminary dispositive issue (whether heard by the assigned judge or another neutral), may offer an effective way to settle a case with legal uncertainty, particularly when parties are entrenched in divergent viewpoints.

Exchange All Relevant, Nonprivileged Information Well in Advance … Along With the Mediation Briefs

A clear understanding of the relevant facts is key to a successful mediation. Well in advance, counsel should discuss what documents and information are necessary in order to appropriately assess risk and settlement value. For example, it may be very helpful to have updated medical records of the claimant, particularly when assessing settlement value that includes future benefits. Information should then be exchanged, either under the federal rules or through formal discovery requests, or by way of an agreement under mediation confidentiality.

The parties also should consider exchanging briefs in advance of the mediation. Skilled counsel generally can appropriately value their case. However, exchanging briefs provides several important benefits: (1) it allows the parties to "hear" their opponent's position; (2) it allows an opportunity to analyze new arguments not previously considered; and (3) it allows an opportunity to manage plaintiff's expectations and/or for defendants to reconsider settlement authority.

In the event that a party has information that is to be shared only with the mediator, consider a supplemental confidential submission. Just make it clear to the mediator that the information is not being provided to counsel and is to be kept confidential.

Remain Optimistic and Allow for Creativity

An effective mediator digs into the case well in advance of the mediation and does not consider the job complete until settlement is achieved, even if this requires post-mediation follow up. A creative

mediator also may employ various strategies to help the parties move towards resolution. But it is important to understand that mediation is a dance, one that cannot be cut short.

Part of the negotiating process may include the traditional exchange of demands and offers. But at some point, negotiations may stall out. Focus on the respective interests of the parties, not stated positions. Remain open to bracketing, the possibility of a high/low settlement and other creative mechanisms the mediator may introduce to help bridge the gap and bring the parties together.

Above all else, remain optimistic. With planning and preparation, mediation works.

Adrienne Publicover is a JAMS panelist based in Northern California. She has counseled domestic insurers and brokers, as well as the London market, in litigation matters in state and federal courts throughout the country.