By
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If All Else Fails, Bang the Table

Insight: Several courts reject recent claims of ambiguous policy language.

Why lawyers sometimes argue that policy restrictions should not be enforced.

Insureds will sometimes argue that policy restrictions should not be enforced because the provisions are ambiguous.

These arguments are often like table-banging: When the law is bad, you bang on the facts. When the facts are bad, you bang on the law. And when the law and the facts are bad, you bang on the table.

Aggressive policyholders faced with bad policy language and bad facts "bang" on ambiguity. It sounds silly, but it's true. If a policyholder's lawyer sees a policy restriction that applies to the facts, the lawyer typically argues that the restriction should not be enforced. That position usually will be based on an ambiguity argument.

Recently, I saw several different courts reject these arguments.

In *Masonic Home of Delaware Inc. v. Certain Underwriters at Lloyd's London,* an employee of a company that handled the dining services for a nursing home alleged that he was injured while working. He sued the nursing home operator. The operator's carrier denied the claim because the employee was employed by an independent contractor. The operator sued. The Delaware Supreme Court found that the policy was not ambiguous. The court ruled that by its "plain language," the policy barred claims against the operator by independent contractors—and by employees of independent contractors.

Another case, *Liberty Mutual Fire Ins. Co. v. Holka,* arose when a policyholder drove a rented moped into a golf cart. Her homeowners insurer contended that a motor vehicle exclusion in the policy precluded coverage for the accident. A Michigan federal district court agreed. It found that the policy was "unambiguous" and it determined that the moped was a "motorized land conveyance" that was subject to motor vehicle registration under Ohio law and, therefore, excluded from coverage.

Does an auto exclusion in a commercial general liability insurance policy exclude coverage for claims against a moving company's executives alleging that they had failed to maintain a truck? A federal district court in Kansas, in *Hanover Ins. Co. v. Jones*, finding no argument that the auto exclusion was ambiguous, easily ruled that coverage for the employee's bodily injury was precluded.

And then there's the decision in *United States Fire Ins. Co. v. Cyanotech Corp.* This was a coverage case over two lawsuits based on allegations of patent infringement brought against a pharmaceutical company and its wholly owned subsidiary. The defendants argued that both actions alleged wrongdoing in "advertising," but the court was not persuaded. It ruled that allegations of patent infringement could not constitute "advertising injury" sufficient to trigger insurance coverage under a CGL policy unless the patented idea itself concerned a method of advertising.

Moreover, the court continued, even if there were some ambiguity as to whether patent infringement could constitute advertising injury, the policy contained a specific exclusion for patent infringement that "unambiguously" barred coverage for injury arising out of patent infringement.

In each of these cases, the policyholder's table-banging rightly fell on deaf ears. BR

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