Policyholder Playbook Episode 30: Point Out That the Insurer's Policy Interpretation Would Render Coverage 'Nearly Illusory'

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PRACTICES Insurance Recovery, Litigation

Quick Overview of the Play – In an insurance coverage dispute, ask whether the insurer's policy interpretation is so far-reaching that it renders coverage nearly illusory; if it does, then such may be a basis for refuting and defeating the insurer's interpretation.

The best policyholder advocates assess whether the insurer's policy interpretation is so far-reaching that, if adopted, the policy would cover almost nothing, such that coverage would be rendered "nearly illusory." Policyholders do not pay expensive premiums to receive "almost nothing," so courts will often refuse to adopt extreme interpretations that would lead to that result.

This principle was on display in *Rembrandt Enterprises, Inc. v. Illinois Union Insurance Co.*, a case brought by a poultry farm against its first-party insurer over coverage for losses sustained in connection with an outbreak of bird flu. 269 F. Supp. 3d 905, 906 (D. Minn. 2017). The poultry farm argued its covered losses included remediation costs it sustained in repopulating its flock after a government euthanasia mandate. *Id.* at 907. The insurer argued those costs were not "remediation costs," however, because the farm "replaces birds on a cyclical basis as part of its normal business operations." *Id.* at 909. In other words, the insurer argued the farm "did not incur any additional expenses—above and beyond its normal expenses—to replace its egg-laying hens." *Id.* The insurer ignored that the farm was forced to replace its hens "almost twice as rapidly as normal." *Id.*

Taking a page from Episode 21, the court took the insurer's argument to its "logical conclusion," noting that, if the insurer was correct, then "costs incurred replacing any property that might have eventually required replacement (through wear and tear, depreciation, obsolescence or other reason) would never qualify as 'remediation costs.'" *Id.* The court then recognized that such a paradigm would "render the coverage nearly illusory," and it accordingly rejected the insurer's argument. *Id.*

It is notable that the court rejected the insurer's argument because it rendered coverage "nearly illusory." That is because insurers, when faced with an assertion that their interpretation renders coverage illusory, will often justify their interpretation by pointing to some sliver of coverage that would still exist if their interpretation were adopted. But policyholders don't pay significant premiums for slivers of coverage. Recognizing as much, and that interpretations that lead to such results are patently unreasonable, the best policyholder advocates are quick to point out instances where an insurer's policy interpretation would render coverage "nearly illusory"—and they have done so with significant success, including in New York. *See, e.g., Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361 (N.Y. 1974) (rejecting insurer interpretation that "would render the coverage nearly illusory") (emphasis added).

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