

Cruising Through Coverage

A Primer for Analyzing Insurance Policies and Issues

BY VICTORIA L. VANCE

Just as associate Rodney Dinglehoff was preparing for his long-planned vacation trip, a senior lawyer in the firm stopped by Rodney's office and announced that as he neared retirement he would need a young associate to take over his practice and his valued clients. The senior partner practiced insurance coverage law, something Rodney did not know much about. "Not to worry," reassured the partner, "it's fun work; you'll learn something new with every case. You're bright, you'll do fine." With that, the partner heaved a stack of coverage opinions and insurance policies on Rodney's desk. "Thumb through these on your vacation; we'll talk when you get back." Dutifully, Rodney packed these insurance papers into his suitcase, along with the latest bestseller. With that, Rodney was off to his long-awaited cruise intent on learning the basics of insurance law and determined to succeed in his new practice assignment. "Who knows, maybe I'll meet people onboard the ship who know a thing or two about insurance," he mused as he departed for a week aboard the S.S. *Premium*.

The Steward: Getting Started

After getting settled in his cabin, Rodney set out with a stack of insurance policies tucked under his arm. He ran into the Steward, a genial, balding fellow with a tie, vest and a somewhat professorial look. The Steward asked if he needed directions. Rodney replied that he needed help on where to begin with these insurance policies. The Steward offered some solid advice:

An insurance policy is simply a contract between the insurer and the insured. *Pilkington N.Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 2006 – Ohio – 6551, ¶ 23.

When interpreting an insurance policy, examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. Rely on the plain and ordinary meaning of the words. *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003 – Ohio – 3373, ¶ 9.

Because the insurer typically drafts the language in the policy, any ambiguity will ordinarily be interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208 (1988), syllabus. But before considering whether terms are ambiguous, first determine whether they are even applicable to the circumstances of the case.

Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto. *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 2010 – Ohio – 6312, ¶ 8.

The Steward was helpful. Rodney could almost picture him teaching a class on insurance. Rodney felt ready to move on.

Dining Room Staff: The Ingredients of a Good Policy

Digesting policy verbiage made Rodney hungry, so he went in search of something to eat. He quickly discovered there was no shortage of food — or insurance advice — onboard this ship. Rodney struck up a conversation with a couple of guys who seemed to know their way around both food and insurance — they were friendly enough in a Neanderthal sort of way. They told Rodney that assembling an insurance policy was a lot like working a buffet line: "Every policy has certain basic ingredients, but the terminology is important, so pay attention when ordering. There may be some items you want to include (endorsements), but other menu items may not be available (exclusions). Just like the food choices onboard this ship, there can be dozens of insurance policies to choose from: it all depends on the activities you plan to engage in and your appetite for risk." As Rodney began to scan the policies over lunch, he could see that these two fellows really did have a modern-day grasp on insurance, despite their appearance.

• **Declarations** The section of the policy that contains the policy holder's name and address, the location of the insured risks, the policy period and number, the limits of coverage, the premium, and a general description of the type of coverage the policy provides.

- **Endorsements** Which have the effect of adding or deleting coverages will sometimes be indicated on the declaration sheet.
- **Insuring Agreement** The part of the policy that sets forth the insurance company's duty to pay losses sustained by the insured (first-party claims) or to defend and indemnify the insured against claims by others (third-party claims).
- **Definitions** Insurance policies contain a variety of definitions, some of which are common to most policies: *bodily injury, household, occurrence*. Read these carefully! When a policy does not define a term, it shall be given its ordinary meaning.
- **Conditions** Policy conditions set forth certain obligations of both the insured and insurer. A breach of a condition which prejudices the insurer can result in a loss of coverage. Those conditions may include the duty to give prompt notice of an injury or loss to the insurer, a prohibition on the policyholder settling a claim without the insurer's permission, and a condition that fraudulent misrepresentations in the application for insurance can render the policy void or voidable.
- **Exclusions** Policies may contain, for example, an intentional act exclusion, a household member exclusion, or a punitive damages exclusion. Exclusions to insurance coverage are only relevant to the extent that coverage exists in the first place. If the coverage is not implicated, any discussion of exclusions is premature. *Allstate Ins. Co. v. Smeltzer*, 2011 WL 2175776 (Ohio App. 9 Dist.) ¶¶ 9, 13. But beware: some of the most important exclusions in insurance policies do not even appear under the heading "Exclusions." Instead, they may be buried in the definitions of other terms: such as the expected or intended injury exclusion, which is often hidden in the definition of "Occurrence."

