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Never gloss over minor policy language changes or fail to read every clause and endorsement to your policies. It could cost you millions.

When Interpreting Insurance Policy Provisions, "The Devil is in the Details"

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Almost every type of insurance policy follows the same general structure: a short "insuring agreement," which states in broad, enticing language the coverage provided, followed by many pages of conditions, exclusions, and other terms all seeking to limit the coverage promised in the short, enticing insuring agreement. While the insuring agreement itself is often quite simple and straightforward, many of the subsequent limiting terms and definitions are subject to multiple interpretations, which can cause disputes between policyholders and their insurance companies when claims arise. Most courts construe ambiguities in insurance policy language against the insurance company and in favor of the policyholder, but before doing so courts often will try to determine whether there is a single applicable reading of the exclusion or definition in question. Thus, parsing the language of your insurance policies is critical throughout all stages of establishing and pursuing coverage — from purchasing a policy through claim submission, cooperating in the insurance company's investigation, and, when necessary, litigating regarding coverage obligations. As is the case with many contracts, and as demonstrated by the three scenarios discussed below, the devil is often in the details.

While the interpretation of insurance policy language is critical for claims brought by policyholders in all industries and involving many disparate types of coverage, the cases below focus on environmental contamination, shareholder derivative actions, and copyright and trademark infringement. As this wide variety of risks makes clear, review and analysis of policy language is important both before and after claims arise.

The "Other Coverages" Exclusion — How It Works and How to Protect Against It

Where an insurance policy includes several distinct coverage parts, as is often the case in most corporate insurance programs, many types of liabilities — including most catastrophic liabilities — may fall under multiple coverages within the same policy. Yet there can be a dramatic difference in the amount of available limits under these various coverage parts. Almost all jurisdictions hold that absent specific policy language to the contrary, the policyholder has the right to choose which coverage part applies. When, however, the policy affords the insurer the right to choose under which part to provide coverage — or when the insurance company simply attempts to seize that right — the lesser coverage may trump the greater.

The tool that potentially enables insurance companies to play one coverage part off against another is a policy provision known as the "other coverages" exclusion, which stipulates that coverage under any one part of a policy excludes coverage under other parts. The recent decision in *DPC Industries Inc. v. American International Specialty Lines Insurance Company*[1] sets a potentially harmful precedent for policyholders with such an "other coverages" exclusion in their policies.

DPC Industries illustrates the harsh fact that policyholders should not always breathe a sigh of relief when an insurance company initially accepts coverage for a claim. The case involved a chlorine gas leak at a facility in Missouri, which ultimately led to over $10 million in defense and indemnity liabilities for the policyholder companies. Although the policy's general liability coverage part (Coverage A) had limits of $11 million, the insurer (AISLIC) was able to reduce its obligation to $5 million by accepting coverage only under the policy's pollution coverage part (Coverage D) — despite the fact that the claims potentially fell under either coverage part. Under the policy terms, the court held that the insurance company had the right to decide under which part it would accept coverage.

Once AISLIC accepted and paid claims under Coverage D, the court held that the policy's "other coverages" exclusion prevented the policyholders from accessing the additional Coverage A limits — or even the difference between the limits of the two coverage parts. Sometimes referred to as an "anti-stacking" exclusion for multiple coverages, this provision can have disastrous effects for policyholders — especially those facing sudden, catastrophic liabilities and needing an immediate response from their insurance companies. Such situations give the insurance company all the leverage in choosing among potentially applicable coverage parts, possibly costing policyholders millions of dollars in otherwise available limits.

What to Look for and How to Protect Yourself

The "other coverages" exclusion prevents stacking of limits from multiple potentially applicable coverage parts within the same policy. This exclusion is illustrated by *DPC Industries*, where the policyholder was barred from obtaining coverage under the greater limits of Coverage A, the general liability part, because AISLIC accepted coverage under Coverage D's pollution liability part, which had less than half the total limits of Coverage A. The general facts of *DPC Industries*, in which an unexpected, catastrophic loss allowed AISLIC to dictate the policy part under which it would provide coverage, could easily arise in any industry. And now that the Fifth Circuit has upheld this damaging exclusion, policyholders will need to be that much more careful in how they submit claims and vigilant about how the insurance company agrees to pay them. Anything less could lead to losing out on millions of dollars of potentially available coverage.

