

## Policyholder Playbook Episode 5: Don't Allow Your Insurer to Rewrite Your Policy

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**PRACTICES** Insurance Recovery, Litigation

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The best policyholder advocates call attention to instances where an insurer's policy language argument is really an attempt to rewrite the policy. That is because nearly every court across the country has articulated some variation of the principle that "courts will not rewrite insurance policies." *E.g.*, *Seaway Cmty. v. Progressive Cas. Ins.*, 531 F. App'x 648, 653 (6th Cir. 2013) ("We simply cannot rewrite an insurance policy under the guise of interpretation."); *Royal Ins. v. Latin Am. Aviation*, 210 F.3d 1348, 1351 (11th Cir. 2000) ("Courts are not free to rewrite an insurance policy or to add terms or meaning to it."); *Francis v. INA Life Ins.*, 809 F.2d 183, 185 (2d Cir. 1987) ("[I]t is not the function of a court to rewrite insurance policies.").

We use this technique whenever an insurer tries to twist policy language in a seemingly results-oriented manner. Imagine a policy excludes "X," and the insurer argues, "by excluding coverage for X, the policy does not cover Y." By arguing the policy does not cover Y when it only excludes coverage for X, the insurer is, in effect, trying to rewrite the policy.

I recently utilized this technique during oral argument enroute to a very favorable summary judgment ruling, where the Court dismissed the insurer's breach of warranty claim, with prejudice. Here's what I argued:

"The Fifth Circuit, the Texas Supreme Court, they say the same thing. The policy and the policy alone controls what it incorporates. And since the 2017 policy doesn't mention or incorporate the letter, the claim fails. Now, there is policy language out there that Homeland could have bargained for. We cited two examples at page 9 of our opening brief. The 2017 policy has no such language, and so, Homeland effectively asks this court to rewrite the policy so that it does. We respectfully submit that the Court should refuse to do so and dismiss Homeland's warranty claim a second time, but this time, with prejudice."

The Court did not expressly cast the insurer's position as an attempt to rewrite the policy, but it nevertheless agreed with our position, holding that "under Texas law, courts determine whether an extrinsic document is incorporated into an insurance policy based on the language used in the insurance policy, not the extrinsic document." *Homeland Insurance Co. v. Clinical Pathology Laboratories, Inc.*, No. 20-cv-783, 2022 WL 2820741, at \*18 (W.D. Tex. July 19, 2022).

### Quick Overview of the Play

If your interpretation of the relevant policy language is more straightforward than the insurer's interpretation, or if the insurer could have used clearer language to achieve the result for which it argues, then consider arguing that the insurer is effectively asking the court to rewrite the insurance policy. Cite a case or two standing for the proposition that courts will not rewrite contracts (or, better yet, insurance policies).

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