Policyholder Playbook Episode 28: Use Insurance Policy Drafting History to Your Advantage

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PRACTICES Insurance Recovery, Litigation

Quick Overview of the Play – Use insurance policy drafting history—from the Insurance Services Office, generated through discovery, or otherwise—to support the reasonableness of your policy language interpretation.

The best policyholder advocates know that in most policy language disputes they must demonstrate that their interpretation of the policy language is reasonable. As discussed in Episode 17, the policyholder often does not need to proffer the "most reasonable interpretation" or the "best interpretation" but just "a reasonable interpretation." A great strategy for doing so, at least in some jurisdictions, is by pointing to insurance policy drafting history that demonstrates that the intent of the drafter—often the insurer or the Insurance Services Office ("ISO")—is aligned with your interpretation.

For example, the policyholder argues that an exclusion does not apply to "A," and then, to support the reasonableness of that interpretation, the policyholder points to insurance policy drafting history that demonstrates that, at the time of drafting, the insurer did not intend to exclude coverage for "A" with the subject exclusion.

An analogous approach was used by the majority of the Texas Supreme Court in *Balandran v. Safeco Insurance Co. of America,* 972 S.W.2d 738, 741 (Tex. 1998). In *Balandran*, the policyholder and insurer offered competing interpretations of a homeowner's policy. *See id.* at 739–41. The Texas Supreme Court held that the insurer's interpretation was reasonable, but that the insured's was too, such that the policy language was ambiguous. The court held that the reasonableness of the policyholder's interpretation was demonstrated by, among other things, "the circumstances surrounding the promulgation of this policy form." *Id.* at 741. The court cited the history of the provision at issue and how it evolved as the Texas Board of Insurance sought to simplify standard-form homeowner's policies. *See id.* at 741–42. The court ultimately held that "[t]he circumstances surrounding the drafting of this policy thus support the [insured's] theory" such that the insured's interpretation was "not unreasonable" and that the court therefore had to "adopt their interpretation as the proper construction of the policy." *See id.* at 742. The insured won. *See id.*

Other courts have cited drafting history in assessing the reasonableness of the insured's position, without even discussing ambiguity. *See, e.g., S.-Owners Ins. Co. v. MAC Contractors of Florida, LLC*, 2024 WL 1573685, at *3 (11th Cir. Apr. 11, 2024) (citing ISO document as further support for policyholder's interpretation of exclusion).

The bottom line: the best policyholder advocates look for opportunities to point to insurance policy drafting history to support their policy language interpretations.

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