What businesses do not know about their insurance policies can hurt them. Increasingly, insurers are requiring arbitration, restricting venues for hearing cases, or specifying which laws can be applied, all designed to give insurers an advantage when resolving disputes. However, policyholders may be able to negotiate and remove these restrictions.

Insurers Try to Tilt Dispute Resolutions Their Way

Many businesses do not realize that their right to go to court to enforce their liability or other casualty insurance policies may be limited by arbitration requirements, choice of law, or choice of venue clauses. These provisions may require mandatory arbitration to settle disputes, restrict the venue where disputes may be brought to ones considered insurer-friendly, or designate the law to be applied to one that is inevitably favorable to the insurer and may have no reasonable relationship to the insured.

To protect their rights, policyholders need to know about these provisions and negotiate them when policies are purchased. Not doing so may reduce or eliminate coverage and provide the insurer with significant tactical advantages.

Who Wins in Arbitration?

One increasingly frequent tactic used by insurance companies is to include an arbitration provision to keep insurance coverage disputes out of court. Insurers apparently have grown tired of courts enforcing the standard rules of contract interpretation, particularly regarding insurance contracts, where exclusions must be construed narrowly, ambiguities must be resolved against the insurer, and the policyholder’s reasonable expectations must be fulfilled. Insurers believe these canons of construction are less likely to be applied in a binding arbitration setting.

Arbitration sometimes is cited as a less expensive alternative to litigation, but in reality it can add to the cost for both parties. In addition, policyholders may have fewer opportunities to conduct discovery, particularly regarding extra-contractual claims, such as bad faith. Arbitration decisions offer limited opportunities to appeal. If the policyholder wins, there may not be an opportunity to seek attorneys’ fees as can be done in court. Insurers can also take inconsistent positions on the same policy language in different arbitrations because arbitrations are private proceedings without a public record.

These and other disadvantages can make arbitration an unwelcome surprise for any policyholder.

Some States Limit Arbitration

For these reasons, 26 states have enacted statutes that restrict arbitration provisions in insurance policies. Recently, the Supreme Court of the State of Washington voided an insurance policy’s arbitration provision because it violated a Washington statute that prohibits insurance policies from “depriving the courts of [Washington] of the jurisdiction of action against the
Avoid future coverage litigation over this issue, policyholders should try to negotiate removal of a choice of venue provision when the insurance policy is purchased and not unwittingly give up a strategic advantage by agreeing to have all coverage disputes resolved in one venue before a claim is ever presented under the policy. Historically, certain jurisdictions are known as either pro-policyholder or pro-insured regarding insurance coverage disputes. Not surprisingly, most insurance policy choice of venue provisions tend to designate a pro-insurer jurisdiction.

**Law Provisions**

Similarly, policyholders should try to negotiate removal of choice of law provisions, because courts tend to strictly enforce those policy provisions. As noted above, there is no universal interpretation of insurance policies used by courts across the United States, and there are many examples in insurance law where two states take exactly opposite views on the interpretation of the same “standard form” language contained in an insurance policy. Often, the provision’s interpretation can mean the difference between a claim being covered or denied.

As with venue provisions, a choice of law provision typically favors insurers. However, in the absence of a choice of law provision, courts generally evaluate all potentially applicable law and then apply the law that has the greatest connection to the particular claim presented. To avoid narrowing the options available to establishing coverage for a claim in the first place, policyholders should not agree to a choice of law provision in their policies.

**Conclusion**

Insurance coverage disputes are complex, and so are the insurance policies that give rise to them. Policyholders must diligently review their policies to make sure that they are not giving their insurers tactical advantages regarding how or where their insurance coverage disputes will be heard and what law will govern those disputes.

Lynda A. Bennett is a partner with Lowenstein Sandler and chair of the firm’s Insurance Coverage Practice. Bennett works with corporate policyholders to negotiate, litigate, and resolve complicated insurance disputes. Ryan J. Cooper is counsel to the firm’s Litigation Department. Ryan provides problem-solving, strategic advice, and counseling to domestic and international entities involved in disputes and litigation in areas such as government and regulatory investigations, insurance recovery, contracts, products liability, and securities matters.

Lynda A. Bennett is a partner with Lowenstein Sandler and chair of the firm’s Insurance Coverage Practice. Bennett works with corporate policyholders to negotiate, litigate, and resolve complicated insurance disputes. Ryan J. Cooper is counsel to the firm’s Litigation Department. Ryan provides problem-solving, strategic advice, and counseling to domestic and international entities involved in disputes and litigation in areas such as government and regulatory investigations, insurance recovery, contracts, products liability, and securities matters.