Commentary

Coverage Litigation And The Magic 8-Ball

Difficulties In Predicting The Outcome Of Coverage Disputes

By
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Introduction — The Abundance Of Insurance Coverage Case Law

Insurance Services Office, Inc. is frequently cited as the source of the terms and conditions of most commercial general liability policies in use today. According to ISO.com, "ISO is the acknowledged leader in writing policy language to cover all kinds of property and liability risks." With all due respect to the fine folks in Jersey City, this credit is misplaced.

While ISO's form CG 00 01 no doubt plays an important role in providing CGL insurance to many of America's businesses, the real source for the terms and conditions has become the nation's courts. There is hardly a single substantive provision in ISO's CGL form that has not been dissected by courts in excruciating detail, leaving in its wake a large body of case law that must now be considered when determining its meaning and applicability. Virtually nothing in the policy — insuring agreements, exclusions and even the seemingly innocuous conditions — has been immune from wide-spread judicial review. And some policy provisions, such as the pollution exclusion and expected or intended exclusion, have been the subject of hundreds of decisions.

It is nearly impossible to know just how many judicial decisions resolving coverage disputes exist. Like the number of licks it takes to get to the Tootsie Roll center of a Tootsie Pop, some numbers may never be known.[1] But to get a sense of just how massive this body of law is, consider these statistics. A combined state and federal Lexis search, undertaken at the time of this writing, for "insurance w/5 policy," restricted to just the past six months alone, returned that groan-producing error message advising you that there are more than 3,000 hits. Restricting the search to "insurance w/5 policy w/15 interpret!," to better ensure that traditional coverage decisions are being captured, still returned a staggering 590 hits — *in just the past six months*. And Lexis does not report decisions from a multitude of state trial courts. No doubt a vast number of coverage disputes are the subject of a trial court decision but never reach the appellate level. Of course, not all of these decisions involve CGL policies, but the point is clear nonetheless.

On one hand, it is curious that this situation exists, when you consider that virtually every court that sets out to resolve a coverage dispute begins by proclaiming the axiom that its role is to determine the intention of the parties by examining the language of the insurance policy. That sounds simple enough. On the other hand, notwithstanding this guiding principal, numerous exceptions, collateral rules and a host of other considerations add a welter of confusion to this seemingly simple standard for insurance policy interpretation. The rules for interpreting an insurance policy can be as diverse as the decisions they leave behind.

Thus, while the policy language is stated to be paramount, real comfort in making a coverage determination requires case law confirmation. In other words, the tools for making a CGL coverage determination now include, in addition to a complete copy of the policy and knowledge of the facts, a subscription to Lexis.

The massive body of insurance case law that exists today is not an indictment of insurers, policyholders or ISO. There are no single fingers to be pointed and no particular feet at which to lay blame. None at all. Today's state of the CGL policy is the result of a confluence of factors, with contributions coming from every camp.

By its nature, the commercial general liability policy is designed by insurers to be all things to all policyholders. While endorsements are used to attempt to tailor the policy to specific risks, the fact remains that form CG 00 01 is a static set of terms and conditions that must define the parameters of liability coverage for businesses engaged in thousands of different operations, that can cause bodily injury, property damage, personal injury or advertising injury in an infinite number of ways. With so much being asked of form CG 00 01, it is not surprising that policyholders and insurers fail to see eye to eye on some coverage questions, sending them to the court clerk's office.

Not to mention that the CGL policy has been required to work overtime in response to a plaintiffs' bar that is perpetually finding new wrongs to be righted. And, of course, the only problems truly worth solving are those covered by liability insurance. These new exposures give rise to never before seen coverage questions. For example, faced with enormous potential liability for asbestos claims, policyholders and courts invented the continuous trigger to shift the burden to insurers under long-expired (and, most importantly, pre-asbestos exclusion) CGL policies that were never contemplated to provide coverage for such types of claims.

And not content to stop there, some policyholders, with the asbestos lesson firmly imbedded, now approach every claim with the same expectation of elasticity from the CGL policy. For example, in 2006 alone, *in addition to* the many cases involving asbestos, hazardous waste and construction defect, all-the-world's-a-continuous-trigger thinking was evident in decisions addressing coverage for malicious prosecution, ingestion of a pharmaceutical drug, damage to an above-ground storage tank, defective heart valves, drug administered by injection and lead paint poisoning.[2] Not surprising, because many insurers believe that the continuous trigger has been used to game the system to create unintended coverage, the issue has been intensely litigated for many years.

