PRACTICE FOCUS / INSURANCE LAW

High court asked if ambiguity resolved with extrinsic evidence

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It is not uncommon for a contract to be drafted by only one of the contracting parties. If the contract is later determined to be ambiguous, the common law concept of contra proferentem — against the offeror — requires the ambiguity be interpreted against the drafter.

There are myriad theories justifying the rule but most agree that it serves the moral purpose of penalizing the person who caused the ambiguity since he was the one who could and should have prevented it. Insurance policies, which are frequently drafted by insurers and offered to policyholders on a take-it-or-leave it basis, are generally subject to this doctrine.

An unsettled area of law regarding insurance contracts, however, is whether a court can use extrinsic evidence to rehabilitate an otherwise ambiguous policy. A recently certified case to the Florida Supreme Court may provide an answer.

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An ambiguity exists if the policy language is susceptible to more than one reasonable interpretation. In *Ruderman v. Washington National Insurance Corp.*, a class of policyholders argued that their home health care expenses policies were ambiguous. The policy provided for three types of coverages: daily benefits, per occurrence benefits and lifetime maximum benefits. One section of the policy suggested that

the daily benefits, and not the other coverages, would automatically increase during each anniversary. For the percentage of the increase, it referred the reader to a schedule, which also provided the limits of all the coverages. On the schedule, because of the way the lines were formatted, the policyholders argued that it could be read to mean that the automatic benefit increase actually applied to all coverages, not just the daily benefits.

The U.S. District Court found that the policy was subject to two reasonable interpretations. Under one reading, the automatic increase applied to only the daily benefits. Under another interpretation, the automatic increase applied to all of the coverages. Based on the competing reasonable interpretations and since the policy was drafted by Washington National, the court ruled that the policy was ambiguous so it should be interpreted in favor of the policyholders and against Washington National.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit considered the possibility that a single interpretation could emerge if extrinsic evidence were allowed. Washington National offered extensive evidence regarding the marketing of the policies to explain everyone's understanding of what benefits automatically increased. If the extrinsic evidence could be considered, the Eleventh Circuit suggested, it is possible that the "evidence would resolve any ambiguity in the Policy about what benefits increase annually and would support Washington National's position that only the Daily Benefit increases annually."

The Eleventh Circuit cited competing authority from the Florida Supreme Court regarding how ambiguous policies should be treated. An earlier opinion suggested that a court has the ability to consider extrinsic evidence before casting a policy as hopelessly ambiguous, while another more recent decision simply explained that ambiguous policies are interpreted liberally in favor of coverage and strictly against the drafter. Because this is an unsettled area of the law, the Eleventh Circuit certified the following question to the Florida Supreme Court: "If an ambiguity exists in this insurance policy — as we understand it does — should courts first attempt to resolve the ambiguity by examining available extrinsic evidence?"

Washington National was required to serve its initial brief by May 4, 2012 in the Florida Supreme Court. If the court answers the certified question in the affirmative, it will have a significant impact on insurance in the state. For attorneys, discovery disputes in coverage litigation will become more pronounced, possibly opening the door to consideration of drafting history and marketing material, which are presently disallowed since an insurer's fate turns simply on the plain language of the policy. For policyholders and insurers, otherwise ambiguous policies may still be saved by referring to the application or other extrinsic evidence. To the extent that this remains debatable under Florida law, guidance from the court will be welcome.

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