When Words Collide

Resolving Insurance Coverage and Claims Disputes

Presented by
Bill Wilson, CPCU, ARM, AIM, AAM
InsuranceCommentary.com

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Once upon a time...

Once upon a time... (Part 2)

• “Secret Policy Coverages Your Companies Never Told You About”
• “How to Battle an Adjuster…and Win Every Time!”
• “How to Win Friends and Influence Adjusters”
• “When Words Collide: Resolving Insurance Coverage and Claims Disputes”
What You Will Learn Today...

- Why are claims denied?
- Policy Interpretation Basics
- Legal and Contractual Principles
- Insurance Policy Interpretation
- Resolving Insurance Coverage and Claims Disputes
- Final Words

Why are claims denied?

- They're not covered
- There is a legitimate difference of opinion on coverage
- One party is committing material misrepresentation
- Cranial inversion (medically, cranitis rectal inversio)

Policy Interpretation Basics

- Duty to Read the Policy
- Policy Form Standardization
- More on Policy Form Edition Dates
- Policy Form Revisions
- Policy Form Revisions...The Lighter Side
- Policy Interpretation Doctrines

“A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.”

– Oliver Wendell Holmes, Towne v. Eisner, 1918
Duty to Read the Policy

- NAIC’s 1993 “Property and Casualty Insurance Policy Model Act”
- Before the purchase
- Insured vs. agent vs. insurer
- 8 reasons agents don’t read insurance policies

Policy Form Standardization

- 4 types of policy forms
  - Standardized
  - Proprietary
  - Hybrid
  - WTF?
- 5 ISO form tests
  - Form number format
  - Form number type or category
  - Edition date
  - Copyright notice
  - Read the policy language

More on Policy Form Edition Dates

- Why does it matter?
- Riding lawn mowers
  - HO 00 03 04 91
    - “Used to service an ‘insured’s’ residence”
  - HO 00 03 10 00
    - “Used solely to service an ‘insured’s’ residence”
  - HO 00 03 05 11
    - “Used solely to service a residence”
Policy Form Revisions...3 dangers:

- Reasons for form revision misunderstood
- Existing body of interpretive case law
- Unintended consequences

Policy Form Revisions...The Lighter Side

Tip Off Insurance Agency

Dear Customer:

I hope you fully understand your business auto coverage, we are providing this simple explanation of the recent changes to your policy. Of many of the items, under Section 11 of your policy:

- All of 1-5 & 6-10 exclusive of counts 11 vs. page 5 & 6. If not exclusive a "delegation" which is defined in the policy as generally interpreted by the writing hand in this case shall be used, but if in the case you please, please see this paragraph again. 11 for exclusion to the exclusion!

The exclusion to the exclusion to the exclusion to the exclusion!

- Exclusions must be clear and conspicuous.
- The duty to defend is broader than the duty to indemnify.
- Folklore is not fact.
Legal and Contractual Principles

- Intent
- Parol Evidence and Extrinsic Evidence
- Ambiguities
- Reasonable Expectations
- Entirety of Contract
- Unconscionable Advantage
- Illusory Coverage
- Public Policy
- Waiver and Estoppel
- Detrimental Reliance
- Reformation and Rescission
- Breach of Contract
- Duty of Utmost Good Faith
- Substantial Performance
- Statutory Supersession
- Regulatory Directive
- Agency Accommodations

When Words Collide

Parol Evidence and Extrinsic Evidence

- Parol evidence rule
- Extrinsic evidence
  - Actions, words, or conduct of the contracting or litigating parties;
  - Insurer or agent internal documents or communications;
  - Insurer or agent public documents or communications;
  - The drafting history of policy forms; and/or
  - Authoritative interpretive sources

"Before a manual can be looked to in determining the rights and liabilities of the parties, it must first have been referred to in the body of policies by plain and clear language and properly made a part thereof." — Virginia Surety Co. v. Knoxville Transit Lines, 1955

Intent

- Insured vs. insurer
- Property Not Covered
  Covered Property does not include:
  Vehicles or self-propelled machines that: (1) Are licensed for use on public roads; or (2) Are operated principally away from the described premises.