To take a more current example — the Telephone Consumer Protection Act has created a cottage industry of lawyers and professional plaintiffs bringing suits seeking statutory damages from those that violate this federal act's prohibition against sending unsolicited faxes and making telemarketing calls using automatic-dialers. For the most part, however, it is only because several jurisdictions have found insurance dollars for this statutory violation (and the hope that others may do the same) that the litigation continues at its current clip. Once again, with the CGL policy's static terms and conditions being asked to respond to a new exposure, differences in opinion resulted and coverage litigation ensued. Courts are about evenly split on whether TCPA violations give rise to "advertising injury," on the basis of "oral or written publication, in any manner, of material that violates a person's right of privacy."

For its part, ISO makes the following claim on its website: "Insurers must also make sure their policies remain competitive — for example, promptly changing coverages in response to changes in statutes or case law. ISO maintains a specialized staff of lawyers and insurance experts to perform those essential functions." In recent years, ISO's form CG 00 01 has been

revised approximately every three years, and sometimes the changes have been relatively minor (and insurers do not always immediately implement the new form). Contrast this with the judiciary, which is issuing decisions on a daily basis that are interpreting the terms of the ISO CGL form. This is not a criticism of ISO, but merely a recognition that there is only so much that ISO can do to keep pace with the courts, policyholders' and plaintiffs' bar, while maintaining the use of consistent, industry-wide forms.

And while ISO's CG 00 01 form is the workhorse of CGL coverage, there are plenty of policies that use similar — but not identical — provisions. Given the promise of courts to resolve coverage disputes based solely on policy language, these distinctions, even if seemingly minor and hyper-technical, are the source of a lot of coverage litigation.

Besides the confluence of these factors that gives rise to the abundance of coverage disputes, there is also the inherent fact that, at the heart of these cases is a singular issue — securing compensation (sometimes very much needed) for injury or damage. Thus, because there are two parties with a motivation to secure coverage, the policyholder and the underlying plaintiff, the potential for more disputes exists.

The abundance of coverage case law also creates a reason for such parties to litigate. For a policyholder (or plaintiff) facing an out-right denial of coverage (or compensation), with potentially huge attendant financial consequences, the existence of a case, *somewhere*, that supports its position, and the knowledge that courts are willing to look beyond their borders, the decision to take a shot is not unreasonable. Thus, coverage litigation spawns more coverage litigation.

Abundance Of Insurance Coverage Case Law — Good Or Bad?

The fact that the collection of insurance coverage case law is growing like a weed gives rise to an interesting question — is it a good thing, with no down-side, or not. In other words, if you can never be too rich or too thin, as the old saying goes, it is also true that you can never have too much insurance coverage case law?

It is very difficult to answer the question whether it is a benefit or detriment to having such an abundance of coverage case law — ironically, for the very reason that there is too much coverage case law. Examples of both positive and negative exist. But there is no disputing that the enormous and ever-growing body of coverage case law has made it much more difficult to predict the outcome of judicial decisions, since courts deciding coverage disputes have an easy time finding a case to say whatever they want. And this is especially so when you consider that, when it comes to coverage litigation, courts for some reason do not seem constrained to limit their analysis to decisions from within their own state. Citation to decisions from anywhere in the country has become fair game.

Also popular these days are courts that provide monster-size string cites to demonstrate the abundance of case law from around the country on both sides of the issue. *E.g.*, *BP America, Inc. v. State Auto Property & Casualty*, 148 P.3d 832 (Ok. 2005) (Oklahoma Supreme Court addressed the distinction between the phrases "any insured"/"an insured" and "the insured," as used in a policy exclusion. The court examined the two schools of thought by citing nearly 60 decisions from around the country addressing the issue. And as for the potential effect of a policy's severability clause on the interpretation of the exclusion, the court cited approximately 50 cases nationally.) This technique certainly keeps the law clerks busy.

Every client in coverage litigation, whether insurer or policyholder, asks its lawyer the same question — what are my chances of winning? How do you answer — knowing that the court may base its decision on any one from 50 states, thirteen circuit courts of appeal or 94 federal judicial districts.

