Decisions Reaffirm Rules of Policy Construction and Interpretation

By Jonathan A. Dachs

The process of construing and interpreting insurance policies has been described as one that "draws us deep into the catacombs of insurance policy English, a dimly lit underworld where many have lost their way." *Ins. Co. of North America v. Home & Auto Ins.*, 256 Ill.App.3d 801 (1993). Indeed, the task of determining whether coverage is provided or excluded under a particular policy often consists of a long and tortuous journey, which frequently leads to nowhere but confusion. Nevertheless, there are well-recognized signs and guideposts that can help to illuminate the path toward understanding.

The analysis of questions involving particular insurance policy language must begin with an understanding of the general rules of policy construction and interpretation. Since an insurance policy is a form of a contract, "the terms and conditions of any insurance policy must be construed in the same manner as any other contract" (*Coppotelli v. Ins. Co. of North America*, 484 F.Supp. 1327 (E.D.N.Y. 1980), aff'd in part, rev'd in part, 631 F.2d 146 (2d Cir. 1980). See also, *Matter of Covert*, 97 NY2d 68, 76 (2001).

Notwithstanding that these general rules are well-settled and widely known, they are frequently repeated and restated by the courts to support their interpretations of various policy provisions. In several recent cases, discussed below, the appellate courts, including the Court of Appeals, have done just that.

'Selective Ins. Co.'

In *Selective Ins. Co. of America v. County of Rensselaer*, 26 NY3d 649 (2016), the Court of Appeals explained that in determining a dispute over insurance coverage, the courts first look to the language of the policy. See *Consolidated Edison v. Allstate*, 98 NY2d 208, 221 (2006), citing *Breed v. Ins. Co. of N.Am.*, 46 NY2d 351, 354 (1978). The court further noted that "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning," and that a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport and the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." See *Greenfield v. Philles Records*, 98 NY2d 562, 569 (2002).

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Therefore, if a contract "on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." Id.[1]

Moreover, the Selective court observed that insurance policies must be construed in a manner that "affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." See *Consolidated Edison*, supra, 98 NY2d at 221-222, quoting *Hooper Assoc. v. AGS Computers*, 74 NY2d 487, 493 (1989).

Selective was an action for money damages by the insurer against its insured, the county, after the insurer defended and settled on the county's behalf an underlying civil rights class action challenging the county's policy to strip-search all arrestees admitted into its jail regardless of the type of crime they committed. The insurer argued, inter alia, that each class member was subject to a separate deductible, while the county argued that only one deductible applied. The court held, inter alia, that the "plain language" of the insurance policies indicated that the improper strip searches of the arrestees over a four-year period constituted "separate occurrences."

The court rejected the county's argument that the definition of the term "occurrence" in the policies was ambiguous. That definition was "an event, including continuous or repeated exposure to substantially the same general harmful conditions, which results in...'personal injury'...by any *person* or organization and arising out of the insured's law enforcement duties [emphasis added]." The court stated that "the language of the insurance policies makes clear that they cover personal injuries to an individual person as a result of a harmful condition" and that "the definition does not permit the grouping of multiple individuals who were harmed by the same condition, unless that group is an organization, which is clearly not the case here."

Insofar as the court concluded that the harm each member of the class experienced was as an individual, it also found that each of the strip searches constitute a single occurrence. Accordingly, the court concluded that "under the plain language of the insurance policies, each strip search of the class members is a separate and distinct occurrence subject to a single-deductible payment."

'Viking Pump'

In *Viking Pump and Warren Pumps v. TIG Ins.*, 27 NY3d 244, 257-58 (2016), the Court of Appeals reaffirmed the well-known proposition that when construing insurance policies, the language of the policies (or contracts) must be interpreted "according to common speech and consistent with the reasonable expectation of the average insured." See *Dean v. Tower Ins. Co. of N.Y.*, 19 NY3d » Page 8

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Insurance

« Continued from page 3

704, 708 (2012), quoting *Cragg v. Allstate Indem. Corp.*, 17 NY3d 118, 122 (2011). Furthermore, the court observed, as it did in *Selective*, that the courts must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect. See also *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh*, 21 NY3d 139,148 (2013); *Westview Assoc. v. Guaranty Natl. Ins. Co.*, 95 NY2d 334, 339 (2000).

Moreover, the court added, while ambiguities in an insurance policy are to be construed against the insurer (*Dean*, 19 NY3d at 708, quoting *Breed v. Insurance Co. of N.Am.*, 46 NY2d 351, 353 [1978]; see *Federal Ins. Co. v. International Bus. Mach. Corp.*, 18 NY3d 642, 650 [2012]), a contract is not ambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." See *Selective Ins.*, 26 NY3d at 655.

Viking Pump was a complex insurance dispute arising from efforts by two pump manufacturers to obtain coverage for thousands of asbestos-related personal injury suits under insurance policies issued between 1972 and 1985 to another company, then defunct, which had previously owned both companies.[2] There, the court, faced with the certified questions of "whether 'all sums' or 'pro rata' allocation applies where the excess insurance policies at issue either follow form to a non-cumulation provision or contain a non-cumulation and prior insurance provision," and "whether, in light of our answer to the allocation question, horizontal or vertical exhaustion is required before certain upper level excess policies attach," carefully reviewed "the policy language at issue here," which controlled.

