Policyholder Playbook Episode 2: Remind the Court of the "Purpose" of Insurance

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PRACTICES Insurance Recovery, Litigation

Lesson From a Landmark Case: Remind the Court of the "Purpose" of Insurance

Over four decades ago, in *Keene Corp. v. Insurance Co. of North America*, the United States Court of Appeals for the District of Columbia Circuit issued what is perhaps the most historic insurance coverage decision ever decided. *Keene* set out for the first time how the general principles of insurance would be applied to asbestos bodily injury claims. It has been noted that asbestos-related liability caused the largest transfer of wealth ever witnessed in the United States. For its part, Keene established a set of rules that governed the relationships of policyholders and their historical insurance providers. *Keene's* legacy can be best understood in the context of all types of insurance disputes that emerged over time and that also involved multiple claims, multiple policy years, and multiple layers of insurance.

Keene was a tremendous achievement for policyholders, as the court held that, with limited exceptions, the policyholder's asbestos claims activated or "triggered" all insurance policies in effect during the entire injury process, *i.e.*, from first exposure through manifestation of the injury itself. The court also held that the insurance companies were *jointly and severally* liable so that the policyholder could pick and choose which triggered policy must cover *all* its losses associated with a particular claim. Keene unlocked billions of dollars in insurance for companies facing asbestos-related claims and created market demand for attorneys with insurance coverage expertise as the ramifications of the decision were hotly contested in not just future asbestos-related disputes but in disputes regarding other exposures such as the wave of environmental liability that emerged in the 1980's. I probably would not have a job, or at least this job, without *Keene*.

Keene was by its own terms novel and of first impression—indeed, the court noted "[n]either the case law nor the terms of the policies lead us directly to a resolution of the coverage issues raised in this case." 667 F.2d at 1041. Knowing there was no precedent and that the language of the policies did not clearly address the issues raised, the policyholder's advocates went back to basics. It was Gene Anderson that admonished the simple but irrefutable idea that the *purpose* of insurance is to insure: to indemnify insureds for uncertain risks that are transferred to insurance companies in exchange for premiums. Thus, to the extent there were any ambiguities, unknowns, or tough questions, they should be resolved in favor of coverage. In favor of the insured.

Judge Bazalon, the opinion's author, embraced the policyholder's "purpose of insurance" argument and used it as "the starting point for [the] analysis." Judge Bazalon wrote that the objective was to give effect to the policies' dominant purpose of indemnity:

> In construing the policies' coverage of liability for asbestos-related diseases, our objective must be to give effect to the policies' dominant purpose of indemnity. An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. By issuing the policy, the insurer agrees to assume the

> risk of the insured's liability in exchange for a fixed sum of money. At the heart of the transaction is the insured's purchase of certainty-a valuable commodity.

667 F.2d at 1041. Given that framing, it is unsurprising that *Keene* maximized the insurance available for policyholders.

This lesson from *Keene* is simple: as a policyholder advocate, consider leveraging the "purpose of insurance" to your advantage. That may mean describing the purpose of insurance in a paragraph, or merely referencing it in a sentence or in passing. That's exactly what we did in a recent motion for summary judgment brief where we stated that, "[c]ourts applying Washington law strictly construe exclusions against the insurer because they are contrary to the protective purpose of insurance." Def.'s Mot. for Summ. J. at 18, *Twin City Fire Ins. v. Lundberg,* No. 20-cv-1623 (Oct. 19, 2021) (emphasis added). The court granted our motion, finding that no exclusions to coverage applied. See *Twin City v. Lundberg*, No. 20-cv-1623 (Feb. 9, 2022).

Quick Overview of the Play

In briefing, particularly that which goes to the existence or scope of coverage, consider leveraging the purpose of insurance: to transfer risk, to insure, to indemnify, to protect, etc. And it doesn't hurt to mention that the policyholder bought those things in exchange for valuable premiums.

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