In addition to the general difficulty of predicting results, another related consequence that is created by having so much coverage case law to choose from is the risk of result-oriented decisions being made. Courts intent on reaching such a decision can easily camouflage their motivations by citation to alleged binding or persuasive authority. That some courts may be reaching result-oriented decisions, while only paying lip service to their promise to interpret insurance policies based solely the policy language, was bluntly stated not long ago by Justice Hecht of the Supreme Court of Texas: "I remain troubled by the way the Court goes about reading insurance policies, which we constantly reiterate must be interpreted

and construed like other contracts, but which hardly ever are because courts approach them, not as neutral arbiters of words on a page, but in hopes there will be coverage." *Utica National Insurance Company v. American Indemnity Company, et al.*, 141 S.W.3d 198, 206 (Tex. 2004) (Hecht, J., dissenting).

For example, in *Madison Construction v. Harleysville Mutual Insurance Company*, 735 A.2d 100 (Pa. 1999), the Pennsylvania Supreme Court called the absolute pollution exclusion "unambiguous," and admonished the trial court for looking at anything other than the policy language before it in interpreting its meaning:

> The trial court's approach does not comport with the settled principles of contract interpretation. In striving to discern the considerations underlying the policy language, the trial court failed to acknowledge and to apply the plain meaning of such language. If the pollution exclusion clause, by its express terms, does not require that a discharge or dispersal be "into the environment" or "into the atmosphere," then the court is not at liberty to insert such a requirement in order to effect what it considers to be the true or correct meaning of the clause. The court's only aim, as noted earlier, must be "to ascertain the intent of the parties *as manifested by the language of the written instrument* . . . .

Madison at 108 (citation omitted and emphasis added).

Based on this strong mandate, who could have predicted that, just two years later, the Pennsylvania Supreme Court in *Lititz Mutual Insurance Company v. Steely*, 785 A.2d 975 (Pa. 2001) would conclude that the absolute pollution exclusion does not bar coverage for lead paint injuries sustained by children. It was difficult to see this coming when you consider that, notwithstanding *Madison Construction's* finger-waving at the trial court, the Supreme Court of Pennsylvania based its decision on a consideration found entirely outside of the policy language — that the insurer could have specifically listed lead-paint poisoning in the absolute pollution exclusion. As support for this decision, the Pennsylvania Supreme Court noted that Maryland's highest court recognized that some policies include such a clause. *Lititz Mutual* at 982, n.11. The court also cited decisions from federal and state courts, outside of Pennsylvania, to conclude that the inevitable and imperceptible deterioration of lead paint applied to the interior surface of a residence is not a discharge, release or escape, as required by the pollution exclusion. *Lititz Mutual* at 982.

It is reasonable to assume that the Pennsylvania Supreme Court's decision in *Lititz Mutual*, so seemingly at odds with its decision just two years earlier in *Madison Construction*, was influenced by a desire to ensure that innocent children are compensated for injuries sustained at the hands of penny-pinching landlords.

As is typical in decisions that are accused of being outcome-determinative, the party on the losing side may claim that the abundance of case law enabled the court to reach an outcome-driven decision. The prevailing party, on the other hand, will praise the court's intellect for using that same case law to assist it in making a determination that was based solely on the intention of the parties through an examination of the policy language. Opinions on judicial correctness are often in the eye of the beholder.

The Many Rules Of Insurance Policy Interpretation

The huge body of coverage case law is just part of the reason for the difficulty of predicting the outcome of coverage litigation. The other is the myriad rules and standards for insurance policy interpretation.

Most coverage decisions begin with a pronouncement by the court of the rules of insurance policy interpretation. And most people that read a lot of coverage decisions probably gloss right over that section, much the same as they gloss over such things as the duty to defend rules, the scope of appellate review and the standard for summary judgment. For that matter, just as people skip the rules of policy interpretation section in a coverage decision, they are probably getting ready to skip this section of this article.

After all, there's nothing to it. The language of the insurance policy controls and if the language is susceptible to more than one meaning, it is deemed ambiguous and construed against the insurer as the drafter. End of story. Or to say it another way, to show that your expensive education was not for nothing — *contra proferentum* — Latin, meaning "against

the offeror," requiring that an ambiguity in an insurance policy be construed against the insurer, as the drafter. For example, as the Eleventh Circuit bluntly put it: "[The Insureds] do not need to show that their interpretation of the term 'household' in this insurance contract is the correct one. All they need to show is that the term is ambiguous, and the existence of two competing, reasonable interpretations establishes ambiguity." *Continental Insurance Company v. Roberts*, 410 F.3d 1331, 1334 (11th Cir. 2005).