"No one knows what evil lurks in the hearts of men...but it's all insured." — California Chief Justice Malcolm Lucas
When Words Collide
Legal and Contractual Principles

Ambiguities
• Contra proferentum
• “Weasel” words
• Semantic (or contextual) ambiguities, including:
  o Noscitur a sociis
  o Ejusdem genereis
• Syntactic ambiguities
  o The Adventures of Semi-Colon Man
  o Those 7 Deadly Little Words

Reasonable Expectations
• What the courts say
  “The objectively reasonable expectations of insureds will usually be honored by
  the courts even if painstaking analysis of the policy forms would have revealed
  that such expectations were unwarranted.” – Robert Keeton in Insurance Law
  Rights at Variance with Policy Provisions, 1970
• How agents can create expectations
  o Marketing and advertising
  o Cool Hand Luke Syndrome
  o The water closet story
• The Case of the Willowy Poolside Blonde

Entirety of Contract
• What the experts say
• What the courts say
• What the statutes say
• What the insurance contracts say
Unconscionable Advantage

“In situations where a layman might give the controlling language of the policy a more restrictive interpretation than the insurer knows the courts have given it...the company cannot ignore its obligation. It cannot hide behind the insured's ignorance of the law. It cannot conceal its liability...It has the duty to speak and disclose, and to act in accordance with its contractual undertaking.” – Bowler v. Fidelity & Cas. Co., 1969

“An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy irrespective of the source of the information.” – Smith v. Travelers Indem. Co., 1973

Illusory Coverage

- My tornado claim
- 2004 ISO CGL policy
- 42 endorsements, including:
  - “Limitation of Coverage to Designated Operations”
  - “Exclusion – All Hazards in Connection with Ongoing Operations and Your Work”

Public Policy

- Incessant price-focused advertising of the industry
- Growth of the E&S marketplace
- Decline in the regulatory vetting of policy forms
- Minimum coverage standards?
When Words Collide
Legal and Contractual Principles

Waiver and Estoppel

- Waiver
- Estoppel
- Goats and ghosts

“Regardless of which language is selected by the insurer, the insured has a valid right to expect coverage as promised by the insurer’s agent.” – Bill Brown Construction Co. v. Glen Falls Ins. Co., 1991

Detrimental Reliance (aka promissory estoppel)

- Certificates of insurance
- Agent and adjuster statements

“Where the agent of the insurance company was told by complainants that they wanted ‘full coverage’ and if the agent assured complainants that they were getting full liability coverage, complainants would be entitled to recover on the policy notwithstanding the exclusions therein.” – Henry v. Southern Fire & Casualty Co., 1958

Reformation and Rescission

- Mutual mistakes
- Unilateral mistakes by the insurer (e.g., Ebasco Constructors, Inc. v. Aetna Ins. Co., 1999)
- 1313 Mockingbird Lane
**Breach of Contract**

- Insurers
  - Homeowners cancellation example
  - Auto cancellation example
- Insureds
  - Subrogation
  - Application

**Duty of Utmost Good Faith**

- Case law on *uberrimae fidei*
- Burden of proof in bad faith claims
- Standard of proof

“The duty of the insurer to act in good faith when dealing with its insured is implied by law as a covenant of the contract. The duty of good faith and fair dealing applies to both parties to the insurance contract...” – Abdelsamed v. N.Y. Life Ins. Co., 1992

**Substantial Performance**

- Proof of loss example
- Suit against insurer example
Statutory Supersession

- A policy cannot be more restrictive than a statute.
- However, a policy can be broader than a statute.
- The insurance contract may not be able to rely on a state law unless such statutory provisions are incorporated into the policy.
- The importance of knowing state laws....

Regulatory Directive

- Industry-wide bulletins or directives
- Individual dispute intervention
- The DOI's authority to regulate
  - Newton Black
  - Dick Webber

Agency Accommodations

- 1956 barn fire
- The danger of agency accommodations
  - Precedent-setting (e.g., Aetna Cas. & Sur. Co. v. Haas, 1968)
  - Discriminatory?
  - Solution....
Insurance Policy Interpretation

- Eligibility vs. Coverage
- Policy Foundational Documents
- Definitions
- Insuring Agreements
- Perils and Exclusions
- Other Policy Provisions and Considerations

Eligibility vs. Coverage

- Buying a Corvette
- Driving a dump truck
- “Where you reside”

Policy Foundational Documents

- Application
- Binder
- Declarations Page
Definitions

- **Defined terms**
  Business, employee, family member, insured, insured location, loading and unloading, occurring, occurrence, pollutants, your work

- **Undefined terms**
  Accident, aircraft, arising out of, auto, care, custody and control, controlled substances, equipment, favorable and unfavorable, firearms, household, improvements and betterments, in connection with, infestation, mechanical breakdown, likely, on ways next to, ownership, pedestrian, permanent, possessed, promptly, public highway, public or livery conveyance, race, reside, riot, theft, vacant, vandalism, wear and tear

- **"Invisible" terms**
  Age, all risks, blanket, friendly, full coverage, licensed, products and completed operations, professional liability

- **"Circular" definitions**
  “How many a dispute could have been deflated into a single paragraph if the disputants had dared to define their terms.” – Aristotle

Insuring Agreements

- **D.I.C.E.**
- **Broad triggers**
- **Components**
  - Insureds
  - Coverage, including basic terms, policy period, territory, etc.
  - Duty to defend

