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PERSPECTIVE

New source for policy interpretation

By Hon. Rex Heeseman (Ret.)

Since 1990, insurance policy interpretation has focused upon three guideposts in seriatum. An excellent example is *Minkler v. Safeco Ins. Co. of America*, 49 Cal. 4th 315 (2010), where the state Supreme Court unanimously declared:

"'If contractual language is clear and explicit, it governs.' If the terms are ambiguous [i.e., susceptible of more than one reasonable construction], we interpret them to protect 'the objectively reasonable expectations of the insured.' Only if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer."

While this quote seems straightforward, there has been "overlap" even in even decisions by the Supreme Court. Some decisions have initially emphasized "reasonable expectations," the second guidepost. See, e.g., *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635 (2003). Other decisions combine the first two guideposts. See, e.g., *Powerine Oil Co. Inc. v. Superior Court*, 37 Cal. 4th 377 (2005) (Powerine II) ("literal language of the policies controls as does the objectively reasonable expectations of Powerine the insured").

Setting aside these arguable inconsistencies, appellate courts have considered various sources in interpreting an insurance policy. A notable example is the use of dictionaries. See, e.g., *Stamm Theatres Inc. v. Hartford Cas. Ins. Co.*, 93 Cal. App. 4th 531, 543 (2001). But a dictionary's definition is not always controlling. *MacKinnon*, 31 Cal. 4th at 649; *TRB Investments Inc. v. Fireman's Fund Ins. Co.*, 40 Cal. 4th 19, 29 (2006).

Another source is the Civil Code, which may flesh out a term's meaning. For instance, because "damages" was not defined in the policy, *AIU Ins. Co. v. Sup. Ct.* (FM Corp.), 51 Cal. 3d 807, 825, 828 (1990), looked to Civ. Code Section 3281. The meaning of a term may also be illuminated by Internet searches. *MacKinnon*, 31 Cal. 4th at 651-52.

A judge may look to common knowledge or common sense. For example, in applying the exclusion for "wet or dry rot" caused by a fungus infestation, the court reasoned a layperson would normally consider "dry rot" as one such cause. *Jordan v. Allstate Ins. Co.*, 116 Cal.App. 4th 1206, 1214 (2004). On the other hand, a strained description or interpretation should not succeed. See, e.g., *Bank of the West v. Sup. Ct. (Industrial Indem. Co.)*, 2 Cal. 4th 1254, 1276 (1992) ("advertising injury" not encompass activity unrelated to advertising).

Rules of grammar and punctuation may be helpful. For instance, according to the "last antecedent rule," words of limitation at the end of a phrase are generally construed to apply to "the words or phrases immediately preceding" and not to "others more remote." *State Farm Gen. Ins. Co. v. JT's Frames Inc.*, 181 Cal. App. 4th 429, 447 (2010). However, this rule is "not immutable," and should not override the clear intent of the language. *Mt. Hawley Ins. C. v. Lopez*, 215 Cal. App. 4th 1385 (2013).

A recent decision has added a practical angle: the manner in which the vehicle was utilized. *American States Ins. Co. v. Travelers Property Cas. Co. of America*, 223 Cal. App. 4th 495 (2014), review denied S217036. There, the insured rented out food trucks and leased one to Mr. Gomez. The food truck had two seats, with cooking equipment installed elsewhere.

When driving the food truck, Gomez swerved, splashing hot oil on his wife, a passenger. The Gomezes sued the insured, which tendered to its automobile insurer and its commercial general liability insurer. The former defended, but the CGL insurer declined. The CGL policy had an automobile exclusion, with a "mobile equipment" exception (i.e., putting such equipment back into the insuring clause).

In the ensuing litigation between those two insurers, the automobile insurer moved for summary judgment, asserting as the food truck constituted "mobile equipment," the automobile exclusion did not bar coverage under the CGL policy. The trial judge rejected that assertion, entering summary judgment in the CGL insurer's favor.

The Court of Appeal reversed. The "mobile equipment" exception applied because the truck's primary purpose was to serve as a mobile kitchen selling food, not to transport people or cargo. The court observed that, during much of the day, the food truck was immobile or made frequent stops to serve food. Moreover, the food truck had only two seats, one for a driver and one for a cook. As the CGL policy covered this products liability claim, the trial judge therefore erred in finding no duty to defend.

Why is *American States* interesting for policy interpretation purposes? Because of that court's focus upon the manner in which the food truck was used for food sales, not transportation — a use contrary to a truck's typical activity. In other words, the "mobile equipment" exception had to mean something.

So, the next time the issue of policy interpretation is encountered, consider various sources in analyzing the existence of coverage. And, sometimes, a practical approach may carry the day.

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