Activities Director: Now the Fun Begins

After lunch, Rodney decided to check out the pool deck. There, the activities director spotted him. She was a perky sort, bouffant hair, bright red lipstick, dressed all in white

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(including her apron). Her eyes sparkled when Rodney mentioned his interest in insurance. She pointed to her activity cart and told Rodney he was free to borrow the dictionary, thesaurus, or whiteboard. "These may come in handy when you analyze coverage issues," she chirped. And boy was she right. Each case Rodney read was more fact intensive than the next. The whiteboard was essential as he diagrammed out the parties, their disputes and their competing claims in each of the cases:

- In *Ward v. United Foundries, Inc.*, 129 Ohio St. 3d 292, 2011 – Ohio – 3176, a foundry company sought coverage (indemnity and defense) from its insurer when an employee filed a substantial-certainty intentional tort lawsuit against the employer.
- An issue in *Allstate Ins. Co. v. Campbell* was whether teenagers' prank of placing a decoy deer on a darkened road was an act that necessarily resulted in harm so as to fall within the intentional act exclusion of the teens' homeowners policies excusing the insurers from providing indemnity or a defense.
- The case of *Safeco Ins. Co. of Am. v. White*, 122 Ohio St. 3d 562, 2009 – Ohio – 3718, explored whether parents' homeowners insurance had a duty to defend/indemnify a lawsuit brought against the family after their 17-year-old son stabbed and injured a 13-year-old neighbor.
- The case of *Ohio Casualty Ins. Co. v. Mansfield Plumbing Products, LLC*, 2011 WL 3930292 (Ohio App. 5 Dist.) considered a loss in progress exclusion to preclude coverage on claims arising out of a defective resin used in the manufacture of a toilet component.

Rodney quickly realized that policy language in each of these cases was occasionally similar but rarely identical. See e.g. *Allstate Ins. Co. v. Campbell*, ¶ 10. Most important terms are defined (*occurrence, bodily injury, household*) but sometimes not (such as the word *accident*, a critically important term in a CGL policy, in a case involving damage to a new hotel caused by water infiltration. *JTO, Inc. v. State Automobile*

Mutual Ins. Co., 194 Ohio App. 3d 319, 3011 – Ohio – 1452 (11th Dist.)). Remembering the "plain language" adage, Rodney referred to the Webster's dictionary often, as did many courts. And the Revised Code app that he downloaded before leaving Cleveland also came in handy as he referred to various iterations of the UM/UIM statute (O.R.C. 3937.18) which helped him understand the scope of coverages in a series of auto accident cases that he read. See e.g. *Advent v. Allstate Ins. Co.*, 118 Ohio St. 3d 248, 2008 – Ohio – 2333; and *Snyder v. Am. Family Ins. Co.*, 114 Ohio St. 3d 239, 2007 – Ohio – 4004.

Tour Guide: Dispute Pathway

At the next port of call, Rodney decided to check out the local courthouse. As Rodney was leaving the ship, a gruff fellow warned him about the mayhem he might see on his journey. "Insurance coverage cases can get complicated," he warned, "lots of claims, lots of pleadings, lots of finger pointing." Despite looking disheveled, this guy seemed knowledgeable about insurance. He explained to Rodney that insurance disputes always start with a loss or injury. An insured party may be sued and will look to his insurer for help. The insurer may dispute having coverage for the incident and bring a declaratory judgment action (R.C. Chapter 2721) asking a court to "declare" that the insurance policy does not apply. But sometimes the insured gets to the courthouse first seeking a declaratory judgment in favor of coverage, and may include a breach of contract and bad-faith claim against the insurer as well.

"Don't forget the duty to defend," he added. It is a critical matter for both the insured and the insurer. *Walburn v. Dunlap*, 121 Ohio St. 3d 373, 2009 – Ohio – 1221, ¶ 24. "If an insurer mistakenly refuses to defend its insured, that insurer is liable for the cost of defending its insured in the initial litigation and of defending itself in a subsequent action by its insured. On the other hand, the insurer may incur substantial costs

if wrongfully required to defend an insured in a case that a court may later hold was not within the terms of the policy." See *Walburn*, ¶ 24. Likewise, an insured, when not provided a defense, may have to choose a settlement over costly litigation, file a separate declaratory judgment action against the insurer, or incur great expense defending without insurance. *Id.* ¶ 25.

These cases can get so procedurally complicated, it sometimes makes sense to bifurcate the claims and take up the issues in stages. *Sanders v. Nationwide Mutual Ins. Co.*, 2011 WL 1584427 (Ohio App. 8 Dist.); Civ.R. 42(B).

Timing is also important. The court will not decide a coverage question until there is an actual controversy. *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St. 3d 133, 2007 – Ohio – 1248, ¶ 9.

Rodney realized that the scruffy fellow was right. The road to the courthouse can be long and tortuous, marked by extensive motion practice, depositions of parties, inspections of premises and equipment, and expert reviews.

Time to Disembark

As Rodney made his way off the ship, he overheard fellow passengers thanking the captain for being in such good hands. The captain's oddly familiar baritone resonated with Rodney as he recalled some of the crew members he met, an interesting bunch of characters with a surprising knowledge of insurance who taught Rodney that successful insurance coverage litigation requires meticulous investigation of a dispute, thorough analysis of root causes, and a command of legal precedents.

Back at the Office:

No sooner did Rodney get back to the office when the senior partner stopped by and told him a new client had called last week while he was out: a guy named Jerry; he had questions about his policy; something about "being up a pole"



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