Ironically, courts differ in how to spell the very word that is at the heart of interpreting ambiguities, with some choosing *proferentum* and others *proferentem.* And some courts would rather not choose so they use both (next to each other). See *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1334, 1349 (D.N.J. 1992) ("The Insurers next argue that decisions finding ambiguity in the term 'sudden' relied on the doctrine of contra proferentum, which they argue is inapplicable to the contracts in issue in this case. This argument fails because the Insurers misconstrue the doctrine of contra *proferentem*. Contra *proferentum* is a general doctrine under which ambiguous language in a contract is construed against its drafter.") (italics added).

It is not unusual — indeed, it is the norm — for a court that proclaims that it must apply *contra proferentum* to add the caveat that the policy should not be tortured to create an ambiguity. Of course, whether the policy is in fact ambiguous, to invoke *contra proferentum*, is itself a highly subjective judicial determination. Thus, *contra proferentum* may be less of a rule of insurance policy interpretation than it is a Latin expression for explaining the reason for finding coverage.

While policyholders typically invoke *contra proferentum* early and often in coverage disputes, and while most rules of insurance policy interpretation usually include a mandate that the language of the policy controls and ambiguities are certainly not a good thing for insurers, there is frequently more to it than this. Much more, in fact. These rules are not as innocuous and routine as they seem.

Set out below are numerous examples in which the rules of policy interpretation went well beyond the popular sound-bite about intention of the parties, policy language and ambiguities. Not to mention, while the rules of policy interpretation should be black-letter like, examples abound of courts within the same state reciting different rules.

The purpose of setting out these rules of policy interpretation is not to try reconcile or find overarching lessons in them. To the contrary, it is to demonstrate that, while the rules of construction should serve as a basis for making it easier to predict the outcome of coverage decisions, they can actually contribute to the problem by being so diverse and sometimes inconsistent. What's more, while some courts (obligatorily) cite the rules of policy interpretation at the outset of an opinion and then never actually discuss their role in the decision, other courts strive to remain faithful to them throughout.

Resort To Extrinsic Evidence

There is perhaps no issue concerning insurance policy interpretation that is more difficult to pin down than the rules concerning the use of extrinsic evidence to make a determination.

For example, despite the popular conception, many courts do not *automatically* construe an ambiguous policy provision against the insurer as the drafter. That may still be the end result, but it is not always a *fait accompli*, as Maryland's highest court has instructed. See *Clendenin Bros. v. U.S. Fire Ins. Co.*, 889 A.2d 387, 393-94 (Md. 2005) ("If an analysis of the language shows that the terms used in the insurance policy are plain and unambiguous, 'we will determine the meaning of the terms of the contract as a matter of law,' however, *'if the language is ambiguous, extrinsic evidence may be consulted.'* As we have stated on numerous occasions in the context of contract interpretation, '[a] term of a contract is ambiguous if, to a reasonably prudent person, the term is susceptible to more than one meaning.' Maryland does not follow, as a matter of first resort, the view of construing an insurance policy most strongly against the insurer, however, if ambiguity is determined to remain after consideration of extrinsic evidence, 'it will ordinarily be resolved against the party who drafted the contract,' where no material evidentiary factual dispute exists.") (citations omitted and emphasis added).

While Maryland allows extrinsic evidence to be considered to *clarify* an ambiguity, a California appeals court has stated its willingness to consider extrinsic evidence to determine if an ambiguity exists in the

first place: "In deciding whether an ambiguity exists, the court may consider extrinsic evidence. The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. The trial court must provisionally receive the extrinsic evidence in order to determine whether the language of the contract is 'reasonably susceptible' of the interpretation contended." *Lockheed Martin Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187, 197 (2005) (citations omitted).

The Pennsylvania Supreme Court has held that consideration of custom in the industry or usage in the trade is relevant and admissible in construing an insurance policy and is not dependent upon any obvious ambiguity in the words. *Sunbeam Corporation v. Liberty Mutual Insurance Company*, 781 A.2d 1189 (Pa. 2001). What's curious about *Sunbeam* is that while this Pennsylvania Supreme Court decision addresses a subject as frequently occurring as insurance policy interpretation, it has been cited a mere handful of times in coverage cases since it was handed down over six years ago.

Indeed, in *Kvaerner Metals v. Commercial Union*, 908 A.2d 888 (Pa. 2006), the Pennsylvania Supreme Court recently recited the Commonwealth's rules for insurance policy interpretation and there was no mention of *Sunbeam* and considerations of extrinsic evidence. For that matter, the *Kvaerner* Court stated the opposite: "Our primary goal in interpreting a policy, as with interpreting any contract, is to ascertain the parties' intentions *as manifested by the policy's terms. When the language of the policy is clear and unambiguous, [we must] give effect to that language.* Alternatively, when a provision in the policy is ambiguous, 'the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage.'" *Kvaerner* at 897 (citation omitted and emphasis added).