AISLIC's "other coverages" exclusion to Coverage A states that the insurance does not apply to:

> Any claim or part thereof which may be alleged as covered under this Coverage of this Policy, if we have accepted coverage or coverage has been held to apply for such claims or part thereof under any other Coverage in this Policy.[2]

Other insurance companies may use different language for their "other coverages" exclusions, but the key is to review your policies (or better yet, have your broker or coverage counsel review them) for any exclusions or provisions that limit application of any coverage part based on acceptance of coverage or payment under another coverage part. Such review is critical both for insurance policies currently in effect and any potential new or renewal policies.

Attempting to Avoid or Limit This Exclusion When Purchasing or Renewing Coverage

If you are purchasing new coverage or renewing an existing policy, the ideal result would be obtaining a policy with no exclusions for claims covered by other coverages. If, however, an insurance company insists on such an exclusion, and business reasons dictate remaining with that company, the best solution is to include language confirming the policyholder's right to choose the applicable coverage part where multiple coverages might apply. Such language would protect policyholders from the result in *DPC Industries*, where the Fifth Circuit found that the policy language permitted AISLIC to decide which coverage to apply to the claims. Maintaining the right to choose the applicable coverage would ensure that policyholders have the option of selecting the coverage part with greater limits, while still protecting the insurer from having to pay multiple limits for the same claim.

Submitting Claims Under Existing Policies With an "Other Coverages" Exclusion

If you already have a policy that includes an "other coverages" exclusion, submission of claims to which multiple coverages may apply likely will be a delicate endeavor, particularly if there is a dramatic difference in the available limits under the potentially applicable coverage parts. The first step is to request coverage under the policy part with the higher limits. The best-case scenario is that the insurance company agrees to provide coverage either specifically under the requested coverage part or without specifying the policy part under which it is paying. In the latter scenario, the policyholder would have a strong argument in any subsequent dispute that the insurance company is bound by the policyholder's choice of coverage because the insurance company never refuted the policyholder's submission of the claims and request for coverage under a specific policy part.

In the more likely scenario, as demonstrated by *DPC Industries*, the insurance company will respond by denying coverage under the policy part with the higher limits but accept coverage under another part with lower limits. This situation presents a difficult choice for a policyholder who likely needs the insurance funds with some degree of urgency and may not be able to fight its insurance company at the same time it is dealing with the underlying claims. If a fight is in order, however, one option is to refuse the insurance company's acceptance of coverage under the lower-limit coverage and immediately bring a lawsuit seeking a declaration that the higher-limit coverage potentially applies and that the policyholder has the right to choose its coverage. In the alternative situation, where the policyholder has little choice but to accept the insurance company's selection of applicable coverage in order to recoup necessary funds incurred in defense of the underlying claims, at least one measure of protection can be employed. The policyholder should turn the tables by responding to the insurance company's choice of coverage with a policyholder reservation of rights letter that would at least attempt to preserve for the future the battle as to the properly applicable coverage.

The best solution is to include language confirming the policyholder's right to choose the applicable coverage part where multiple coverages might apply.

DPC Industries sets a potentially harmful precedent for policyholders with an "other coverages" exclusion in their policies. Many industries and companies are subject to various accidents or losses that might fall within multiple coverages under their policies, and there are often dramatic differences in the available limits under these various coverage parts. A policyholder who has conducted a thorough review of all policies for the presence of this exclusion, and who is careful and vigilant about submission and payment of claims, will be better positioned to receive the benefit of the full limits of its policies and not discover too late that millions of dollars in policy limits were unattainable due to the application of a seemingly innocuous exclusion.

One Insurance Company's Attempt to Use a So-Called "Addition" to Coverage to Severely Limit Available Coverage for a Shareholder Derivative Action

In *Family Dollar Stores Inc. v. Federal Insurance Company*,[3] the decision by Letter Opinion of Judge Victor Ashrafi, dated July 30, 2009, determined coverage for an underlying case in which Family Dollar and its directors and officers were sued in a derivative action involving alleged securities errors. The decision turned on the court's interpretation of the policy's four separate insuring clauses and the definitions of the terms "claim," "security claim," and "securityholder derivative demand." The application of these definitions to the underlying action was critical because of the retentions and policy limits corresponding to each insurance clause. Specifically, the policy provided for a retention of $500,000 under Insuring Clause 2 (executive indemnification coverage) for claims other than securities claims, but a retention of 10 times that amount ($5 million) for securities claims under Insuring Clauses 2 and 3 (entity securities coverage). As to policy limits, there was also a dramatic difference — $15 million per claim, but a $250,000 sublimit for investigations relating to a "securityholder derivative demand" (Insuring Clause 4).