Perils and Exclusions

- **Efficient proximate cause vs. concurrent causation**
- **Perils**
- **Exclusions**
  - Clear and conspicuous
  - Ambiguous exclusions
  - Unconscionable exclusions
  - Illegal exclusions
  - Intentional loss exclusions
  - Unintended exclusions
  - Unintended consequences
  - Manual, endorsed, and “invisible” exclusions
  - Exceptions to exclusions
Other Policy Provisions and Considerations

- Conditions
  Coinsurance, concealment, misrepresentation and fraud, insurable interest, loss settlement provisions, other recovery limitations, pair or set clause, subrogation, suit against insurer, onerous, nonsensical and unconscionable conditions
- Additional Coverages and Coverage Extensions
- Endorsements

Resolving Insurance Coverage and Claims Disputes

- Tactical Procedures and Claim Resolution Steps
- Step 0: Heading Off Denials After the Claim
- Step 1: Read the Policy (Again)
- Step 2: Interpret the Policy
- Step 3: Research the Interpretation
- Step 4: Plead Your Case

Tactical Procedures and Claim Resolution Steps

- The role of risk management
- Why everyone wants to avoid litigation
- The steps....
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Resolving Insurance Coverage and Claims Disputes

Step 0: Heading Off Denials After the Claim
- Notice
- Claim declination and reservation of rights letters
- Unfair claims settlement practices and bad faith laws
- “The Devil Made Me Do It” claim denial
- Declaratory or summary judgments

“It is axiomatic that an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage...generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) is not sufficient.” – Harleysville Group Insurance v. Heritage Communities, 2017

Step 1: Read the Policy (Again)
- Does the insuring agreement apply?
- Is the person an insured?
- Do any exclusionary policy provisions apply?

“15 minutes a day.” – John Eubank, CPCU, ARM

Step 2: Interpret the Policy
- Does the policy provision seem ambiguous?
- What is the apparent intent of the language?
- What are the insured’s reasonable expectations of coverage?
When Words Collide
Resolving Insurance Coverage and Claims Disputes

Step 3: Research the Interpretation

• Is there any authoritative support for your interpretation? *(Caveat emptor)*
• Are there any precedent-setting court cases that may govern?
• Are there any superseding statutes?

"An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy irrespective of the source of the information." – Smith v. Travelers Indem. Co., 1973

When Words Collide
Resolving Insurance Coverage and Claims Disputes

Step 4: Plead Your Case

• The scales of justice
• Appeal to your insurer
• Appeal to your agents association
• Appeal to your regulators (Richard T. Webber)
• Last resorts (Dickie Scruggs)

When Words Collide
Final Words

Final Words

• Education
• Advocacy
• Insurance as a Profession
• Final Words
**Education**

- Bob “Yoda” Ross
- Florida law: “Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transaction authorized by the license or appointment.”
- Choose wisely, Mr. Jones

**Advocacy**

- Pre-inception
- Pre-loss
- Post-loss

“SAME COVERAGE, Better Value!” – ‘Flo’

“Insurance is NOT a commodity!” – The rest of us

**Insurance as a Profession**

- 7 Characteristics of a Profession
- 7 Habits of Insurance Professionals
- The Insurance Professional Oath*

As an insurance professional,
I shall strive at all times to live by the highest standards of professional conduct;
I shall strive to ascertain and understand the needs of others and place their interests above my own;
I shall strive to maintain and uphold a standard of honor and integrity that will reflect credit on my profession, my employer and myself.

* Based on The CPCU Oath
Final Words

“Never, ever forget in everything you do professionally that the purpose of insurance is to insure and that the mission of this industry and every professional in it is to assist individuals, families and organizations in minimizing their exposure to serious or catastrophic loss.”

— Bill Wilson, CPCU, ARM
from the book
“When Words Collide: Resolving Insurance Coverage and Claims Disputes”

The cornerstone of the independent agent advantage in competing and beating direct sales organizations consists of:

Trust
- Trusted relationship
- Credibility (particularly product knowledge and expertise)

Choice
- Carriers
- Coverage and pricing options
- Customization of products

Advocacy

Now available at www.WhenWordsCollideBook.com
- Based on 30+ years of practical experience
- Proven 90%+ dispute resolution success
- Over 80 case law citations
- Over two dozen expert testimonials, including….

“Bill Wilson takes his years of experience in the trenches and provides the insurance community with realistic and street-wise words of wisdom in this excellent claims handbook. For both the novice and the experienced professional, Bill’s approach gives any reader a heads-up and pathway to approaching even the most complex claims situations.” — Dan Kohane, J.D.
One last thing...

Thank you

Feel free to contact me:

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Com·men·tar·y ... an expression of opinions or offering of explanations

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