Intention Of The Parties

The most sacrosanct of all rules of policy interpretation is that the court's goal is to ascertain the intention of the parties, as manifested by the policy language. But even this black letter of all black letter rules can come with a caveat.

In *Fiess v. State Farm Lloyd's*, 202 S.W.3d 744 (Tx. 2006), the Supreme Court of Texas, addressing the availability of mold coverage under a homeowners policy, stated: "As with any other contract, the parties' intent is governed by what they said, not by what they *intended* to say but did not. Moreover, in cases like this involving a standard form policy mandated by a state regulatory agency, we have held for more than 100 years that the actual intent of the parties is not what counts (as they did not write it), but the ordinary, everyday meaning of the words to the general public." *Fiess* at 746 (emphasis in original).

Reasonable Expectations Of The Insured

Some states are considered "reasonable expectations" jurisdictions. In other words, the policy is allegedly construed in a manner to conform to the insured's reasonable expectations of whether coverage should be available. Here too, the story is not so simple. Courts are all over the place on the role or lack thereof that "reasonable expectations" should play in making a coverage determination.

For example, in New Jersey, a jurisdiction that is often colloquially considered as applying the insured's "reasonable expectations" to the availability of coverage, courts have consistently stated that if the policy language is clear, the court does not reach the question of the insured's reasonable expectations. See *Argent v. Brady*, 901 A.2d 419, 424 (N.J. Super. App. Div. 2006) ("Where the policy is clear and unambiguous, we are bound to enforce it. Only where the language is ambiguous does the doctrine of reasonable expectations come into play, permitting a construction that favors such expectations of an insured.") (citations omitted). Thus, simply because New Jersey is characterized as applying the "reasonable expectations" doctrine does not automatically give the edge to the insured in a dispute over coverage (at least it should not).

To the contrary, "reasonable expectations" is a rule of policy construction that can benefit insurers, as recently described by the Court of Appeal of California in *London Market Insurers v. Truck Insurance Exchange*, 146 Cal. App. 4th 648, 656 (2007): "If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent

with the objectively reasonable expectations of the insured." See also *Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039, 1045 (D. Nevada 2006) ("An ambiguity exists when a policy provision is subject to two or more reasonable interpretations. In such case, the court should consider not only the language of the policy, but also the intent of the parties, the subject matter of the policy, the circumstances surrounding the issuance of the policy *to effectuate the reasonable expectations of the insured*. If these steps do not resolve the ambiguity, the contract is to be construed against the insurer and in favor of the insured. However, a court will neither rewrite an otherwise unambiguous contract provision nor struggle to find ambiguity where none exists.") (emphasis added.)

Thus, while "reasonable expectations" is usually viewed as a pro-policyholder doctrine, it is, in fact, if used properly, a rule of construction that can benefit insurers, as it can serve as a hurdle to a court's otherwise knee-jerk reaction that an ambiguous policy provision is construed against the insurer.

Nonetheless, insureds frequently seek to invoke the doctrine on the basis of an argument that reasonable expectations is the standard to be employed by the court, *in the first instance,* when initially determining if a policy provision is ambiguous. For example, "Where an insurance policy provision reasonably lends itself to two conflicting interpretations, its terms are ambiguous and must be construed in favor of the insured and against the insurer, the drafter of the policy language. *The test for whether an insurance provision is ambiguous focuses on the 'reasonable expectations of the average insured upon reading the policy.*'" *Wider v. Heritage Maintenance Inc.*, 2007 N.Y. Misc. LEXIS 34, **17-**18 (citations omitted and emphasis added).

Policy Definitions

Courts engaged in coverage disputes frequently address definitions (or the lack thereof) of policy terms. On one hand, many courts hold that the absence of a specific definition in a policy does not make it *per se* ambiguous. See *McAninch v. Wintermute*, 2007 U.S. App. LEXIS 5208, *24 (8th Cir.) ("Because the court is to construe language in an insurance policy in its 'plain, ordinary, and popular sense,' the fact that a term is not defined in the policy 'does not automatically render it ambiguous.'")