In an effort to limit its exposure, Federal argued that its payment of $250,000 — the sublimit under Insuring Clause 4 — extinguished all its other obligations to Family Dollar. In the alternative, Federal argued that the underlying action was a security claim subject to the $5 million retention for securities claims, but overlooked the fact that Federal's policy definition for securities claims expressly excluded securityholder derivative demands. The court carefully reviewed and analyzed the policy provisions and ultimately ruled against Federal on both issues, finding Federal's arguments "incongruous" and inconsistent and holding that the ambiguous policy definitions must be interpreted in favor of Family Dollar.

One of the lessons of *Family Dollar* is that the inclusion of Insuring Clause 4 in the policy, and Federal's attempted use of this clause to limit its obligations, illustrates the danger presented by purported "additions" to coverage. This particular policy's new insurance clause for "securityholder derivative demand coverage," offered to policyholders as "adding" to coverage, in fact may substantially minimize coverage by providing a much smaller sublimit for investigations conducted by special litigation committees that are commonly used in derivative actions to evaluate whether the company should prosecute the claim or not. In such circumstances, the investigation costs of the board-appointed special litigation committee can be, and often are, the largest cost involved in a derivative action. Thus a minimal sublimit on this category of coverage for a massive derivative action is a hidden trap.

Fortunately for policyholders, as the *Family Dollar* court held, an insurance company's attempt to characterize all defense costs as investigation costs subject to a small sublimit does not make them so. Every defense involves an investigation of the facts, and every directors and officers policy should provide corresponding coverage for defense costs — or the coverage is illusory. Ultimately, policyholders must be wary of alleged "enhancements" to coverage that carry reduced limits, as such clauses can be used by insurance companies to try to limit their coverage obligations.

Advertising Injury Coverage May Be Available for Certain Claims Under an Exception to the General Exclusion for Intellectual Property Claims

It can be confusing enough for policyholders to comprehend the detailed exclusions within their insurance policies, but exclusions can be further complicated where there are exceptions carved out from the exclusions. Thus it is critical to parse exclusionary language within a policy, as it may contain an applicable carve-out that can provide access to valuable coverage. One such exception exists within a common exclusion found under many commercial general liability (CGL) insurance policies' advertising injury coverage part.

Advertising Injury Insurance Coverage

Depending on the CGL policy's vintage, advertising injury provisions may cover liability for copyright infringement, trademark and trade dress infringement, patent infringement or piracy, antitrust violations, unfair competition, defamation, or privacy violations. Where coverage exists for advertising injury, it includes payment of attorney's fees incurred in defending such actions as well as potential recovery for settlements or judgments paid in such actions.

In the 1970s, advertising injury insurance coverage was marketed and sold as part of the broadest package of coverage available to the average insured. CGL policies have explicitly offered coverage for advertising injury since at least 1981, when that coverage was included in the broad-form endorsement to the Insurance Services Office's CGL policy. Since that time, the coverage has gone through several changes in definition and scope, most of which were efforts to limit coverage. As a result of the changes in advertising injury coverage over the years, policyholders must review their CGL policies to determine which version of the advertising injury provisions appear therein.

Most recently, a 2001 change to the standard-form CGL policy excluded coverage for personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret, or other intellectual property rights if the infringing material is not in the policyholder's advertisement — but specifically included coverage for infringement of copyright, trade dress, or slogan within the policyholder's advertisement. Thus, while the current policy form's personal and advertising injury provisions include a general exclusion for intellectual property claims, actions that allege "copyright, trade dress, and slogan" infringement within a policyholder's advertising are explicitly excepted from the exclusion.

Copyright infringement protects artistic works of authorship from the improper use of others. Trade dress involves allegations of similarities in product packaging. Slogan infringement involves alleged use of protected "attention-getting phrases." Trade dress and slogan infringement causes of action are intended to protect consumers from confusion as to the source of the trademarked goods. Policyholders must present their insurance claims properly in order to argue for a broad interpretation of these terms and receive the promised advertising injury coverage. Fortunately, courts have shown a willingness to support such claims when pled properly and supported by the underlying facts.

Several Court Decisions Support Advertising Injury Insurance Coverage for Trade Dress and Slogan Infringement

Courts have interpreted the term "trade dress" broadly. "In short: any 'thing' that dresses a good can constitute trade dress."[4] Indeed, the trade dress of an item is viewed in totality, and it may include a mark on packaging.[5] Because the term "trade dress" in the advertising injury provision has been interpreted broadly, policyholders who have been sued for trademark infringement regarding their products' packaging should look to their CGL policies for insurance coverage.

