

Arbitration Prevails in Coverage Dispute

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In a recent coverage dispute, an Indiana federal court addressed a two-pronged issue. First, in the case of a multi-tiered ADR clause, who decides whether the dispute should be conducted under the arbitration section of the clause? Second, where there are several arbitration clauses, who decides which one prevails? You'll have to read more to find out.

In [*Atlantic Specialty Insurance Co. v. Anthem, Inc.*](#), No. 1:19-cv-03589-JRS-MJD, 2020 U.S. Dist. LEXIS 86677 (S.D. Ind. May 18, 2020), a coverage dispute arose under a tower of professional liability coverage. The primary policy had a multi-tiered ADR clause that allowed for the parties (with the insured having final choice) to choose non-binding mediation before JAMS or binding arbitration through JAMS and under the JAMS rules. Two excess insurers denied coverage and the policyholder invited them to mediate before the mediator who was mediating the underlying antitrust class action dispute. The mediation was unsuccessful and the policyholder commenced arbitration. The policyholder brought a declaratory judgment action on the coverage issue and sought to stay the arbitration. The policyholder moved to stay the litigation and compel arbitration.

[The court stayed litigation and compelled arbitration](#), but here's where it gets interesting. The first insurer argued that because mediation was chosen, the issue was no longer arbitrable and had to be decided by the court. The court found that the issue was one of procedure not whether the insurance policy contained an arbitration clause. The court also found that the arbitration provision incorporated JAMS rules and, accordingly, the issue of arbitrability was delegated to the arbitrators. The court distinguished between a contract where there was a question of whether a party had the right to arbitrate and a contract where it was simply a matter of performance under an existing arbitration agreement.

For the second insurer, the issue was somewhat different. The second insurer was much higher up the insurance tower and incorporated the terms of the multiple policies below it. Those policies had different arbitration provisions. Ultimately, the court found that there were really only two different arbitration provisions to contend with. The court held that the parties fundamentally agreed to arbitrate and that it was up to the arbitration panel to sort out the procedural differences between the provisions. The court rejected the notion that there was an ambiguity because of the multiple underlying policies and arbitration clauses. The court also found that under either iteration of the arbitration provision, both delegated arbitrability to the arbitrators, because both incorporated rules that did so (JAMS rules and JAMS International Rules).

The court ordered the parties to arbitration, with the arbitrators to determine the arbitrability issue arising from the prior mediation and to sort out the procedural differences between the arbitration provisions. The court also instructed the parties to return if there is a lapse in naming the arbitrators.

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