On the other hand, policyholders are often quick to point out that the dispute over an undefined policy provision could have easily been avoided if the insurer had simply included a definition. Some courts are receptive to the argument that the absence of a policy definition is a strike against the insurer. See *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 429 F. Supp. 2d 1274, 1281 (M.D. Fla. 2005) ("[W]hen an insurer fails to define a term in a policy, . . . the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided.") (citation omitted); *American Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1247 (2006) ("Although the absence of a policy definition does not necessarily create an ambiguity, in an appropriate case, the absence of a policy definition, though perhaps not dispositive, might weigh, even strongly, in favor of finding an ambiguity.") (citation omitted).

Decisions that fault insurers for not defining a term can leave them wondering if nothing short of incorporating by reference *Webster's Unabridged Dictionary of the English Language* would have satisfied the court.

Ambiguity Based On Varying Court Interpretations

Some courts use the abundance of conflicting case law on a particular provision as support for their determination that it must be ambiguous. In other words, so the argument goes, if all of these judges can not agree, then the provision must be ambiguous. For example, the Supreme Court of Arizona described this rule of construction and its rationale as follows:

> We follow the principle of construction that where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an insurance contract ambiguity is established. If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it.

Federal Ins. Co. v. P. A. T. Homes, Inc., 547 P.2d 1050, 1052-53 (Ariz. 1976).[3]

Other courts are not so quick to adopt this circular argument. See *Firemen's Fund v. Kline & Company Cement Repair, Inc.*, 2007 U.S. Dist. LEXIS 12609, *53 (E.D.Va.) ("[U]nder Virginia law, an insurance policy is not ambiguous merely because courts of varying jurisdictions differ with respect to the construction of policy language.")

Prior judicial decisions can also play a part in the interpretation of an insurance policy, outside of the context of how to resolve varying ones. See *Lockheed Martin Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187, 197-98 (2005) ("[I]f a term in an insurance policy has been judicially construed, it is not ambiguous and the judicial construction of the term should be read into the policy unless the parties express a contrary intent. We apply this rule with caution, first determining whether the context in which the construed term appears is analogous to the context of the term before us. . . . Prior judicial construction of a term in a standard form policy will be helpful only so long as the term appears in a context analogous to its context in the policy before us.") (citations omitted).

More Latin Maxims

While *contra proferentum* is the granddaddy of all Latin maxims of insurance policy rules of construction, it is not the only one invoked by courts to resolve coverage disputes. For example: "Under the doctrine of *ejusdem generis*, 'where general words are used in a contract after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified.' The phrase *noscitur a sociis* literally means 'it is known from its associates,' and the doctrine implies that the meaning of a general word is or may be known from the meaning of accompanying specific words. The doctrines are similar in nature, and their application holds that in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words." *Change, Inc. v. Westfield Ins. Co.*, 542 S.E.2d 475, 478-79 (W. Va. 2000).

Coverage Provisions Versus Exclusions Versus Exceptions To Exclusions

Another rule of construction that is frequently cited by courts addresses certain general differences between provisions that grant coverage and those that take it away: "[I]nsurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer. As a coverage provision, [an] exception [to an exclusion] will be construed broadly in favor of the insured. This broad construction will aid the insured in meeting its burden of proof, thereby ensuring that the end result (coverage or noncoverage) conforms to the insured's objectively reasonable expectations." *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 145 P.3d 472, 477 (Cal. 2006).

Rules For Sophisticated Insureds

Some courts consider whether the rules of insurance policy interpretation differ when the insured is a so-called "sophisticated insured," as opposed to an individual or the proverbial mom and pop-insured. *See Cps Chem. Co. v. Cont'l Ins. Co.*, 536 A.2d 311, 318 (N.J. App. Div. 1988) ("These principles [of insurance policy interpretation] are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the ambiguity was caused by language selected by the insurer."); *Stryker Corp. v. XL Ins. Am., Inc.*, 2006 U.S. Dist. LEXIS 47899, *36 (W.D. Mich.) ("To the extent that the cases cited by the Magistrate Judge mention a 'sophisticated insured' exception, it is clear that the insured's sophistication is not the dispositive issue in determining whether to apply the *contra proferentum* rule, rather the issue is whether the contract was negotiated by the parties.")