When the trademark infringement action alleges the use of a phrase as "an attention-getting device" or a "slogan," and not merely as a trademark, the policyholder may be entitled to coverage under the advertising injury provision enumerating infringement of a slogan. Courts have interpreted the term "slogan" in the advertising injury provision broadly.

Ultra Coachbuilders Inc. v. General Security Insurance Company[6] concerned the Ford Motor Company's certification program called Quality Vehicle Modifier, or QVM. QVM-certified companies were authorized to convert Ford vehicles into limousine-style stretch vehicles. Ford sued Ultra Coachbuilders for infringing the QVM mark by using a similar "VQM" mark in advertising and selling converted Ford vehicles. Ultra tendered a claim to its insurance company, who denied the claim because it alleged trademark infringement, which was excluded from coverage. Ultra argued that its claim fit within the exception to the bar on coverage for trademark claims for use of a "slogan" in the advertising at issue.

The United States District Court for the Southern District of New York found that if "the alleged infringement of Ford's unregistered marks 'Quality Vehicle Modifier' or the abbreviation, 'QVM,' could support a claim of slogan infringement, there is a duty to defend."[7] The court cited the Supreme Court of California's definition of slogan: "A slogan is a brief attention-getting phrase used in advertising or promotion or a phrase used repeatedly, as in promotion."[8] The court held that under California insurance law, the acronym "'QVM' or 'Quality Vehicle Modifier' could potentially qualify as a slogan under either of these articulations (for the purposes of 'personal and advertising injury' coverage)."[9]

Recently, in *Hudson Insurance Company v. Colony Insurance Company*,[10] the United States Court of Appeals for the Ninth Circuit held that allegations by NFL Properties that the policyholder company had sold league jerseys including the use of the words "Steel Curtain" in reference to the Pittsburgh Steelers were covered under the advertising injury provision. Specifically, the Ninth Circuit held that "Steel Curtain" was a term used to promote fan loyalty and was a "brief attention-getting phrase used in advertising or promotion" and thus met the standard for a slogan. Accordingly, because the term "slogan" in the advertising injury provision has been interpreted broadly, policyholders who have been sued for trademark infringement regarding any terms or slogans in their advertisements should look to their CGL policies for insurance coverage.

As shown by the cases described above, proper presentation of a policyholder's copyright, trade dress, or slogan infringement insurance claims makes all the difference in accessing valuable advertising injury coverage. These terms, found in the exception carved out from the exclusion for certain advertising injury coverage, will be interpreted by courts analyzing the specific facts surrounding the alleged infringement in the underlying case. Accordingly, understanding what types of claims fall within this exception will allow policyholders to evaluate properly whether they have a valid claim for advertising injury coverage.

Conclusion

There are several concepts that policyholders should take away from the cases discussed above. First, always carefully review all your insurance policies and reject any proposed exclusions or "improvements" that grant the insurance company the right to choose the applicable coverage or that end up reducing coverage for common expenses such as special litigation committee investigations in derivative actions. Second, never gloss over minor policy language changes or fail to read every clause in and endorsement to your policies, because even the smallest change or "addition" to coverage can cost you millions down the road. Finally, do not assume that exclusions can only eliminate available coverage, as exclusionary language occasionally includes carve-outs or exceptions that offer valuable coverage for specific types of claims.

Endnotes

1 *DPC Industries Inc. v. American International Specialty Lines Ins. Co.*, 615 F.3d 609 (5th Cir. 2010).
2 *Id.* at 611.
3 *Family Dollar Stores Inc. v. Federal Insurance Co.*, Somerset County, Docket L-1428-07 (July 30, 2009).
4 *Abercrombie & Fitch Stores Inc. v. American Eagle Outfitters Inc.*, 289 F.3d 619, 630 (6th Cir. 2002).
5 *Patsy's Brand Inc. v. I.O.B. Realty Inc.*, No. 999 Civ. 10175 JSM, 2001 WL 170672 (S.D.N.Y. 2001).
6 *Ultra Coachbuilders Inc. v. Gen. Security Ins. Co.*, No. 02 CV 675 (LLS), 2002 WL 31528474 (S.D.N.Y July 15, 2002).
7 *Id.*
8 *Id.*
9 *Id.*
10 *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264 (9th Cir. 2010).

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