The policy provisions at issue included one that defined an "occurrence" as "injurious exposure to conditions, which results in personal injury," and another that defined "personal injury" as "personal injury or bodily injury which occurs during the policy period." Also involved were a provision that stated that "[f]or the purpose of determining the limits of the [insured's] liability: (1) all personal injury...arising out of continuous or repeated exposure to substantially the same general conditions...shall be considered as the result of one and the same occurrence"; and an "other insurance" clause. After completing its review of the policy language, the court concluded that "all sums allocation and vertical exhaustion apply based on the language in the policies before us."

'Boro Park Land Co.'

In *Boro Park Land Co. v. Princeton Excess Surplus Lines Ins.*, 140 AD3d 909 (2d Dept. 2016), the Second Department stated that an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is "no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." See *Allstate Ins. v. Zuk*, 78 NY2d 41, 45 (1991); *Cumberland Farms v. Tower Group*, 137 AD3d 1068, 1070 (2d Dept. 2016); *Salt Constr. v. Farm Family Cas.*, 120 AD3d 568, 589 (2d Dept. 2014). Furthermore, "Policy exclusions are to be strictly and narrowly construed and are not to be extended by interpretation or implication." See *Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co.*, 12 NY3d 303, 307 (2009); *Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d 304, 311 (1984); *Edwards v. Allstate Ins.*, 16 AD3d 368, 389 (2d Dept. 2005).

The court further stated that in order to be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint in the underlying action "cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision." See *Frontier Insulation Contrs. v. Merchants Mut. Ins.*, 91 NY2d 169, 175 (1997); see *492 Kings Realty v. 506 Kings*, 88 AD3d 941, 943 (2d Dept. 2011); *Exeter Bldg. Corp. v. Scottsdale Ins.*, 79 AD3d 927, 929 (2d Dept. 2010). "[I]f the language is doubtful or uncertain in its meaning, any ambiguity will be construed in favor of the insured and against the insurer." See *Lee v. State Farm Fire & Cas. Co.*, 32 AD3d 902, 904 (2d Dept. 2006); see also *Insurance Co. of Greater N.Y. v. Clermont Armory*, 84 AD3d 1168, 1170 (2d Dept. 2011); *Pepsico v. Winterthur Intl. Am. Ins. Co.*, 13 AD3d 599, 600 (2d Dept. 2004).

In *Boro Park Land*, the plaintiff, Boro Park Land Co., was the owner of premises in Brooklyn, which it leased to another entity for the purpose of operating a nursing home. The defendant insurer issued a "Senior Living Professional Liability, General Liability and Employee Benefits Liability" policy to the lessee, in which Boro Park Land was named as an additional insured, as required by the lease agreement.

Following an accident in which an employee of the nursing home fell in the parking garage of the premises, and the injured employee's negligence lawsuit against Boro Park Land, the insurer, to which the summons and complaint

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were forwarded for a defense, disclaimed coverage. That disclaimer was based upon an "Insured versus Insured" provision in the policy, which excluded "[a]ny 'claim' made by or for the benefit of, or in the name or right of, one current or former insured against another current or former insured." Because it was not clear from the language of the exclusion whether the insured claimant, as an employee, was an "insured" as defined in the policy, the court held that the provisions were ambiguous and subject to more than one interpretation, and, thus, held that the insurer failed to establish its *prima facie* entitlement to judgment as a matter of law, and, indeed, granted summary judgment in favor of the insured declaring that the insurer was obligated to defend it in the underlying personal injury action.

Fitzgerald

Finally, although this point was previously mentioned in a recent article in this space[1], it is worth repeating that in *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 NY2d 799 (2015), the Court of Appeals observed that in interpreting the provisions of the *prescribed* UM and SUM endorsements, the general rule of construction of ambiguities against the drafter (insurer) will not apply because the insurers did not choose the terms of these endorsements of their own accord, but, rather, were required to include them in compliance with the governing statutes (Ins. L. Sections 3420[f][1] and [f][2]) and Regulations (11 NYCRR 60-2.3[f]). As the Court stated the exception to the general rule of policy interpretation discussed above, policy provisions mandated by statute "must be interpreted in a neutral manner consistent with the intent of the legislative and administrative sources of the legislation."

Endnotes

1. See Dachs, J., "Insurance Law Lessons My Father Taught Me," N.Y.L.J., February 22, 2016, p. 3, col. 1.

2. For a detailed discussion and analysis of *Matter of Viking Pump, Inc., et al. v. TIG Ins. Co.*, 27 NY3d 244 (2016), see Dachs, J. "'Viking Pump': Allocation, Exhaustion, Policy Interpretation," N.Y.L.J., May 17, 2016, p. 3, col. 1; and Epstein, Howard B. And Keyes, Theodore A., "'Viking Pump': Changing the Allocation Landscape," N.Y.L.J., August 31, 2016, p.3, col. 1.

3. See Dachs, J., "Insurance Law Lessons My Father Taught Me," N.Y.L.J., February 22, 2016, p.3, col. 1.