Illusory Coverage

It is not uncommon for insureds to argue that coverage is owed because any other decision would render the policy illusory. While illusory coverage arguments are made frequently by policyholders, the burden for proving truly illusory coverage is a high one. "Illusory coverage means that the policy, when read as a whole, provides no coverage at all. Only where there is no possibility under any set of facts for coverage is the policy deemed illusory." *Employers' Fire Ins. Co. v. Berg*, 2007 U.S. Dist. LEXIS 6077, *13 (N.D. Ill.). "An insurance provision is considered illusory if a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances." *Empire Fire & Marine Ins. Co. v. Sargent*, 2007 U.S. App. LEXIS 1518, *6 (7th Circuit).

On the other hand, policyholders have had success securing coverage by convincing courts that, because the risk that to be excluded is so integral to the nature of the policyholder's business, coverage for it must be available. However, in these cases, the issue is not whether the coverage is illusory, but whether the interpretation offered by the insurer is a reasonable one.

For example, in *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996), the Indiana Supreme Court examined the applicability of the pollution exclusion to a claim by a gas station for clean-up costs following a gasoline spill. The court concluded that coverage was owed, but not based on an illusory coverage rationale. Rather, the court noted that the "oddity" in the insurer's position, that it would sell a "garage policy" to a gas station when that policy specifically excluded the major source of potential liability [was], "to say the least, strange." *Id.* at 948. Nonetheless, the court noted "that if the policy clearly excludes such coverage, that contract will be enforced." *Id.*

While the Indiana Supreme Court still found against the insurer, it reached its decision on the basis that the policy was ambiguous, not illusory:

> Clearly, this clause cannot be read literally as it would negate virtually all coverage. For example, if a visitor slips on a grease spill then, since grease is a "chemical," there would be no insurance coverage. Accordingly, this clause requires interpretation. As mentioned in Section I, the interpretation of insurance policies is not new to this Court. We are particularly troubled by the interpretation offered by American States, as it makes it appear that Kiger was sold a policy that provided no coverage for a large segment of the gas station's business operations. . . . [S]ince the term "pollutant" does not obviously include gasoline and, accordingly, is ambiguous, we once again must construe the language against the insurer who drafted it.

Id. at 948-49.

Interpretation Of Endorsements

Endorsements come with their own rules of construction. "The interpretation of an insurance policy must extend to any endorsements thereto. The endorsement must control where any irreconcilable conflict exists between provisions of the policy and provisions of an endorsement." *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2nd Cir. 1990) (citations omitted).

> When interpreting an insurance contract, the Court must look at the entire document, and the specific terms in an endorsement generally control over less specific provisions in the body of the policy, unless the terms of the endorsement are hidden or unfairly restrict coverage provided in the main policy. Barbara O'Donnell, 1 *Law and Practice of Insurance Coverage Litigation* § 1:9 (Sept. 2005); *see also St. Paul Fire & Marine Ins. Co. v. United States Fire Ins. Co.,* 655 F.2d 521, 524 (3d Cir. 1981) (citations omitted) (applying Pennsylvania law, court of appeals noted that "if there is a conflict between the terms of the endorsement and those in the body of the main policy, then the endorsement prevails, particularly when it favors the insured.") Moreover, the Court of Appeals has observed:
>
> > These rules have developed as a result of the common industry practice of using a basic policy form and then attaching endorsements to provide specialized forms of coverage. To the extent that the standard conditions in the underlying form are applicable, this procedure avoids unnecessary repetition. But when a specific form of insurance is provided by an endorsement tailored to meet the particular needs of the insured and the company, that language must be followed to carry out the intentions of the parties.

Wash. Energy Co., LLC v. Century Sur. Co., 407 F. Supp. 2d 680, 701-02 (W.D. Pa. 2005).

Rules For Interpreting Reinsurance Contracts

Courts have also considered whether *contra proferentum* should be applied in the context of a reinsurance dispute, with the majority rule being that it is not.

The District Court of Vermont recently addressed this issue as a case of first impression for the Green Mountain State. In *Professional Consultants Insurance Company v. Employers Reinsurance Company*, 2006 U.S. Dist. LEXIS 24170 (D. Vt. 2006), the court concluded that, while there were reasons for applying *contra proferentum* (the dispute was between ERC, a reinsurance industry leader, versus a company new to reinsurance), it would not do so:

> There is a stronger case, however, for not applying the canon here and treating the agreement like any other contract because a key policy rationale for the canon — unequal bargaining power — is absent where the reinsured is a sophisticated party who bargained for the contract language. See Ostrager & Newman, Handbook on Insurance Coverage Disputes §§ 1.03[c], 15.04[a] (stating that courts generally do not refer to the rule in reinsurance cases, and when they do, it appears to be in instances of standard-form or facultative certificate reinsurance contracts). Recent Second Circuit cases applying New York law tend not to apply the canon to disputes involving two insurance companies.

Id. at *11.

Conclusion

It is very difficult to answer the question whether having such a huge body of coverage case law is advantageous or not. But there is no disputing that the enormous and ever-growing body of coverage case law has made it much more difficult to predict the outcome of judicial decisions. It requires little effort to find decisions that involve substantially the same facts, policy language and rules of construction, yet reached opposite outcomes — with each court citing a host of opinions that support its decision. Therefore, it appears that, in addition to needing a complete copy of the policy, knowledge of the facts and a subscription to Lexis, the most important tool for making a CGL coverage determination may in fact be a Magic 8-Ball.[4]

Endnotes

1. Tootsie Roll Industries's website describes scientific studies that have been undertaken by the following to answer this question that has been burning since the famous 1970 television commercial — Engineering students at Purdue University (364 licks); chemical engineering doctorate student at the University of Michigan (411 licks); and high school students at Swarthmore School (144 licks). Tootsie Roll proclaims: "Based on the wide range of results from these scientific studies, it is clear that the world may never know how many licks it really takes to get to the Tootsie Roll center of a Tootsie Pop." I am not making this up. See http://www.tootsie.com/memoriesLicksMachine.html for more about these studies and http://www.tootsie.com/howmany.html for other childhood memories.

2. See *Coregis Insurance Company v. City of Harrisburg, et al.*, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa.)(Court rejected city's argument that a continuous trigger theory of liability should apply to cases of malicious prosecution); *Steadfast Insurance Company v. Purdue Frederick Company, et al.,* 2006 Conn. Super. LEXIS 1970 (Court determined that the injuries caused by the ingestion of a pharmaceutical drug did not involve a continuous trigger); *Fidelity and Guaranty Insurance Underwriters, Inc. v. Nationwide Tanks, Inc.*, 2006 U.S. Dist. LEXIS 9854 (S.D. Ohio)(Court rejected policyholder's argument that a continuous trigger should apply to damage to an above-ground storage tank); *Suter v. Gen. Accident Insurance Company*, 2006 U.S. Dist. LEXIS 48209 (D.N.J.)(Court rejected a continuous trigger to bodily injury claims involving defective heart valves); *Pharmacists Mut. Ins. Co. v. Urgent Care Pharm.*, 413 F. Supp. 2d 633 (D.S.C. 2006)(Court adopted the use of a continuous trigger to claims for injury caused by a drug administered by injection); and *Maryland Casualty Company v. Hanson*, 902 A.2d 152 (Md. 2006)(Court adopted a continuous trigger to claims for lead paint poisoning).

3. [U]nder Arizona law, the policy language is ambiguous because several jurisdictions have interpreted it differently. *Federal Ins. Co. v. P. A. T. Homes, Inc.*, 113 Ariz. 136, 138, 547 P.2d 1050, 1052 (1976) (Arizona courts find ambiguity as a matter of law 'where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an insurance contract.'), *disapproved on other grounds by Wilson,* 162 Ariz. at 258, 782 P.2d at 734. Although *Wilson* and other decisions *(see,*

e.g., Darner Motor Sales Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 389, 682 P.2d 388, 394 (1984)) have criticized this rule, the court has never renounced it. In fact, in *Wilson,* the court relied on the rule to support its finding that the policy at issue was ambiguous, stating: We come then to the question of ambiguity. Indeed, because two divisions of our court of appeals have reached diametrically opposite conclusions based on essentially identical wording, prior authority requires us to conclude that the clause must be ambiguous. See *Federal Ins. Co. v. P.A.T. Homes, Inc.*, 113 Ariz. 136, 138-39, 547 P.2d 1050, 1052-53 (1976). *Wilson,* 162 Ariz. at 256, 782 P.2d at 732." *TNT Bestway Transp. v. Truck Ins. Exch*, 1994 Ariz. App. LEXIS 186, *6-*7.

4. According to Wikipedia, the 20 standard answers on a Magic 8-Ball are as follows: Signs point to yes; Yes; Most likely; Without a doubt; Yes — definitely; As I see it, yes; You may rely on it; Outlook good; It is certain; It is decidedly so; Reply hazy, try again; Better not tell you now; Ask again later; Concentrate and ask again; Cannot predict now; My sources say no; Very doubtful; My reply is no; Outlook not so good; and Don't count on it. I love Wikipedia. ■